Agunah and the Problem of Authority: Directions for Future Research

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1.0 *History and Authority*

1.1 Not infrequently, the problem of *agunah*[1] (I refer throughout to the victim of a recalcitrant, not a

1 The verb from which the noun *agunah* derives occurs once in the Hebrew Bible, of the situations of Ruth and Orpah. In *Ruth* 1:12-13, Naomi tells her widowed daughters-in-law to go home. Even if she herself were to remarry and have further sons, "Would you, for them, refrain from having husbands (הלהן תעגנה לבלתי היות לאיש)? No, my daughters; for it grieves me much for your sakes that the hand of the Lord is gone out against me." We think of the problem of the *agunah* today in terms of the female victim of a recalcitrant husband. As used in rabbinic literature, however, it is confined neither to the wife nor to victimhood. *Rabbenu Tam* (R. Jacob b. Meir, France, 1100-1171)

disappeared husband) is approached by appeals to history. An "historical" argument, in this context, is one which is willing to draw normative conclusions from the facts of halakhic history established by (independent) historical research. Broadly, we find two types of such argument.

1.1.1 The first appeals to an earlier stage in the development of the *halakhah,* and invites us to revert to it. For example, it has been argued that the procedure mentioned in *Deuteronomy* 24:1-4 was merely the expression of a custom, and "there is no biblical injunction mandating the giving or receiving of a get".[2] However this may be,[3] such an argument ignores the authority of rabbinic interpretation, which takes no account of the possibility of such an anterior, oral stage, but rather (a) views the procedure of *sefer keritut* as mandatory, (b) classifies the procedure as a matter of prohibition (*issura*)[4] (since a woman not so divorced is forbidden to any other man) and (c) regards this prohibition as of *de'orayta* status.[5] It is this combination which makes change particularly difficult.

1.1.2 A second type of historical argument might be the following: major historical changes have been made in Jewish law (not least, in the areas of marriage and divorce) in the past, in particular:

(i) the introduction of financial security for the wife through the *ketubah* and its being secured on the husband's property.[6]

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conceives of the case of the *moredet* who wishes to remain in the marriage but without obeying her husband as one where it is the wife who "chains" the husband, since he may not financially be in a position to divorce her:

> After this, Amemar explains [the essential elements] of the [case of] a *moredet* — that she says: "I want him, but I wish to cause him pain," [meaning] "I want him if he does not wish to divorce me and give me my alimony, I want him — in order to cause him pain and keep him tied [to me] (*ule'igno*) until my alimony gives out ... (Riskin 1989:100).

From a text of Raban (Rabbenu Eliezer ben Natan, born Mayence 1090, an older contemporary of Rabbenu Tam), it appears that the terminology "chained" may have originated as a deliberate penalty for a wife who was "rebellious" (e.g. by withholding sexual relations):

> We also cause the *moredet* who says "I want him" to wait one year without the divorce, to penalize her by being "chained" (*lekonsah shetitagen*) (Riskin, 1989:92f.).

During this year she is deprived of maintenance (see Rabbenu Tam, citing Alfasi, in Riskin 1989:99): either she will fall into line or, at the end of the twelve months (the *ketubah* having now run out or been forfeited), she will be divorced (even if at that stage she still does not want to terminate the marriage).

2 M.D.A. Freeman, "The Jewish Law of Divorce", *International Family Law* (May 2000), 58-62, at 58.

3 See Appendix A.

4 See, e.g., *Rosh Resp*. 35:1 at §4.3.1, *infra*; M. Elon, *Jewish Law*, *History*, *Sources*, *Principles* (Philadelphia: Jewish Publication Society, 1994), II.851; see also Elon, I.123 (on *M. Eduyot* 1:12, *Yevamot* 15:3), 137-140, for the distinction in general. Thus, arguments based upon the capacity of Rabbenu Gershom to ban polygamy also miss the point. What R. Gershom did was (merely) to remove a permission (*heter*) to take more than a single wife. Polygamy was never mandatory nor was monogamy ever prohibited. Indeed, as Professor Resnicoff reminds me, if despite R. Gershom's decree a man took a second wife, the marriage was valid under Jewish law and the second wife was biblically forbidden to any other man.

5 Both the prohibition of adultery and the status of the woman as still married if she has not received a *get* being (explicit) biblical rules. Against this, Rav Moshe Morgenstern, "Hatorot Agunot: Emancipation Of Chained Women", ch.1 (originally at http://www.agunah.com; see now *HATOROT AGUNOT - Sexual Freedom from a Dead Marriage* (New York: privately published, 2 vols., 2001)), argues that all present marriages have only rabbinical status since *kiddushin* by delivery of a ring is derived from the Torah by use of the *middot*, and is therefore only rabbinical (following the view of Maimonides — as opposed to that of Nahmanides — that such conclusions are *derabbanan* unless *de'oraita* status is explicitly ascribed to them: see *Sefer Hamitsvot*, 2nd princ., ed. Kafih, p.11). In support of the rabbinical status of contemporary *kiddushin*, following Maimonides, *Hilkhot Ishut*, 1:2,3, 3:20, he cites also *Pithei Teshuvah Even Ha'ezer* #25 end of chapter 42; Rav Akiva Eiger, *Responsa* #9/1; *Shev Ya'akov* #21. Against the view that even if *kiddushin* by a ring is rabbinic, the requirement for a *get* would still be biblical, he argues "if the status is only rabbinical, then all disabilities or stigma that are Biblical in character do not exist." For this he cites *Tosafot Baba Batra* 48b. It is not clear whether this implies that adultery is now permitted!

6 The husband forfeits the *mohar* if he unilaterally divorces the wife without good cause. See further B.S. Jackson,

(ii) A control on unilateral divorce by the husband was imposed via court supervision of the process: a *get* must be authorised by (though it is not issued by) a *bet din*.[7]
(iii) Consent of the wife came to be required by Rabbenu Gershom unless one of a number of serious, defined matrimonial offences was proved.[8]
(iv) The ban on polygamy (attributed to R. Gershom).[9]
(v) The rejection of *kiddushin* by *biyah*.[10]

Why, then, can we not make the necessary changes to meet the problem of *agunah* today? Against this, the dogmatician might reply: it is not a question of history, but rather of authority. The mere fact that changes were made in the past does not in itself entail the view either that those who made them had the authority to do so or that we have authority to make such changes today. Any appeal to the halakhic authorities must be based upon authority, not history: the halakhic authorities are — dare we say? — "positivists": the validity of halakhic propositions is judged *ex auctoritate*, the authority being that of the *poskim* and the sources they use.[11] We have to accept as our starting point the orthodox premise that changes cannot be made today unless the authority exists to make such changes. The issue then become whether such authority does exist.

1.2 At this point, however, the history of the matter re-enters the debate. The question of authority itself sometimes depends upon historical claims. If the Talmud ranks as the highest authority, we need to establish the text of the Talmud. One talmudic text vital to our question has, as we shall see, a problematic text. Is the establishment of the text itself to be determined by historical scholarship or by recourse to authority? In this same area, that of whether the husband of a *moredet* may be coerced to give her a *get,* the claim is made (by Rabbenu Tam) that the Gaonim lacked authority to do what they did, and this view of Rabbenu Tam proved (ultimately) decisive for the future development of this area of law. It depends, however, upon two factual/historical claims, as to (i) what the Gaonim actually did, and (ii) the basis of authority on which they did it. How is the authority of Rabbenu Tam's view affected if doubt is cast upon the historical assumptions on which it was based?

Again, some of the rules of law relevant to our area incorporate dependence upon historical factors, which may change from time to time (without thereby changing the rule, merely its

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"Problems in the Development of the *Ketubah* Payment: The Shimon ben Shetah Tradition", in *Rabbinic Law in its Roman and Near Eastern Context*, ed. C. Hezser (Tübingen: Mohr-Siebeck, 2003), 199-225.

7 There is some debate as to when this became mandatory: Freeman 2000:58, cites I. Haut, *Divorce in Jewish Law and Life* (New York: Sepher-Hermon, 1983), 27-41, and Suzanne M. Aiardo, "Avitzur v. Avitzur and New York Domestic Relations Law Section 253: Civil Response to a Religious Dilemma", *Albany Law Review* 49 (1984), 131-169, at 138, for the view that it was at the time of R. Gershom (11th cent. Germany) that the process of drafting and delivering a *get* was made so complex that supervision by a Beth Din became a practical necessity. However, there is considerable evidence of court involvement from a much earlier period: see Z.W. Falk, *Jewish Matrimonial Law in the Middle Ages* (Oxford: Clarendon Press, 1966), 120-124.

8 See further Falk 1966:115-118; A. Grossman, "The Historical Background to the Ordinances on Family Affairs Attributed to Rabbenu Gershom Me'Or ha-Golah ('The Light of the Exile')", in *Jewish History, Essays in Honour of Chimen Abramsky*, ed. A. Rapoport-Albert & S.J. Zipperstein (London: Halban, 1988), 3-23, at 15; E. Westreich, *Transitions in the Legal Status of the Wife in Jewish Law* (Jerusalem: The Hebrew University Magnes Press, 2002), ch.2 (Heb.).

9 See further Falk 1966:13-19; Grossman 1988:3-15.

10 Elon 1994:II.851f. quotes *Rosh*, *Resp*. 35:2: "a marriage is valid only if it conforms to their [that of the halakhic authorities] legislation; even if the marriage is effected by means of intercourse, they have declared the act to be fornication."

11 This is a major theme of the debate in B.S. Jackson, ed., *Modern Research in Jewish Law* (Leiden: E.J. Brill, 1980; The Jewish Law Annual, Supplement I): see, esp., I. Englard, "Research in Jewish Law, Its Nature and Function", *ibid*., at 27-29. See also my "History, Dogmatics and Halakhah", in *Jewish Law in Legal History and the Modern World*, ed. B.S. Jackson (Leiden: E. J. Brill, 1980; The Jewish Law Annual, Supplement II), 1-26; "*Mishpat Ivri*, *Halakhah* and Legal Philosophy: *Agunah* and the Theory of "Legal Sources"", *JSIJ - Jewish Studies, an Internet Journal* 1 (2002), 69-107, at http://www.biu.ac.il/JS/JSIJ/1-2002/Jackson.pdf.

application): the use of emergency powers (is there an emergency?) is an obvious example; annulment on the basis of a mistake made on entry to the marriage (what counts, at any given time, as a material mistake?), is another.[12]

1.3 Authority systems, moreover, themselves have a history. If we are not entitled to argue: "just because changes have been effected in the past, the authority must exist to make further changes today", it must follow that we cannot argue either: "just because changes have *not* been effected in the past, the authority cannot exist to make changes today". If it is illegitimate to argue from history to authority in the one case, it must equally be so in the other. Just as one cannot rely simply upon the fact of historical change as authority for present change in the law, so too one should not rely upon the historical fact of a past/present practice of reluctance to change (insofar as it reflects a psychological/sociological/historical attitude, rather than being mandated by the law itself) as itself being normative.

Take two different legal systems, one (a civil law system) which applies the legal institution of desuetude, the other (a common law system) which does not recognise such an institution. Suppose that in both a power which was exercised at one time has not been exercised for a very long period. We might readily conclude that that power had ceased to exist in the civil law system but had not ceased to exist in the common law system. When, then, we are confronted with arguments in the *halakhah* to the effect that "we do not do this today", we are entitled to ask whether such a statement has *normative* connotations or not. In fact, in the context of the *agunah* we do find a number of statements which both record and give reasons for halakhic reticence.[13]

1.4 One final preliminary observation. In discussing this problem, the impression is often given that the *agunah* problem is a relatively recent phenomenon — a product of the era of Emancipation, when (i) both marital breakdown and abuse by the husband of his rights in relation to a *get* are more common, and (ii) the halakhic authorities themselves (deprived by both internal and external factors of some of their traditional powers) have suffered a loss of nerve and have become more reluctant than their predecessors both to innovate and even to exercise powers which the *halakhah* gives them. In fact, these features of the "modern" period are already well attested from an early stage in the halakhic tradition. *Mishnah Nedarim* 11:12[14] already records a tightening in the rules regarding the wife's entitlement (in defined circumstances) to demand a *get* against the will of her husband, the motivation being stated explicitly as: "a woman must not be [so easily given the opportunity] to look at another man and destroy her relationship with her husband."[15] Indeed, even the strategy of

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12 Cf. Broyde, *infra*, §4.4.5. For further discussion of the status of "dogmatic error" in the *halakhah*, see Jackson 2002b:§4.2.

13 E.g., *Ribash*, *Resp.* #399, discussed *infra* §4.3.4.

14 "Originally [the Sages] said: Three women are to be divorced [even against their husband's will] and are to receive their alimony: (1) One who says "I am defiled for you" [i.e., the wife of a priest who claims she was raped and is therefore forbidden to live with her husband]; (2) [one who says] "Heaven is between you and me" [i.e., only the Almighty understands the difference between us, because you are impotent or sterile]; and (3) [one who says] "I have been taken away from Jewish men" [i.e., since I vowed not to have sexual relations with anyone (including my husband), I can no longer live with you]. The Sages then revised [their views] and said that a woman must not be [so easily given the opportunity] to look at another man and destroy her relationship with her husband. [Therefore], (I) she who claims "I am defiled for you" must bring proof of her words. (2) [She who claims] "Heaven is between you and me" must be appeased [by an attempted reconciliation between the couple]. (3) [She who claims] "I have been taken away from Jewish men" must have his share of the vow nullified (that is, since he has the right to nullify that aspect of the vow which pertains to himself, he must do so) and he may then have sexual relations with her [but] she will remain "taken away from Jewish men'' (that is, any man other than her husband — after she is divorced or widowed; this is the new meaning of her vow)." Translation of Riskin 1989:11. Interestingly, the *Ran* (cited by Riskin 2002:48 for a different purpose), appears to regard the procedure here as retrospective annulment, despite the fact that the Mishnah uses the expression: יוצאות ונוטלות כתובה.

15 On the possible historical context of this rabbinic reaction, see B.S. Jackson, "Some Reflections on Family Law in the Papyri", in *Jewish Law Association Studies* XIV (2004), 141-77, at 147f.

rabbinic encouragement to the family of the *agunah* to "pay off" the husband in order to achieve a "voluntary" *get* is attested at least as early as the twelfth century.[16] Other than the parallel existence of civil marriage and divorce, I believe that there is little in our present difficulties which is inherently modern or new. Contrary to some contemporary voices, the present difficulties already existed long before the introduction of civil marriage and divorce. Nor can we blame our present predicament on inhibitions against beating the husband deriving from secular criminal law: the halakhic problem of when *kefiyah* is permissible is quite independent of such external constraints.

1.5 I shall review some aspects of the history of three of the principal strategies which have been used to try to alleviate the problem of the *agunah,* in order to highlight the problems of authority which variously afflict them. The *agunah* problem is, I believe, primarily a problem of authority. If we were able to resolve the various authority issues which arise, we would rapidly achieve a solution. Of course, we have to define what we mean by a "solution". I do not demean the sincere efforts of those who have sought to provide case-by-case alleviation, though the use of social (shaming[17]) and religious sanctions[18] (extending even to the threat of withholding burial rights[19]) or through the use of secular law (an inherently "parochial"[20] approach in that it requires replication in each separate secular jurisdiction where Jews reside) involving inhibitions on divorce in secular law,[21] or exposing the recalcitrant husband) to risks in respect of the (civil) divorce settlement,[22] actions for

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16 Raban (R. Eliezer b. Nathan of Mainz, 12th cent.; Elon 1994:II.848f.): "We advised her relatives to pay the young man some money to free her, and this is what happened." See further §4.2.2, *infra*, and n.183, *infra*. Cf. Rabbenu Tam's account his own decision in the case of the daughter of R. Samuel in Chappes: *infra* §3.5.3 at n.145. In a responsum of Rosh (35:2; see further §5.3.3, *infra*), discussed by Elon, the conclusion was: "it is advisable to appease and satisfy him with money to induce him to divorce her", although Rosh does go on to say that if the man is not willing to accept money "I will support you in compelling him to divorce her" (Elon 1994:II.850f.).

17 There is now a web site which publishes *seiruvim* pronounced against recalcitrant husbands: see www.getora.com/seiruvim.htm. One such (on line, November 30, 2003), issued by the Bais Din of the Vaad Harabonim of Queens together with the Bais Din of America, on 1st Sivan 5762, proclaims a *herem* against the recalcitrant husband in the following terms: "The entire community is obligated to refrain from doing business or conducting any dealings with ... He is not to be included in a minyan and should be excluded from any synagogue that he may enter and from Kvuras Yisrael [Jewish burial] as per Remah Y.D. siman #334:6. This ban is to remain in effect until he changes his ways and submits to the authority of the Bais Din."

18 On the *harkhakot deRabbenu Tam*, see Rabbi Chaim Jachter, with Ezra Frazer, *Gray Matter. Discourses in Contemporary Halachah* (Teaneck, NJ: privately published: ISBN 0-9670705-3-8, 2000), 17f., and at "Viable Solutions II", http://www.tabc.org/koltorah/aguna/aguna59.2.htm; see further *infra*, n.19.

19 Included in the *herem* quoted *supra,* n.17. In a report of a meeting he addressed, carried by the *International Jewish Women's Human Rights Watch*, Winter 2000/2001, Newsletter #9, pp. 2-3, Rabbi Kurtstag, Head of the Johannesburg *bet din*, indicated that his Bet Din included refusal to allow burial in Jewish cemeteries within the communal sanctions it was prepared to deploy. Chief Rabbi Eliyahu Bakshi-Doron is reported to have agreed that such a measure "was an appropriate sanction", when consulted about an 80 year-old recalcitrant husband in London, divorced civilly 42 years ago, and to have urged this course of action on the rabbis of Sephardi congregations in London. However, the Sephardi Bet Din of London, after reportedly informing the husband of the threat (*International Jewish Women's Human Rights Watch*, Spring 2003, Newsletter No.16, pp. 1-2), decided (according to the London-based Agunot Campaign, in an e-mail communication) not to enforce it.

20 Thus what may work, to the extent that it does, for the Jews of New York does not extend to New Jersey, and the much vaunted Divorce (Religious Marriages) Act 2002 in England does not even extend across the border to Scotland.

21 See further Appendix B.

22 Notably, the second New York "Get" Law — the 1992 amendment of the Equitable Distribution Law of 1980, concerning the exercise by the Court of its power of "equitable distribution" of marital property. This provided that upon dissolution of a marriage the Court shall, where appropriate, consider the effect of a barrier to remarriage in determining the disposition of marital property and the setting of maintenance. Despite a measure of endorsement by the Rabbinical Council of America, opponents argue that a *get* given to avoid potential economic losses under the 1992 Law may be invalid as a *get me'useh.* See further 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

damages (in contract[23] and now also in tort[24]), or the range of civil disabilities now available as sanctions in Israel.[25] But the problem will continue to plague us — as one of morality[26], of

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(Northvale, N.J. and London: Jason Aronson Inc., 1995), 141-157, at 151f. The RCA considers the voluntariness of a *get* procured under such pressure to be a matter for determination by the individual *bet din*. See, however, the argument of Marvin E. Jacob, "The Agunah Problem and the So-Called New York State Get Law: A Legal and Halachic Analysis", in Porter 1995:159-184, esp. 160, 175, that Zweibel misinterprets the nature of the remedy provided by the 1992 amendment: the latter is not penal but simply comprises *mezonot* provisions, which automatically preclude the possibility of *get me'useh*; and are not coercive or punitive. There is also a view that even a *get* given under economic pressure is valid "after the fact" (*bediaved*). Rabbi Jachter, citing *Rema, E.H.* 134:5, writes: "However, if the husband had already given a Get to his wife because of fear of monetary penalty, the Get is considered acceptable after the fact ("B'dieved"). See Taz (134:6) and Gra (134:14) who endorse the Rama's decision and see Pitchei Teshuva (134:10) for a critique of this ruling from Teshuvot Mishkenot Yaakov." See his "Viable Solutions III", http://www.tabc.org/koltorah/aguna/aguna59.3.htm. See also C. Malinowitz, "The New York State *Get* Bill and its Halachic Ramifications", *Journal of Halacha and Contemporary Society* XXVII (1994), 5-25; Rabbi Yitzchok Breitowitz, DOMESTIC RELATIONS LAW 236B: A Study in Communications Breakdown: http://www.jlaw.com/Articles/sec236b.html, and at 1993:209-19, 225-29; M.J. Broyde, "The New York State Get [Jewish Divorce] Law", *Tradition* 29/4 (1995), 3-14; and "The New York Get Law: An Exchange" at http://www.jlaw.com/Articles/get_exchange1.html (Malinowitz); http://www.jlaw.com/Articles/get_exchange2.html (Broyde); Michael J. Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law* (Hoboken NJ: Ktav, 2001), 103-17, 178-84 (notes).

23 In *Avitzur* v. *Avitzur*, 1983 (on which see further *infra*, n.56), the New York Court of Appeals regarded the Lieberman clause in a Conservative *ketubah* (which required the parties to submit to the decisions of the *bet din* of the Rabbinical Assembly and authorised that *bet din* to impose terms of compensation for failure to appear or follow its decision) as imposing a contractual obligation enforceable by the civil court. It would follow from this (though the proceedings in this case did not reach this stage) that damages may be awarded for breach of that contract. The same assumption underlies the PNA of the Chief Rabbi, and other PNA's. See further Aiardo 1984; S. Riskin, "A Modern Orthodox Perspective", in Porter 1995:187-203, at 190. On the constitutional aspects, see M. Edelman, "Entangling Alliances: The Agunah Problem in the light of Avitzur v. Avitzur", *The Jewish Law Annual* 8 (1989), 193-210; Symposium, "The Enforcement of a Jewish Marriage Contract in a Civil Court: Is Jewish Law a Religious Law?", *Jewish Law Report* (April 2000). In his contribution to the latter, at 13, S.H. Resnicoff notes that a new Jersey decision of 1996, *Aflalo* v. *Aflalo*, 295 N.J/Super. 527, expressed agreement with the three dissenters in *Avitzur,* but opines that specific enforcement of such decisions is constitutional, "at least in the vast majority of cases". On April 2nd, 2003, Lisa Fitterman reported in the Montreal Gazette a decision by Quebec Superior Court Justice Israel Mass, ordering a Jewish man to pay his ex-wife damages of $47,500, plus interest and indemnities, for breach of contract, in that he had refused to grant her a religious divorce for 15 years, despite having signed an agreement specifically to do so in the context of the civil divorce settlement (information kindly supplied by Norma Joseph).

24 A recent Israeli decision has opened the way to actions for damages for emotional distress on the part of the *agunah* under the Israeli Torts Ordinance: Decision of Judge Ben-Zion Greenberger in the Jerusalem Family Court, Case 00/3950, 23rd January 2001, reported in the *International Jewish Women's Human Right Watch*, Fall 2001 Newsletter No. 11, and available on-line at http://www.legalaid.org.il/judgement.htm.

25 Under the Rabbinical Courts Jurisdiction Law (Upholding of Divorce Rulings) (Emergency Order) 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. Cf. Freeman 2000:62 n.19. Rabbi Jachter writes: "In Israel, laws have been enacted to permit State Rabbinic Courts to take away the driver's licence and checking accounts of recalcitrant spouses. This is a modern application of Harchakot D'Rabbeinu Tam": "Viable Solutions II", http://www.tabc.org/koltorah/aguna/aguna59.2.htm. The power of the District Court in Israel, on application by the Attorney-General, to imprison a husband who has failed after 6 months to comply with the order of a rabbinical court to give his wife a *get*, under s.6 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, has rarely been invoked, and when invoked has not always been effective: in one notorious case the wife had to wait to become a widow, when her husband ultimately died in prison some 32 years later (see n.106, *infra*). Not all have accepted the halakhic validity of a *get* given under such a threat of imprisonment. Rabbi Jachter writes: "It should be noted that sending a husband to prison for failure to give Get is considered coercive (see Igrot Moshe E.H.4:106, but see Rav Herzog T'Chuka L'Yisrael Al Pi HaTorah 3:209)": "Viable Solutions III",

reputation (*hillul hashem*) and of social/gender values — until and unless we find a universal solution, either one which prevents the situation of *agunah* from arising at all or provides a universal remedy when it does arise.[27] So let me proceed to the three principal strategies: conditions, coercion and annulment.

2.0 *Conditions*

2.1 Conditions in Practice Documents and Halakhic Restrictions

2.1.1 Can the *agunah* problem be prevented from arising by the use of a condition in the *ketubah* or other pre-marital agreement? There are, indeed, documents from practice which record such clauses. A marriage contract from Elephantine, a Jewish military settlement in Egypt in the 5th cent. B.C.E., includes the following clause:

> And if Yehoyishma divorces her husband Ananiah and says to him,[28] "I divorce [thee], I will not be to thee a wife," the divorce money is on her head, his *mohar* is lost. She shall sit by the scales and shall give to Ananiah her husband silver shekels 7, [2] *R.,* and she shall go forth from him with the rest of her "substance" and her goods, and possess[ions in the value of karsh 7, shekels 5+] 3, h(allur) 5, and the rest of her goods which are written (above) he shall give to her on [one d]ay, at one time, and she shall go to the house of her father.[29]

2.1.2 No one would dream of according halakhic status to the Elephantine papyri, even though some fifteen hundred years later, in a *ketubah* in the Cairo Geniza (dated by Friedman on palaeographical grounds to the 10th cent.), we also find a clause apparently giving the wife a right of unilateral divorce:

> 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[30]) and with the consent of our masters, the sages.[31]

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http://www.tabc.org/koltorah/aguna/aguna59.3.htm.

26 Rabbi David Novak, "Annulment in Lieu of Divorce", *The Jewish Law Annual* 4 (1981), 188-206, at 192f., comments: "Here and now we have a situation where the law as it stands enables a lawless person, the husband, to use a specific law to reject the authority of the Law in general and to fulfill his avaricious or sadistic designs against his wife. She, on the other hand, will be penalized precisely because her very lawfulness prevents her from remarrying without a *get*. In the Talmud we find a refusal to accept any legal situation where "the sinner is rewarded" (*hot'e niskar*: see *M. Hall*. 2:7)."

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

28 The parallel clause relating to the husband's right of divorce adds "in an/the assembly", and we must take this to be assumed also as the setting for the wife's declaration. See further Appendix B, *infra*.

29 Papyrus 7:24-28 (420 B.C.E.) in Emil G. Kraeling, *The Brooklyn Museum Aramaic Papyri: New Documents of the Jewish Colony at Elephantine* (New Haven, 1953), 204-207. See further Jackson 2004:133-35, and literature there cited.

30 Discussed further *infra*, nn.111, 113.

31 TS 24.68, ll.5-7, 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.54 (dating), 55f. (Friedman, no.3). For a parallel *ketubah* and scholarly discussion of the meaning of the procedure, see *infra*, n.111. At I.346, Friedman observes: "We have traced the development of a rare *ketubba* clause over a 1500 year period. Jewish law certainly never empowered a wife to issue a bill of divorce unilaterally and thus dissolve her marriage. However, it was stipulated in *ketubbot*, which, from talmudic times, followed the Palestinian tradition, and the rabbis eventually recognized this as binding law that through the wife's initiative, if she found life with her husband unbearable, the court would take action

2.1.3 This latter clause is thought by some to reflect the Gaonic measures in favour of the *moredet* (below, §3.4). Be that as it may, the authority of these historical practice documents has to be evaluated in terms of the halakhic rules concerning the validity of conditions (*tena'in*). *Tosefta Kiddushin* 3:7-8 states:[32]

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

2.2 The Palestinian Tradition on Conditions

2.2.1 This might appear to close the door against a condition obviating the need for a *get:* if the husband's (in principle, voluntary) delivery of a *get* is "a Law contained in the Torah", then the capacity to override it by a *tnai* depends upon classifying it as "monetary" (דבר שהוא של ממון). The distinction in *Tosefta Kiddushin* 3:7-8 might make that appear unlikely. However, divorce does involve financial consequences (regarding the *ketubah*), and this appears to have influenced R. Yose, in the *Jerusalem Talmud, Ketubot* 5:8 (30b), to take the view that a clause allowing the wife a unilateral right of divorce (for "hatred") was indeed to be classified as "monetary":

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

Unfortunately, the *ketubah* clause here being debated is not fully reproduced in the text (an indication, perhaps, that it was well-known): we have the protasis: "if he grow to hate her or she grow to hate him", but the apodosis is left unstated. The English translation here quoted[33] represents the dominant view,[34] namely that there is here an entitlement to divorce (even against the objection of the other party, and without proof of any further "cause"), and it is possible to view the Genizah clause quoted in §2.1.2 above as simply a more explicit version of it. By contrast, Katzoff takes the implied apodosis to affirm only special terms regarding the *financial consequences* of the

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to terminate the marriage, even against the husband's will."

32 Translation of Elon 1994:I.125; for further discussion, see *ibid*., at 124-127.

33 Riskin 1989:29f. He supports this, at 31, by reference to another tradition in the Jerusalem Talmud, *Y. Ket* 7:7 (31c), where a *ketubah* clause is quoted reading: "if this one [fem.] hates this one [masc.] her husband, and does not wish to [remain] married [to] him, let her take half her *ketubah*" (following the reading of Lieberman: see 166.n.16; see also Riskin 2002:4):

אין הדא פלונית תשני להדין פלוני בעלה ולא תצבי בשותפוהיה תהוי נסבא פלגות פרן

For a different view of this latter source, see R. Katzoff, in N. Lewis, R. Katzoff and J.C. Greenfield, "Papyrus Yadin 18. I. Text, Translation and Notes (NL), II. Legal Commentary (RK), III. The Aramaic Subscription (JCG)", *Israel Exploration Journal* 37 (1987), 229-50, at 245f. And see further Friedman 1980:I.316-318.

34 E.g. L. Epstein, *The Jewish Marriage Contract. A Study in the Status of the Woman in Jewish Law* (New York: Jewish Theological Seminary of America, 1927), 198 n.19; Friedman 1980:I.316-322; D.I. Brewer, "Jewish Women Divorcing Their Husbands in Early Judaism: The Background to Papyrus Se'elim 13", *Harvard Theological Review* 92:3 (1999), 349-357, at 353f., 356.

divorce.[35] However this may be, even if the clause does validate unilateral divorce by the wife, it does not tell us *how* precisely the divorce is effected in this situation, and in particular what is the position if the husband refuses.[36]

2.2.2 Riskin attaches great significance to this Palestinian tradition.[37] There is nothing in the Babylonian Talmud which explicitly negates it; indeed, the view has been expressed that the later Gaonic reforms regarding coercion of the *moredet* (§3.4, below) may have been based on it.[38] Nevertheless, many later authorities proceed as if conditions of this kind are self-evidently excluded, applying the principle of כל המתנה על מה שבתוב בתורה תנאו בטל. What, then, is the weight of an explicit ruling in the Jerusalem Talmud, against what is merely implicit in the Babylonian tradition? This is not a (post-talmudic) situation where we apply *hilkheta kebatra'i,* but our problem is highlighted by Rema's formulation of that principle:

> In all cases where the views of the earlier authorities are recorded and are well known 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.[39]

R. Yose's view, not disputed in the Jerusalem Talmud, is certainly "recorded" and cannot be regarded as "not previously published". But it hardly appears to be "well known". Riskin (1989:83) observes that the Babylonian Geonim were apparently unaware of this stipulation provided for in the Jerusalem Talmud. His argument, moreover, stresses the distinctiveness of the Palestinian tradition (which also knows of other forms of condition which, it has been suggested,[40]

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35 Katzoff 1987:245f., comparing *Y. Ket* 7:6(7) (7.31c), quoted *supra* n.33, in which it is provided that if in the course of the marriage the wife hates her husband and does not wish the marital union, she will receive only half the dowry.

36 In the abstract of a paper delivered in 1982, Riskin wrote that the *ketubah* clause "ensured that if either party found the other distasteful, the court could impose a divorce": "The *Moredet:* A Study of the Rebellious Wife and her Status in Initiating Divorce in Jewish Law", in *The Touro Conference Volume,* ed. B.S. Jackson (Chico, Ca.: Scholars Press, 1985; Jewish Law Association Studies I), 155. In his book, 1989:32, he is more circumspect: by the stipulation the rabbis ensured "that she could virtually initiate the divorce herself. Her power was not truly *de jure* — that is, upon her stating her desire for divorce, the court would then coerce her husband until he acquiesced, and in the end it would still be he who gave the divorce to his wife — but it provided her with a *de facto* means of getting both her freedom and a livelihood." At 166 n.17, he adds: "It may be assumed that the divorce was effectuated by the court's coercing the husband to give his wife a divorce. It is unlikely that the Jerusalem Talmud discarded the Biblical command: "He shall write her a bill of divorce and place it in her hand" (Deut 24:1)."

It is, however, possible to ascribe to the verb "hate" here in the protasis the technical (constitutive) meaning, which it does appear to bear in some earlier sources. R. Yaron, *Introduction to the Law of the Aramaic Papyri* (Oxford: Clarendon, 1961), 55, finds evidence at Elephantine of both of its original usage as a motivation and its later technical (constitutive) function; see further R. Yaron, "Aramaic Marriage Contracts from Elephantine", *Journal of Semitic Studies* 3 (1958), 1-39, at 32-34; D. Daube, *The New Testament and Rabbinic Judaism* (London: Athlone Press, 1956, reprinted New York: Arno, 1973), 366; A. Verger, *Ricerche Giuridiche sui Papiri Aramaici di Elefantina* (Roma: Università di Roma, 1965; Studi Semitici 16), 118; *aliter*, Friedman 1980:I.314f. n.10. Kraeling 1953:148, took the expression in Brooklyn 2 as "evidently fixed phraseology that must be used to make the thing legal".

37 Riskin 1989:30.

38 See Riskin 1989:82 (n.113, *infra*), quoting *Me'iri*; and citing Friedman 1980:II.42f., though Riskin himself, *ibid.* at 83, argues against this connection. See further Jackson 2002b:nn.84-85.

39 *Rema* to *Shulhan Arukh Hoshen Mishpat* 25:2, as quoted by Elon 1994:I.271.

40 Breitowitz 1993:59. *M. Kidd.* 3:1 already knows of a deferred betrothal, which Z.W. Falk, *Introduction to Jewish Law of the Second Commonwealth*, *Part II* (Leiden: Brill, 1978), II.286, compares to the Alexandrian form of *ketubah* on which Hillel is said to have adjudicated in *T. Ket.* 4:9:

When the people of Alexandria betrothed women, and then someone came from the market and stole her [and

may be adapted to help the *agunah*), which may be regarded as particularly appropriate in contemporary circumstances.[41]

2.3 The French Proposals of 1907

2.3.1 In modern times, a fresh attempt has been made to use *tena'in* specifically to prevent women divorced in civil law to remain "chained" according to *halakhah*. The French Orthodox Rabbinate in 1907 urged that all *ketubot* include a clause[42] stating that a civil divorce decree would *annul* the marriage.[43] Interestingly, in the light of *Tosefta Kiddushin* 3:7 (§2.1.3, above), which invalidates a condition releasing the wife from any future *yibbum,* this proposal is said to have been based on *Rema*,[44] *Even Haezer* 157:4, where a clause annulling the marriage in the event that the husband dies childless was held valid, where the husband (at the time of the marriage) had only one brother,

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married her], and the matter came before the Sages, they considered declaring the children bastards (*mamzerim*). Hillel the Elder said to them: 'Bring me the *ketubah* of your mothers'. They showed them to him, and it was written, 'When you enter my house you will be my wife according to the custom of Moses and Israel.'

The Alexandrian provenance of such betrothal practices is confirmed by Philo, *De Specialibus Legibus* iii.72 (who is critical of them). P. Segal, in N.S. Hecht, N.S., B.S. Jackson, et al., *An Introduction to the History and Sources of Jewish Law* (Oxford: Clarendon Press, 1996), 137f., sees this form of *ketubah* as evidence of "a law allowing one to make a condition under which the betrothal could be cancelled retroactively without the necessity of a *get* ... Thus, by virtue of the conditions laid down in the *ketubah*, the acquisition made by the betrothal was cancelled without the requirement of a *get* even though the act of betrothal did result in the creation of the status of 'married woman'." Breitowitz 1993:59 notes that this Alexandrian practice "was employed throughout Palestine for hundreds of years and became formalised into a prenuptial agreement called a *symphon*." The latter, found in the Jerusalem Talmud, *Kidd.* 3:2(63d), specified a certain day for the betrothal, after which the bride was no longer under any obligation: see further A. Gulak, *Das Urkundenwesen im Talmud im Lichte der griechisch-aegyptischen papyri und des griechischen und roemischen Rechts* (Jerusalem: Verlag Rubin Mass, 1935), 37-42; A.H. Freiman, *Seder Kiddushin Venisuin* (Jerusalem: Mossad Harav Kook, 1944), 11f.; B. Cohen, "Betrothal in Jewish and Roman Law", *Proceedings of the American Academy for Jewish Research* 18 (1949), 67-135, reprinted in his *Jewish and Roman Law* (New York: Jewish Theological Seminary of America, 1966), I.279-347, at I.304-306; Falk, 1966:47f.; R. Katzoff, "Philo and Hillel on Violation of Betrothal in Alexandria," *The Jews in the Hellenistic-Roman World. Studies in Memory of Menachem Stern*, eds. I.M. Gafni, A. Oppenheimer, D.R. Schwartz (Jerusalem: The Zalman Shazar Center for Jewish History and The Historical Society of Israel, 1996), 39*-57*, at 42, 48f.; Brewer 1999:355.

41 §5.1.4, below. The Jerusalem Talmud also takes a distinctively strong line on annulment, justifying it by "Sages have the power to uproot Torah Law by annulling marriages" (*Jerusalem Talmud Gittin* 4:2), cited by Gilat, *infra* §4.1.2, and Morgenstern (internet version):ch.III, rather than (as Breitowitz 1993:62 n.171 observes) the Babylonian Talmud's common rationale בל דמקדש, discussed *infra* §4.1.2-3. Riskin's argument does not require this radical justification, though he refers to it at 2002:11, and suggests that it may lie behind the approach of *Me'iri*, *infra* n.292.

42 This, therefore, is not the same as the Reform practice (in the U.K., at least), of simply recognising the civil divorce for the purposes of *halakhah*. The Reform practice does not require a pre-marital agreement to this effect. But the *original* French Orthodox proposal was also for automatic annulment. See M. Meiselman, "Jewish Women in Jewish Law: Solutions to Problems of Agunah", in Porter 1995:61-71, at 61f., on the argument of Rabbi Michael Weil of Paris that the contemporary Rabbinate had the power to annul any marriage, and the rejection of this view on the grounds that the change was legislative in nature, and *universal* acceptance was a *sine qua non* for legislation (citing Maimonides, Introduction to *Mishneh Torah* and *Rosh Resp.* 43:8), since no legislative prerogative to change the basic marriage and divorce laws was granted to any Rabbi or group of Rabbis subsequent to the talmudic period. On the history of the issue in France, see Freiman 1944:388-94 (not 288-94 as per Breitowitz 1993:60 n.169); Gabrielle Atlan, *Les Juifs et le divorce. Droit, histoire et sociologie du divorce religieux* (Bern: Peter Lang, 2002), 211-18.

43 Indeed, Meiselman 1995:62 notes that the groom was also to declare during the marriage ceremony itself: "Behold you are wed to me. However, if the judges of the state shall divorce us and I not give you a Jewish divorce, this marriage will be retroactively invalid."

44 R. Moses b. Israel Isserles, Poland, 1520-1572. Riskin 1989:136 cites R. Israel of Brunn (1400-1480) as the "halakhic precedent". See further *infra* n.73.

who had abandoned Judaism for another faith. Clearly, the clause was designed to avoid placing the wife in a position where she would require *halitsah* from someone who was most unlikely to grant it.[45] Similarly, the French Rabbinate appears to have argued, such a clause would be acceptable where it was foreseeable that otherwise the wife might be left "chained" by act of the husband himself, where the marriage had (effectively) been terminated by civil divorce.

2.3.2 This proposal, however, met with widespread opposition,[46] on two principal grounds. The first was that even Rema's ruling itself violated the principle כל המתנה על מה שכתוב בתורה תנאו בטל.[47] Against this, it was argued that the condition did not explicitly exclude the laws of *yibbum* and *halitsah* but merely "sidestepped" them.[48] Secondly, a distinction (based on *Yevamot* 94b and *Ketubot* 72b-74a) has been drawn by some between the *Kiddushin* and *Nissu'in* components of marriage. While the former may be entered conditionally, the latter cannot ("*Ein Tnai B'nissuin*"), since any such conditions would be invalidated by the subsequent marital relations between the couple,[49] applying the principle אין אדם עושה בעילתו בעילת זנות: a presumption (חזקה) that marital relations are intended as such, and not as acts of promiscuity. The status of sexual relations between the spouses, on this argument, cannot be conditional — they cannot be marital if not invalidated by subsequent acts bringing the condition into effect, non-marital if those conditions are fulfilled. Of course, this argument is strongest where the annulment provided for by the condition is retrospective. The objection is more debateable (in the case of a condition relating to a *get,* if not in relation to *yibbum*) if one takes the view — as does Broyde (§2.4.4, below) — that conditions in relation to post-marriage events may be formulated to take effect only on the occurrence of those events, and not retrospectively. Otherwise, it is sometimes argued, it would be necessary for the couple to declare (each time?) before they engage in marital relations (with witnesses standing behind the wall) that the marital relations do not constitute avoidance of prior conditions.[50] One

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45 See Jachter, "Unaccepted Proposals III", http://www.tabc.org/koltorah/aguna/aguna59.6.htm, noting also that the *Taz* (*E.H.* 157:1) cites his father-in-law, the *Bach*, who rules that such an arrangement can also be made if the husband's only brother's whereabouts are unknown. Similarly, he observes, most authorities accept the ruling of the *Nachalat Shiva* (*Laws of Chalitza* 22:8) that this arrangement can also be made if the groom's only brother is mentally incompetent (*Cheresh* or *Shoteh*). He cites *Aruch Hashulchan* (*E.H.* 157:15), *Pitchei Teshuvah* (*E.H.* 157:9), and *Igrot Moshe* (*E.H.* 1:147), and notes: "Indeed, Rav Yehuda Amital told this author that he has performed two wedding ceremonies in this manner when the groom's only brother was mentally incompetent. This type of ceremony should only be performed with the approval of an eminent halachic authority. Rav Amital acted upon the approval and guidance of Rav Moshe Feinstein." Cf. Jachter 2000:34f.

46 Jachter, *supra* n.45, cites Rav Yitzchak Elchanan Spektor, Rav David Zvi Hoffman, and Rav Chaim Soloveitchik, and, in the following generation, Rav Yosef Eliyahu Henkin (*Peirushei Ibra*) and Herzog 1989:1:76 for rejection of the proposal. See also Freiman 1944:390; Riskin 1989:136, citing also R. Yehudah Lubetski of Paris, who published a dossier documenting the opposition: *Eyn Tenai beNisuin* (Vilna, 1930); Breitowitz 1993:60 n.169.

47 Jachter, *supra* n.45, cites *Melamed Lehoil* 3:22, and *Tzitz Eliezer* 1:27.

48 Jachter, *supra* n.45, cites *Nodah B'Yehuda* (*E.H.* 56), the *Chatam Sofer* (*E.H.* 110-111), and the *Aruch Hashulchan* (*E.H.* 157:15-17). One may perhaps compare the "sidestepping" of the laws of intestate distribution by a will which uses words of gift rather than inheritance.

49 This is regarded by Breitowitz 1993:60f. as the primary reason for rejection of conditional marriage, citing *Ket.* 73b, *Rambam Hilkhot Ishut* 7:23, *Tur E.H.* 38; *Shulhan Arukh E.H.* 38:35, though noting (61 n.170) an alternative rationale, that the cohabitation may constitute a new, unconditional marriage. He discusses the practical differences between these two rationales.

50 *Beit Shmuel E.H.* 157:6 and *Aruch Hashulchan* 157:17, cited by Jachter, *supra* n.45. Broyde in fact appears to see this as required to sustain even a non-retrospective condition subsequent. A similar problem exists in relation to a conditional *get* given by a soldier going on active military service, if the soldier returns home on leave. However, Bleich 1977:153, notes that Dayan Abramsky, head of the London Beth Din, held it unnecessary to renew the *get* at the end of each leave, on the grounds that "since the husband grants a divorce for the sole purpose of precluding the eventuality of his wife being an *agunah*, there is no reason to suppose that he will annul his proxy while on leave." It is difficult to see why a similar argument may not be applied to a condition in a *ketubah*.

might have thought, however, that they could, by prior declaration in a document, at least create a presumption that they intend their relations to be marital, notwithstanding the existence of the condition.[51]

2.3.3 Yet even if these difficulties can be overcome, opponents of the French proposal argued, the condition accepted by Rema, contemplating a problem of *chalitsah,* is very different from that of anticipating a civil divorce. In Rema's case, the risk of בעילת זנות is relatively small since, as Jachter puts it, "most couples have children and every effort will be made in case the husband doesn't have children and is on the verge of dying he will give his wife a Get prior to his death, to insure that the marital relations will not be retroactively considered promiscuous"; the risk of civil divorce, on the other hand, is considerable, and in such circumstances marital relations do serve to cancel the conditions. The French proposal would, he argues, effectively eliminate the entire institution of *Gittin*, and, by making every marriage conditional, would weaken the institution of marriage.[52]

2.3.4 In short, the French proposal failed on a variety of technical and policy grounds. The technical objections did not constitute an "open and shut" case. Clearly, amongst halakhic authorities worldwide, the objections (which seem to have overlooked the Palestinian tradition represented by *Jerusalem Talmud, Ketubot* 5:9 (30b), §2.2, above) were sufficient to prevent the emergence of a consensus (even, so it seems, a majority). The specific form of the French proposal is unlikely to re-emerge today, given the fact that any universal solution to the problem of *agunah* must take account of the situation in the State of Israel, where civil divorce does not exist. Yet some of the arguments used in defending the proposal may still prove relevant in the present context.

2.4 Modern Proposals for Conditions

2.4.1 The modern generation of proposals relating to "conditions" largely avoid making annulment (whether retrospective or not) a consequence of breach. Rather, they concentrate on financial provisions, thus remaining clearly within the sphere of the "monetary" (דבר שהוא של ממון). The Conservative Movement has adopted the "Lieberman clause" (1954)[53] under which the parties recognise the authority of the *Beth Din* of the Rabbinical Assembly to counsel them, summon them and "impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decisions".[54] To this has been added since 1991 a "Letter of Intent", which makes

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51 On this issue, see further B.S. Jackson, "*Agunah*: Problems of History and Authority", Paper delivered at JOFA Fourth International Conference on Feminism and Orthodoxy, New York, November 10th, 2002, available at http://www.mucjs.org/jofaweb.htm.

52 Jachter, *supra* n.45.

53 Which Riskin 1989:137; Riskin 1995:190, describes as "very similar to the *ketubah* stipulation cited earlier in the Jerusalem Talmud".

54 *Proceedings of the Rabbinical Assembly of America* XVIII (1954), 67, quoted in I. Klein, *A Guide to Jewish Religious Practice* (New York: The Jewish Theological Seminary of America, 1979), 393, and in J.D. Bleich, "A Suggested Antenuptial Agreement: A Proposal in the Wake of *Avitzur*", *Journal of Halacha and Contemporary Society* 7 (1984), 25-41 (cf. http://www.jlaw.com/Articles/antenuptial_agreement2.html): "And in solemn assent to their mutual responsibilities of love, the bridegroom and bride have declared: As evidence of our desire to enable each other to live in accordance with the Jewish Law of Marriage throughout our lifetime, we, the bride and bridegroom, attach our signature to this *ketubah* and hereby agree to recognize the *Beth Din* of the Rabbinical Assembly of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish Law of Marriage throughout his or her lifetime. We authorize the *Beth Din* to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decisions." Different formulations of this, however, are in circulation: e.g.: "_____, the groom, and _____, the bride, further agreed that should either contemplate dissolution of the marriage, or

their agreement to enforceability by the civil courts explicit.[55] The vague character of the award contemplated by the *bet din,* combined with the possible penalties for breach by the civil courts,[56] prompted objections on the basis of *asmakhta*: contractual obligations, according to the Halakhah, are required to be determinate.[57] It was partly in response to this objection[58] that Rabbi David

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following the dissolution of their marriage in the civil courts, each may summon the other to the Bet Din of the Rabbinical Assembly and the Jewish Theological Seminary, or its representative, and that each will abide by its instructions so that throughout life each will be able to live according to the laws of the Torah" (http://www.ritualwell.org/Rituals/ritual.html?docid=754).

55 As quoted at http://www.ritualwell.org/Rituals/ritual.html?docid=754: "Each of us acknowledges and confirms our understanding that this ketubah is a legal contract and shall be binding under both Jewish and civil law concerning the formation and dissolution of our marriage. In particular, each of us acknowledges that according to this ketubah, should our marriage be dissolved in the civil courts, each of us is bound to appear before the Joint Bet Din of the Conservative Movement, or such Bet Din as shall be designated by the Joint Bet Din, if so requested by the other, and to abide by its instruction and decision with respect to the dissolution of our marriage under Jewish law. Each of us intends that the undertaking to appear before and to be bound by the directions of the Bet Din may be enforced by the civil court of law. Each of us acknowledges our agreement to the ketubah and our willingness to be bound by its terms."

56 In *Avitzur* v. *Avitzur*, 446 N.E. 2d 136, 29 A.L.R. 4th 736 (N.Y. 1983), where the wife sought specific performance of a Lieberman clause in order to compel her husband to appear before the *bet din*, the New York Court of Appeals declared by a 4-3 majority that the Lieberman *ketubah* was valid and enforceable. See further Bleich, *supra* n.47; Riskin 1989:138; *idem, supra* n.16, at 190; Breitowitz, *supra* n.14, at 96-106, for discussion of the constitutional, contractarian and halakhic aspects. At 101 Breitowitz argues, on arbitration principles, that the civil court would not be able to enforce the "terms of compensation" imposed by the *bet din:* "The exclusive remedy for a breach of a contract to arbitrate is an action for specific performance, which in turn would be enforceable by imprisonment or fines to be determined by the court." Thus argument, of course, would not apply to financial conditions outside the context of an arbitration agreement.

57 Bleich 1984:text at n.3; Riskin 1989:137; Meiselman 1995:66f. Bleich sought to draft a variation of the Lieberman clause, which simply commits the parties to appear before an Orthodox *bet din*, and provides that the "award or decision of the Rabbis or a majority of them shall be enforceable in any court of competent jurisdiction pursuant to the New York Law of Arbitration - CPLR ARTICLE 75", without indicating *any* financial penalties for breach (see www.jlaw.com/Articles/antenuptial_agreement2.html). Such financial penalties, he argues, are unnecessary in the light of *Avitzur,* since the civil courts could back up orders for specific performance with imprisonment, if necessary. Bleich comments that this variation of the Lieberman clause "would do much to ameliorate the plight of the agunah but would by no means serve as a panacea", noting doubts as to whether it extends to the civil enforcement of any subsequent *bet din* decision commanding the husband to grant a *get* (and whether such enforcement would, depending in part on the exact form of the civil court order, render the *get me'useh*). Its value, he argues, resides in the fact that once the parties are compelled to appear before a Beth Din, the latter "will be able to use its ample powers of moral persuasion in order to effect the desired result". He describes his earlier proposal for a PNA based on *tosefet mezonot* (see *infra,* n.59), as "more radical" (1984:n.20). See also his comments on the problems, in both religious and civil (US) law, of a clause by which the parties explicitly undertake to execute a *get* or to appear before a Beth Din for the specific purpose of executing a *get*, including his citation (at 1984:n.21) of rabbinical court decisions in Israel holding such agreements to be unenforceable in Jewish law, as constituting a mere *kinyan devarim*.

This agreement, Bleich suggested, should be executed as a separate document from the *ketubah,* in order to avoid possible objections that the *ketubah* is a religious document whose enforcement would violate the Establishment Clause of the US Constitution. Against such a characterisation, Bleich argues (1984:n.23): "Similarly, the marriage contract itself is in no way a religious document. It merely recites the obligations assumed by the groom for the support and maintenance of the bride and the financial provisions made for the wife upon dissolution of the marriage by death or divorce. Jewish law requires the document both for the protection of the bride and as a means of preventing precipitous divorce. The instrument itself is no more religious in content — or romantic in tone — than an insurance policy." See also his comments there on the (even more) secular character of the *get*.

58 Cf. Breitowitz 1993:98f. n.282. On the problem of *asmakhta,* as affecting specific penalty clauses as well as indeterminate obligations, see Breitowitz 1993:151-55; J.D. Bleich, "The Device of the Sages of Spain as a Solution to the Problem of the Modern Day *Agunah*", in J.D. Bleich, *Contemporary Halakhic Problems, Volume III* (New York: Ktav, 1989), pp.329-343, at 330f. The "Device of the Sages of Spain" was itself a mechanism for avoiding the

Bleich[59] (followed by Rabbi Shlomo Riskin[60]) drafted a pre-nuptial agreement based on the concept of *tosefet mezonot,* which includes a provision that if, at any time, the wife does not share the husband's board, "may it be for any reason whatsoever, the groom obligated himself that he will thereupon immediately give his wife the sum of 200 dollars to spend for food, clothing and domicile and will give her a like sum every single day throughout the period during which she does not share his board until a judgment is issued by a *Bet Din* declaring that she is not prevented from marrying in accordance with the law of Moses and Israel because of him." A similar approach is adopted in the Prenuptial Agreement now being promoted by the Orthodox Caucus in the United States[61] and by the Rabbinical Council of America.[62]

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asmakhta problem (in general) by dividing such clauses into separate (unconditional) obligations to pay a specific sum and (by the other party) to release that obligation on the occurrence of a particular condition. This generates, in Bleich's analysis, an alternative procedure designed to address the *agunah* problem, but one which involves the execution of four separate documents, two during the couple's engagement and two immediately prior to the wedding ceremony.

59 J.D. Bleich, "Modern-Day *Agunot:* A Proposed Remedy", *The Jewish Law Annual* 4 (1981), 167-187 (proposed document, Hebrew and English versions, at 184-87). This model was first outlined by Bleich in reaction to difficulties seen in a suggestion by Rabbi Elyakim Ellinson, according to which the husband contracted civilly to provide his wife with the normal quantum of support required by Jewish law until a religious divorce had been executed: see Bleich 1977. Whether Bleich would go further than this is far from clear, despite the remarks of Lucette Lagnado, "Of Human Bondage", in Porter 1995:12f., who writes, in the US context: "There are hints of progress, whispers of reform among the rabbis. Several of them now endorse the notion of a prenuptial agreement that would guarantee a woman a *get* in the event of a divorce. Among the sponsors of such a solution is the eminent rabbi and legal scholar David Bleich of Yeshiva University's Cardozo Law School. Bleich has fashioned a document he thinks is religiously acceptable. Unfortunately, he can't get enough of his rabbinical colleagues to agree: "I can't get them together in one room. The problem is that we do not have one authoritative body with the power to issue fiats"." In fact, Rabbi Bleich regards the financial pressures of this *tosefet mezonot* proposal as itself sufficient to "guarantee a woman a *get* in the event of a divorce" (private conversation), although he conceded at the end of his 1997 article (*supra*) that "to be fully effective, the sum stipulated at the time of marriage should be significantly greater than any likely alimony award." See also Bleich 1981:173f. At the same time, it must not be so large as to constitute a "penalty", and thus risk being viewed as indirect coercion: see further Bleich 1985.

60 Riskin 1989:140-42. At 182 n.10, he acknowledges Bleich 1981, and takes support from a letter of Chief Rabbi Zolti of 1983, but argues that the agreement be tied to the *tenayim*, "making it an aspect of the wedding ceremony itself and not a separate — and totally secular — antenuptial agreement". At 140, he writes: "Since the sum is specified, the problem of asmakhta is avoided. Since we are dealing with a prenuptial agreement, which is not technically part of the actual religious ceremony, such a document would be enforceable within the secular courts. And since there already exists an accepted form of prenuptial agreement known as *tenayim*, which is generally signed immediately preceding the marriage ceremony, it is logical to make this stipulation an addendum to the *tenayim*. An ancient custom thus gains crucial relevance, and provides a framework for the final arbitration agreement from the very start." In response, see Bleich 2002:I.18 n.17. Compare also the draft of Broyde 2001:131: "Furthermore, husband-to-be hereby obligates himself now (*me'achshav*) to support wife-to-be from the date their domestic residence together shall cease, for whatever reasons at the rate of $100 dollar per day (adjusted by the consumer Price Index All Urban Consumers, calculated as of the date of the parties marriage) in lieu of his Jewish law obligation of support, so long as the parties remain married according to Jewish law, even if wife-to-be has one or more other sources of income or support."

61 http://www.orthodoxcaucus.org/prenup/prenupform.htm (and in Broyde 2001:132-35), drafted by Rav Mordechai Willig of Yeshiva University, with the guidance and written approval of Rav Zalman Nechemia Goldberg and Rav Chaim Zimbalist of the Beit Din Hagadol in Jerusalem. It too is designed to oblige the husband to a specified (here index linked) amount of maintenance "from the day we no longer continue domestic residence together, and for the duration of our Jewish marriage, which is payable each week during the time due, under any circumstances, even if she has another source of income or earnings". The future husband affirms: "I execute this document as an inducement to the marriage between myself and my wife-to-be" and the latter "acknowledge[s] the acceptance of this obligation by my husband-to-be, and in partial reliance on it agree to enter into our forthcoming marriage." The parties agree to refer any marital dispute to an arbitration panel, namely a specified *Bet Din*, whose decision "shall be fully enforceable in any court of competent jurisdiction". See further Jachter, 2000:8-16, and http://www.tabc.org/koltorah/aguna/aguna59.1.htm, who indicates that the form has obtained the written approval of, *inter alia*, Rav Ovadia Yosef, and that a recent study

2.4.2 We may note that the PNA in use since 1996 in the United Synagogue[63] appears to be subject to the same objections on the grounds of *asmakhta* as the Lieberman clause; by the same token, it fails to specify a regular maintenance obligation,[64] unlike some of the current US and Israeli Orthodox versions.[65] It is also weaker[66] than the Lieberman clause in making recourse to the civil courts (if,

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indicated that more than half of the Rabbis who are members of the Rabbinical Council of America use it. For the resolution of the RCA, see B. Herring and K. Auman, eds., *The Prenuptial Agreement. Halakhic and Pastoral Considerations* (Northvale, NJ: Jason Aronson, 1999), 23f.

62 The website of the latter, http://www.rabbis.org/, as of late December 2003, provided a stylistically different (downloadable) text from that in n.61, being the Binding Arbitration Agreement of the Beth Din of America. The website carries the signatures, by way of endorsement, of ten Roshei Yeshivah, including Rabbis M.D. Tendler and M. Willig.

63 "The bride and bridegroom agree that, in the event of any matrimonial dispute, they will both attend the Court of the Chief Rabbi, the London Beth Din (or such other Beth Din as that Beth Din shall direct), when required to do so and that they will comply with the instructions of that Beth Din, including co-operation in any mediation recommended, in seeking to resolve all problems arising out of or in connection with their Jewish marriage" (Clause 1).

64 Rather, it leaves the maintenance obligation to be determined by the Bet Din *expostfacto*: "The bridegroom further undertakes that, irrespective of civil proceedings being instituted in respect of the marriage, he will fulfil all his financial obligations to his wife as determined by the London Beth Din (or such other Beth Din as that Beth Din shall direct)" (Clause 3).

65 *Supra* nn.59, 61, 62; see also Rabbi M. Willig in Herring and Auman 1999:34f.; Rachel Levmore, *Prenuptial Agreements for the Prevention of Get-Refusal at the End of the Twentieth Century* (M.A. dissertation: Department of Talmud, Bar Ilan University, Hebrew with English abstract), reviewing 16 Israeli PNA's dating from 1984 to 2001.

66 As to the halakhic status of the (now withdrawn) compulsory arbitration clause ("The bride and bridegroom further agree that if the problems concerning their Jewish marriage are not resolved, under paragraph 1 above, any dispute arising out of or in connection with that marriage shall be referred to and finally resolved by arbitration by the London Beth Din (or such other Beth Din as that Beth Din shall direct), in accordance with Halacha under the Arbitration Acts 1950, 1975 and 1979 (or any amendment, consolidation or replacement thereof) and in accordance with the procedural rules of the relevant Beth Din"), the observations of R. Moshe Feinstein as quoted by Jachter, "Viable Solutions I", http://www.tabc.org/koltorah/aguna/aguna59.1.htm, are of interest: "It should be noted that Rav Moshe Feinstein (Igrot Moshe Even Haezer, 4:107) writes, regarding signing a binding arbitration agreement which assigns jurisdiction to resolving a Get dispute to a specific Beit Din, - "This is halachically permissible to do and a Get given in the wake of such an agreement will not be considered illicitly coerced ("Get M'eusah"). Saving both parties from being trapped in an Aguna situation is indeed a matter of great importance." Cf. Jachter 2000:10f. Amongst the sample agreements provided by Broyde 2001:136 is one "written at the request of Rabbi Haskel Lookstein" (similar, Broyde notes, to one drafted in Hebrew by the late Professor Ariel Rosen-Tzvi), which concludes: "... in the event of any breach of this contract, in addition to any other legal remedies available, the injured party shall be entitled to injunctive or mandatory relief directing specific performance of the obligations included herein." Indeed, there have been cases of courts in Common Law jurisdictions granting injunctive or mandatory relief, in order to give full practical effect to a civil divorce, even in the absence of any such contractual clause: see Berkovits 1990:139f. on *Morris* v. *Morris* (Manitoba, 36 D.L.R. 447) and *Gwiazda* v. *Gwiazda* (Australia, Case no. M10631 of 1982). Of course, if the husband refuses to obey an order for specific performance (to grant a *get,* assuming that is what the Bet Din has ordered him to do), the only further recourse is to penalise him for that disobedience — ultimately, by imprisonment for contempt of the civil court; neither the civil court nor the Bet Din has authority, under this condition, itself to effect an halakhic termination of the marriage.

despite present indications, that will be accepted in English law[67]) dependent upon permission from the *bet din:* "Neither the bride nor the bridegroom shall apply in any civil proceedings without prior approval in writing of the Beth Din for an order to enforce an award of the Beth Din, or for an order in relation to non-compliance with this agreement" (Clause 4). And of course, it makes no attempt to make the validity of the marriage (retrospectively or not) conditional upon observance of its terms, as might have been achieved, for example, by expanding the existing Clause 5 to read:

> The bride and bridegroom confirm that they have made this agreement freely and in the full knowledge and understanding of the meaning of its terms *and that their continuing willingness to abide by it is a condition of the continuing subsistence of the marriage*.

2.4.3 Such a clause would, of course, create a conditional marriage, and takes us back to the issues raised by the French proposal.[68] Despite the rejection of the latter at the time, this type of condition (breach of which is designed to terminate the marriage) was revived in 1967 by Eliezer Berkovits,[69]

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67 In *N* v. *N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745, Wall J. held that an agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is contrary to public policy because it undermines the concept of marriage as a life-long union; moreover, the obligation to attend the Beth Din could not be severed and specifically enforced (as the court held to be permissible in *Avitzur*). The court did, however, accept that the PNA could have evidentiary value if its terms proved relevant to an issue before the court in subsequent proceedings. Such a first instance decision does not create a binding precedent in English law. An appeal (which would have produced a precedent-setting decision) was filed but subsequently withdrawn, when the rabbinical authorities succeeded in pressuring the husband into giving a *get* (see *The Jewish Chronicle*, 26.11.99, p.1). Freeman 2000:61 considers Wall J.'s decision correct, and has described the PNA as "as much a social management technique designed to control an increasingly errant community as they are a dispute resolution resource." Indeed, Freeman's own previously-expressed view on the broad policy issue was adopted by the court: "It is a sad reflection on the dilemma of a religious minority that, having forgotten its liberal heritage, it has to call upon the dominant culture to bale it out. The Jewish community should not have to go cap in hand to legislatures ... when, by discovering their own sources and interpreting them creatively and dynamically they can solve problems which their interpretations have created."

68 The rabbis of Turkey in 1924 made a similar proposal: see Freiman 1944:391f. Riskin 2002:27 describes the condition which the Constantinople court wished to attach to all betrothals and marriages as stating that "if the husband leaves his wife for an extended period of time without permission, or if he refuses to accept a court ruling, if he takes ill with a mental or contagious disease — in all such cases the marriage is retroactively cancelled, and the woman does not need a *get*." This was later rejected by Rabbi Ben Zion Uziel of Israel, and was never implemented. Nevertheless Rav Uziel himself suggested (*Mishpetei Uziel, E.H.* 46) a form of conditional betrothal, using the formula: "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 or 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*." See Riskin 2002:27f., noting that this proposal, too, was rejected by most of the generation's rabbinic authorities.

69 *Tnai beNisuin uVeGet* (Jerusalem: Mosad Harav Kook, 1967), a condition that if the husband does not comply with the order of the Bet Din to grant a *get,* the marriage will be annulled. Meiselman 1995:64f. notes that the book elicited virtually no response (other than complete rejection) from the Orthodox rabbinate. He claims that this was because "his proposal was nothing more than a slight modification of the earlier Paris proposals. There was nothing substantially new in his book." See also B.-Z. Schereschewsky, "Agunah", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), II.432; Riskin 1989:137.

and continues to command some support. Dayan Berel Berkovits has himself written:[70]

> Here I will refer you to a book by my late uncle, Dr Eliezer Berkovits, who was a leading Jewish philosopher and a leading *halachic* scholar. Thirty years ago he wrote a major *halachic* work called *T'nai bi 'Nisuin uVe'Get* (*Conditional Clauses in Marriage and Divorce Agreements,* Jerusalem, 1968, in Hebrew), in which, rather than attempting to import alien concepts into the Jewish structure, he analysed the structure of a Jewish marriage and attempted to put forward a proposal, based on solid *halachic* reasoning, to show that you can build into the marriage contract a provision for a dissolution in certain circumstances, without the need for a *Get*. The proposals are complex, they are controversial, but I believe, not because he is my uncle, but because he is the first person who tackled it with a fundamental look at the structure of Jewish law, rather than attempting to import concepts from other systems or to take very rare, isolated situations and extrapolate them, like the annulment proposal. He attempted to look at the fundamental structure of Jewish law of marriage and divorce, and I think that the way forward is to reopen that avenue and to re-examine it.

2.4.4 In the United States, Rabbi Michael Broyde, a strong opponent of the Rackman/Morgenstern courts, has himself expressed the view that this may offer a way forward. Distinguishing the operation of conditions from mistake-induced invalidity,[71] he writes:[72]

> A condition in a marriage or divorce (and maybe all areas) follows a particular technical formulation and can cover contingencies that cannot ever be predicted by the parties and certainly need not be present [citing Maimonides, *Hilkot Ishut* 6:1-5]. Thus, a man may marry a woman and he or she can state under the *chupa* that they are marrying each other only on the condition that neither ever get cancer or drink wine (or both). When one makes such a condition in a marriage, and that condition is breached, the marriage is void, assuming that both of them never forgave the marital condition ... (T)he *tenai* procedure — if correctly followed — works for almost every imaginable contingency, including those currently not present. However, normative halacha assumes that people forgive *tenaim* after the couple commence a sexual relationship, and thus the marriage is valid, even if the subsequent conditions are breached, as happily married couples waive otherwise permanent conditions shortly after marriage.[73] However, when a *tenai* is made at the time of marriage, and kept in effect during the sexual relationship and then the *tenai* is breached, the marriage ends without any divorce, as if there never was a marriage. Nevertheless, the marriage is fully valid until such time as the condition is breached.
>
> While it is true that the custom and practice is not to use any conditions in a marriage, as there is a distinct halachic possibility that any such condition is void if the parties live together sexually without explicitly repeating the condition, such is not the categorical halacha, as Rama clearly rules that such conditions can and do work, and he proposes one to cover the case of a brother unwilling or unable to do *yibum* [*EH* 157:4]. Certainly, all agree that a *tenai* can be kept in effect if, for example, the couple repeated the condition to a bet din each time before they

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70 "An Halachic Viewpoint", www.icjw.org.uk/halachicindex.htm, a paper he gave to the London Conference of the International Council of Jewish Women in September 1998.

71 On which see also Bleich 1998:107f.

72 "Error in the Creation of Jewish Marriages: Under what Circumstances Can Error in the Creation of a Marriage Void the Marriage without Requiring a *Get* according to Halacha?", http://www.jlaw.com/Articles/KidusheiTaut.html, now reprinted with minor differences as "Error in the Creation of Marriages in Modern Times under Jewish Law", *Diné Israel* 22 (5763/2003), 39-65 (English section). The passage here quoted in the text appears, with variations and some deletions, at 49-51.

73 *Even Haezer* 38 and 39 (*en passant)*; but see *Rema*, *Even Haezer* 157:4. On this latter source, where Rema approved a ruling of Rabbi Israel Bruna, who had sanctioned a condition that the marriage would be retroactively annulled should the husband (whose brother was an apostate) died without children (in order to avoid the problem of the widow being tied to an apostate, who might refuse to grant *halitsah*), see Breitowitz 1993:59; M. Ish-Horowicz, "The Problem of *Iggun* and its Solutions", in *The London 1996 Conference Volume,* ed. E.A. Goldman (Atlanta: Scholars Press, 1997), 91-101 (Jewish Law Association Studies IX), at 97.

engage in a sexual relationship.[74]

In sum, in a *tenai* case, when a condition is used and the procedure for a *tenai* is followed, the marriage is valid but conditional. If the proper procedure is followed, the condition can survive and it can govern many un-foreseeable activities. However, in the real world of Jewish marriages, formal conditions are never used, as the procedural requirements to keep them valid once a sexual relationship commences are very onerous in all but the rarest of circumstances.

Broyde asserts that conditions which bring the marriage to an end (without a *get*) are in principle acceptable (and apparently need not be retrospective[75]); the practical problem (which has generated a "custom and practice" of not using such conditions) is that of maintaining the conditions intact at the same time as the marital relations.[76] One may observe that this is an example of a rule devised originally for the *benefit* of the woman now being turned against her. Broyde does not suggest any formula for a terminative condition of the kind hypothesised above. He has, however, noted the existence within the tradition of five different models of divorce (reflecting different conceptions of the nature of marriage) which have been normative in different communities at different times,[77] and

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74 Citing the extensive analysis of this topic in *Pitchai Teshuva*, *Even Haezer* 157:4.

75 "Nevertheless, the marriage is fully valid until such time as the condition is breached": Broyde, "Error", *supra* n.72: cf. 5763/2003:50. His basis for this is not made clear (unless he assumes an explicit term in the condition that the invalidity will not be retroactive). Breitowitz 1993:58 n.164 is clear that conditions in marriage, though they be conditions subsequent, operate *nunc pro tunc*. Similarly, Bleich 1998:107 writes: "As with all conditions of marriage, if the condition subsequent is violated or unfulfilled the marriage is retroactively and automatically null and void." There is, however, a distinction between annulment *lekhathilah* and annulment *bedieavad:* see Rabbi S.-Y. Cohen, "*Kefiyat haget bizeman hazeh*", *Tehumin* 11 (5750), 195-202, at 199. One might, moreover, argue from the final position of the Babylonian Talmud on the *moredet* (*infra*, §3.3.3), as understood by Rabbenu Tam (§3.5.3), according to which she must wait twelve months without maintenance, after which the *get* might be coerced. But how would the coercion be effected at the end of the twelve months, particularly given Rabbenu Tam's apparent rejection elsewhere of coercion of the *moredet* in principle, as lacking talmudic authority? Perhaps the existence of the *ketubah* was regarded as a condition subsequent for the marriage, so that its disappearance rendered the marriage *automatically* invalid.

76 On this problem, see further Jackson 2002. The same issue affects the proposal of Louis Epstein, in his *Hatza'ah Lemaan Taqanot Agunot* 1930 and *Lishe'elat Ha-agunah*, 1940, that subsequent to every marriage the husband appoint his wife as an agent to execute a divorce on his behalf (on which see also Breitowitz 1993:66-68). See further Meiselman 1995:63f., noting that in 1935 the (Conservative) Rabbinical Assembly voted to accept this proposal, but the Orthodox rabbinate responded with unanimous disapproval, on both the practical grounds that the husband could subsequently dismiss the wife as his agent, and the halakhic objection of Rabbi Moshe Soloveitchik of New York, quoting Maimonides, *Hilkhot Gerushin* 9:25 (a *get* becomes invalid if the husband subsequently has intercourse with the wife, and this is so even without evidence of actual intercourse, but if he has secluded himself with her; all the more so if he secludes himself with his wife after he has given instructions for the writing of the *get*, but before it is actually written), that cohabitation is an unconditional act expressive of unconditional commitment and therefore the very appointment of an agent for a divorce is nullified by cohabitation. The same arguments apply to the delivery of a conditional *get* by the husband himself at the time of, or shortly after, the marriage.

Meiselman 1995:65 quotes Rabbi M.M. Kasher as referring to a *herem* issued in the 1930's, signed by more than a thousand rabbis, in which they forbade anyone from introducing the delivery of a *get* by means of an agent appointed at the time of the wedding. This may exclude explicit agency, but not necessarily implicit agency. Dayan Berkovits comments on the use of this by Rabbi Morgenstern: "Finally, Rabbi Morgenstern cites the revered Rabbi Y. Weinberg (Seridei Eish 3:25, at end) to the effect that the Beth Din can act for a husband, and execute a *get* without his consent, if it is "a benefit" to him. This is an implied agency, thus not subject to the problem addressed in the *herem*." Rabbi Morgenstern argues that a recalcitrant husband is a "transgressor" and that, consequently, he may not be rescued — halachically — if he falls into a river, so that his life is in danger. By having the *get* done for him, however, he (apparently) ceases to be a transgressor and can therefore be saved. He thus "benefits" from the Beth Din's acting on his behalf. Rabbi Weinberg actually concludes, however, after an exhaustive discussion, that "if we do not know [that divorce is beneficial to him], and it is possible that he does not want, under any circumstances, to give a get, the basis for acting on his behalf collapses, and therefore … one ought to try to influence the husband to agree to a get."

77 Broyde 2001:ch.2 (for two of them, cf. Michael S. Berger, "Two Models of Medieval Jewish Marriage: A Preliminary Study", *Journal of Jewish Studies* LII/1 (2001), 59-84).

which he maintains it is still possible, in principle, to adopt (by the use of appropriate conditions): "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."[78] One such model he terms "Marital Abode as the Norm":[79] here, the parties may agree that either has a right to divorce after a specified period of separation.[80]

2.4.5 Rabbi Morgenstern himself, it may be noted, sees no need for the addition of further conditions to the marital documents. For him, breach by the husband of the obligations of the traditional *ketubah* already justifies annulment.[81]

3.0 *Coercion*

3.1 The Mishnah

The principle of coercion was accepted already in the time of the Mishnah in some cases where the law recognised that the woman had a right to divorce:[82] broadly, cases of "major" physical defect, malodorous occupations inhibiting conjugal relations and abusive behaviour;[83] indeed, *Mishnah*

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78 Broyde 2001:86. See further Jackson 2002:§2.2.

79 Broyde 2001:23, and citing in support, *inter alia,* Rav Moshe Feinstein, *Igrot Moshe*, *Yoreh Deah* 4:15.

80 Cf. *Resp. HaHayyim VeHashalom,* vol.2, no.112, cited for other purposes by Riskin 2002:6f., who took the view that if a couple is separated for eighteen months and there appears no chance of reconciliation, the Bet Din must coerce the husband to grant a *get*.

81 *Supra* n.5: "... if the husband does not behave in the living style of a Jewish husband as enumerated in the Ksuboh, ... the Rabbis are empowered to withdraw their assent to the legitimacy of the marriage contract. The marriage is then annulled and the woman is free to remarry without a Get. See Aruch Hashulchon Even Hoezer 38:61, 38:64, See Bais Shmuel Even Hoezer 38:8 Chelkos Mechokek 38:14, Bais Shmuel 38:20 for the Halachic support of this cardinal principle. Thus, when a husband beats a wife, or abandons her, or abuses her physically or mentally, or commits adultery, does not support her, is addicted to drugs or alcohol, or the wife ceases to love him and he becomes repugnant to her so that she revises to have sex voluntarily, he must give her a Get. If he refuses, Bet Din are empowered to beat him until he complies. Today the Law forbids the Bet Din to beat the husband, so we will annul the marriage. See lgros Moshe Volume 1:79 end, Dvor Eliyohu #48, Ohel Moshe Volume 2:1x3:8. Otherwise, no woman would agree to have a Hallachic marriage ..."

82 The *bet din* is not, however, now regarded as having the power to coerce in every case where the husband is obligated to give a *get*. See Cf. Breitowitz 1993:42 on the distinction between *yotzee* and *kofin*. Cf. Zweibel 1995:154, maintaining that it is only in extraordinary circumstances, as discussed in *Shulhan Arukh*, *Even Ha'ezer* 154, that physical force or some other form of duress may be used.

83 *M. Ket.* 7:1, *M. Ned.* 11:12, *T. Ket.* 7:10-11, *Ket.* 77a (on infertility and refusal to maintain); *Shulhan Arukh*, *Even Ha'Ezer* 154:1-2, 6-7; see further Haut 1983:25; Breitowitz 1993:42-45; Riskin 1989:9ff.; B.Z. Schereschewsky, "Divorce", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), VI.126-128, classifying the causes under two headings: physical defects and husband's conduct.

On domestic violence as a grounds for coercion, see further the Court Decision of Rabbi She'ar-Yashuv Cohen, Case 42/1530, 5742, *Piskei Din Rabaniyim* 15, pp. 145-163, in which he ruled that a violent husband can be compelled to divorce by incarceration (see further *infra*, n.217); D. Villa, "Case Study Number Two", *Jewish Law Watch* (Jerusalem: Schechter Institute of Jewish Studies, 2000), 9-15, quoting (at 13f.) Rabbi Eliezer Waldenberg, *Responsa Tzitz Eliezer*, part 6, no. 41, chapter 3: "Therefore in a case of a woman's fear of death such as this, there is no room ... to be stringent and not to compel the husband to divorce her at the risk of endangering her life and we have a well-established principle that "regulations concerning physical danger are more stringent than a ritual prohibition" (*Hullin* 10a) and to those who want to be overly pious and not to compel [the husband to divorce her] we say about them the words of the Tashbets quoted above: "If she were theirs, they would not have said so"... Needless to say, in such a case the claim of "he is abhorrent to me" [*ma'ees alay*] by the woman is clear and *all authorities both rishonim and aharonim are of the opinion that you compel a divorce* ... From all the above, in my humble opinion, one should rule to compel

Ketubot 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.[84] As for the rationale justifying coercion, we find already in *Mishnah Arakhin* 5:6 the seemingly paradoxical statement: "so also regarding a divorce we force him until he says 'I want to'":

וכן אתה אומר בגטי נשים, כופין אותו עד שיאמר רוצה אני.

The Gemara, *Yev*. 106a, finds biblical authority for the paradox: the law of sacrifices combines the notions of compulsion and voluntariness in *Lev*. 1:3 (לרצונו); in our context, *Kidd*. 50a justifies the coercion, in a manner taken up later most explicitly by Maimonides,[85] on the grounds that "it is a religious duty to obey the words of the Sages": משום דמצוה לשמוע דברי חכמים.

3.2 The Issues

The Mishnaic institution of coercion, however, is of limited value to the *agunah:* it applies to a list of situations where the wife has a *right* to divorce. While the Mishnah already contemplates financial sanctions (in respect of the *ketubah*) against the *moredet*,[86] the wife who refuses conjugal

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the husband to divorce his wife with a get, and he is also required to pay the sum specified in the *ketubah*."

84 For the view that the categories of permissible coercion are closed, see Moshe Chigier, "Ruminations over the Agunah Problem", in *Jewish Law Annual* Vol. 4 (1981), 208-225, at 213, reprinted in Porter 1995:73-92, at 77, on *Shulhan Arukh*, *Even Ha'ezer* 154 and earlier sources. He argues that, true to the nature of Jewish Law codification, the codes recorded both opinions, leaving the matters in dispute to the discretion of the judging court (citing also Z. Warhaftig, "Coercion to Grant a Divorce in Theory and in Practice", *Shenaton Hamishpat Ha'Ivri* 3-4 (1976-7), 153-216 (Heb.), at 160). If this had remained the position, the court could consider each case on its merits, in order to decide whether an order of compulsion was lawful in the particular case, although it was not explicitly mentioned in the earlier lists. However, the later *poskim* have stated that compulsion would be lawful only in the cases distinctly stated by the Talmud. As a result, Chigier concludes, the list is now closed.

A different view is taken by Villa 2000 who, while acknowledging that the *Hatam 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 She'ar Yashuv Cohen, "Compelling a Divorce in Our Day", *Tehumin* 11 (5750), 200-201 (Heb.), which quotes, *inter alia,* the *Hazon Ish (Even Ha'ezer* 69, 23: "The *Hatam Sofer's* ruling cannot be upheld ...") and Rabbi Isaac Herzog (*Responsa Heikhal Yitzhak*, *Even Ha'ezer*, part 1, no.1). For other Aharonim supporting the use of coercion, see Riskin 1989:139; *idem,* 2002:6f., citing *inter alia* R. Chaim Palaggi (19th cent. Izmir) and *Resp. HaHayyim VeHashalom,* vol.2, no.112 (for which see *supra*, n.80).

85 Maimonides, *Hilkhot Gerushin* 2:21-22: "And why is this *get* not null and void, seeing that it is the product of duress, whether exerted by heathens or by Israelites? Because duress applies only to him who is compelled and pressed to do something which the Torah does not obligate him to do, for example, one who is lashed until he consents to sell something or give it away as a gift. On the other hand, he whose evil inclination (*yetser hara*) induces him to violate a commandment or commit a transgression, and who is lashed until he does what he is obligated to do, or refrains from what he is forbidden to do, cannot be regarded as a victim of duress; rather, he has brought duress upon himself by submitting to his evil intention. Therefore this man who refuses to divorce his wife, inasmuch as he desires to be of the Israelites, to abide by all the commandments, and to keep away from transgressions — it is only his inclination that has overwhelmed him — once he is lashed until his inclination is weakened and he says "I consent," it is the same as if he had given the *get* voluntarily" (translated by Isaac Klein in *The Code of Maimonides*, *Book Four*, *The Book of Women* (New Haven and London, Yale University Press, 1972), 177f.). Cf. B. Berkovits, "Divorce and *Gittin* in the 1990s", *L'Eylah* 33 (Spring 1992), 22-25, at 23: "... every Jew wishes, at least at a subliminal level, to act in accordance with Halakhah, even if his judgment is sometimes clouded by extraneous subjective factors." Rabbi Jachter, "Viable Solutions III", http://www.tabc.org/koltorah/aguna/aguna59.3.htm, writes: "Furthermore, the Chelkat Yoav (Dinei Oness, section five) rules that if one must ("Chayav") give a Get, his complete free will is not required for the Get to be kosher. Even if the husband has a minimal definition of free will, the Get is acceptable since he must give it." See further Bleich 1983:93-100; *Piskei Din Rabbaniyim* 11:300-308.

86 *Mishnah Ketubot* 5:7: "If a wife rebels against her husband, the [lump-sum] alimony provided for by her marriage contract is to be reduced by seven *denarii* each week [of her refusal] ... For how long do the reductions continue? Until the entire alimony has been depleted ... Likewise, if a husband rebels against his wife, an addition of three denarii a week

relations to her husband without having one of the grounds listed by the Mishnah, it is only the Gemara which considers coercion (at first, seemingly *against*) her.[87] This was to become a major issue between the Gaonim and the Rishonim.[88] Its importance for the *agunah* resides in the fact that any wife refused a *get* by her husband might well (and sincerely) declare herself a *moredet,* to whom her husband is "repulsive" (*ma'is alay).* The issues which then arise are the following: (a) is such a wife entitled to a divorce? (b) is she entitled to a *coerced* divorce?; (c) what form might the coercion take?; (d) what if the husband resists the coercion? It is only if coercion is both universally available to a wife refused a *get,*[89] and if there are means of ensuring that the coercion is universally effective,[90] that we can look to this strategy to provide a universal solution to the problem of the *agunah.* The history of this matter, moreover, raises some particularly difficult problems regarding the authority system of the *halakhah.*

3.3 The talmudic sources

3.3.1 In *Ketubot* 63b, we encounter a dispute between two Amoraim regarding both the definition and treatment of the *moredet.* The definitional problem need not here concern us. What is important is the substance. The essential issue is as follows:

> ... 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).

3.3.2 According to this, the traditional text, the issue between Amemar and Mar Zutra is whether the wife is to be compelled back (into marital compliance). Mar Zutra takes the view that she is;[91] Amemar takes the view that she is not. Are we to take Amemar to imply that she is entitled to a divorce, even a coerced divorce? The text is not explicit.[92] However, recent work towards a critical edition of the

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is to be made to the alimony provided for by her marriage contract." *Tosefta Ketubot* 5:7 records an increase in the pressure against the woman, by the introduction of public warnings and the threat of a more speedy forfeiture of the *ketubah;* see §3.3.5, *infra.* Whether the eventual exhaustion of the *ketubah* entailed divorce at this period is not clear.

87 The concept first appears in *Mishnah Ketubot* 5:7 (where it is applied also to the husband who *mored*: בן המורד על אשתו), in a context (see *Mishnah Ketubot* 5:6) clearly suggesting that the "rebellion" is against sexual relations. Riskin 1989:18-20 discusses a passage in *Genesis Rabbah* 52:14-16 which records a dispute between two first-generation Amoraim, in which the *moredet* does appear to be understood as refusing sexual relations. Nevertheless, at 1989:8, he suggests that it may include one who refuses to fulfill her household duties. The fact that the concept includes a husband rebelling against his wife, as Riskin himself notes, further suggests that it does refers to sexual relations. Cf. Elon 1994:II.658, defining *moredet* (and the masculine form, *mored*) as signifying "the refusal by the wife or the husband to live together conjugally".

88 See further B.S. Jackson, "*Moredet*: Problems of History and Authority", in *The Zutphen Conference Volume*, ed. H. Gamoran (Binghamton: Global Publications, 2001; *Jewish Law Association Studies* XIII), 103-23, at 117-122; see also Jackson 2002b:§4.2.1.

89 On the view either that coercion of the husband of a *moredet* is halakhically permissible (broadly: the Geonic view, rejected by the Rishonim) or that the categories of permissible coercion are not closed (see n.84, *supra*).

90 Falsified, *inter alia*, by the notorious case in Israel where a recalcitrant husband remained in prison for 32 years, and died there: *infra* at n.106.

91 Through the steady reduction of her *ketubah*: the Gemara is here commenting on *M. Ket.* 5:7 (*supra*, n.86). Amemar takes the view that the Mishnaic sanctions apply only where the wife is withholding conjugal relations "to cause him pain" (ומצערנא), i.e. to put pressure on him over some dispute between them, but without seeking a divorce, but not where she seeks a divorce because she finds him repulsive. Mar Zutra would apply the sanctions also in the latter case. Rabbenu Tam rejects Mar Zutra's view and indicates that this is not the *halakhah:* see the text quoted *infra* n.150. Cf. Riskin 2002:4f., noting that the *halakhah* follows Amemar in this respect.

92 Riskin 1989:42 sees the ambiguity as (still) a potential resource: "Nevertheless, his words open the door for a liberal interpretation of the law, which would force the husband to divorce her and ensure that she receives her Ketubah." At 2002:5, Riskin takes Rambam, Rashbam and Rosh to have understood Amemar's view to have entailed an immediate

Talmud text has revealed a significant variant.[93] MS Leningrad Phirkovitch reads:[94]

> ... if she says, however, "He is repulsive to me (מאיס עלי)," [Amemar said] he is forced (בייפינין לה). Mar Zutra said: She is forced (בייפינין לה).

3.3.3 Here, Amemar takes the view that it is the husband who is coerced,[95] which can hardly mean anything other than that he is coerced to give her a *get*. The final view of the Talmud on the matter, that of Rabbanan Sabora'i, is that the wife is made to wait twelve months "for a divorce (**אגיטא**)", during which time she receives no maintenance from her husband. This view of Rabbanan Sabora'i does not say anything explicit about coercion, but does appear to indicate that the wife who claims "He is repulsive to me (**מאיס עלי**)," contrary to the view of Mar Zutra, is not to be compelled back (into marital compliance) but rather is entitled to a divorce.[96]

3.3.4 The issue raised by the variant text of Amemar's opinion is of great importance for the later development of the *halakhah*. The Gaonim accepted and developed the institution of compulsion against the husband of a *moredet,* but their view was ultimately rejected by Rabbenu Tam. For Rabbenu Tam, the Gaonim had no authority to go beyond the Talmud, and the Talmud referred to coercion, in the case of the *moredet*, only in respect of the wife, not in respect of the husband.[97] But Rabbenu Tam did not have access to this variant MS tradition. Suppose that scholarship ultimately concludes that the variant represents the original text, so that the Talmud does (in the opinion of Amemar, which would then have to be taken into account in interpreting the final decision of Rabbanan Sabora'i) contemplate coercion of the husband? Would such an historical discovery be taken into account by halakhic authority? A recent study of this problem by Rabbi Moshe Bleich cites the view of Rabbi S.Y. Zevin, the editor of the modern volume of *variae lectiones*, that:

> ... a variant talmudic text is significant only when it can be demonstrated that an early-day

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divorce, coerced if necessary.

93 A different variant in the text was known to some of the Rishonim: the view of Amemar is presented as לא בייפינין לה. That would most naturally be rendered: "he is not coerced". However, S. Friedman, "Three Studies in Babylonian Aramaic Grammar" (Heb.), *Tarbiz* 33 (1973-4), 64-69, has argued that לה can itself be used as the feminine preposition, in which case the variant introduces no substantive change in Amemar's view from that in the traditional text. On the variant known to the Rishonim, see further Jackson 2001:109f.

94 *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), 123-47, at 126; *idem*, "The Rise and Decline of the Law of the Rebellious Wife in Medieval Jewish Law", in *Jewish Law Association Studies XIII*, *The Zutphen Conference Volume*, ed. H. Gamoran (Binghamton, NY: Global Publications, 2001), 207-18, at 209; Jackson 2001:110f.

95 Friedman's argument (*supra* n.93) cannot be applied to the variant in MS Leningrad Phirkovitch, since to do so would eliminate any difference between the views of Amemar and Mar Zutra.

96 Nonetheless, the view that coercion was here implied is found amongst the Rishonim. Riskin 1989:168 n.15 cites Rashi and Ritva for this view, and argues himself for such an interpretation, at 45. See also Breitowitz 1993:53f.

97 Riskin 1989:xiii. At 94, 96, he quotes *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: "And Rabbenu Tam raised another problem, that in the entire [Talmudic] discussion there is no mention of forcing the husband, only of forcing the wife ..." (דבכל השמועה אינו מזכיר כפיית הבעל אלא בפיית האשה, p.94). Cf. ובלא שום פירכא בעולם כפייה לבעל לא אשכחן בכולא שמעתא (Riskin 1989:98 (Heb.), which he translates and seeks to explain, at 101, thus: "And we do not find in any [part of the laws of divorce] that the husband is forced to give a divorce without any [logical] difficulty at all [in the law's formulation]". Taken literally, such statements are difficult to reconcile with Rabbenu Tam's apparent recognition that Rabbanan Saborai did authorise coercion after twelve months: see further text at n.140, *infra*. See further n.143, *infra,* for an attempt to summarise Rabbenu Tam's overall position in the light of these difficulties.

> authority based his ruling upon that version of the text.[98]

But should that apply even when manuscripts become available which were not available at all to the earlier authorities? Is the situation not comparable to the principle of *hilkheta kebatra'i*, where account is taken of the fact that the new argument could not have been known to the earlier authorities?[99] However that may be, R. Moshe Bleich concludes that:

> ... for halakhic purposes, it is the consensus of contemporary authorities that inordinate weight not be given to newly published material. Even earlier authorities who gave a relatively high degree of credence to newly discovered manuscripts did so within a limited context. Accordingly, formulation of novel halakhic positions and adjudication of halakhic disputes on the basis of such sources can be undertaken only with extreme caution.[100]

In this formulation, we may note, it is "the consensus of contemporary authorities" which serves as the criterion for the determination of a "secondary" rule[101] of the legal system, one which tells us how we are authorised to recognise and change the primary halakhic rules.

3.3.5 Before passing on to the period of the Gaonim, we may note that here too (as in the issue of the validity of conditions, §2.2.1), the Palestinian tradition appears to have been more explicitly favourable to the position of the wife. The Mishnah, in introducing the issue of the *moredet,* had sought to "persuade" her back into compliance by reducing her *ketubah* by 7 *denarii* per week, until it was entirely exhausted.[102] Whether, at this stage, such exhaustion of the *ketubah* was already taken to entail an obligation to terminate the marriage, is not clear. But such a view was not long in emerging. The Tosefta indicates that subsequent to the compilation of the Mishnah, "our Rabbis decreed that the court warn [her] for four and [or] five consecutive weeks, twice each week. If she continues [her rebelliousness] beyond this point, even if her marriage contract is worth one hundred

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98 M. Bleich, "The Role of Manuscripts in Halakhic Decision-Making: Hazon Ish, His Precursors and Contemporaries", *Tradition* 27/2 (1993), 22-55, at 42. This is Bleich's account of Yevin's view, not a direct quotation. He derives it from Yevin's introduction to the first volume of *Dikdukei Soferim ha-Shalem* (*supra*, n.94).

99 *Shulhan Arukh Hoshen Mishpat* 25:8, quoted *infra* n.162.

100 Bleich, *supra* n.98, at 45. A more liberal view towards the admissibility of MSS evidence was taken, he argues, before the period of "definitive codifications of Halakhah" (and particularly the *Shulhan Arukh*), e.g. Rambam's overruling a Geonic ruling on the grounds that the talmudic text available to them was at variance with MSS examined by *Rambam* (*Hilkhot Malveh ve-Loveh* 15:2, noted by Bleich, *ibid*., at 23). However, most of Bleich's argument is directed towards the emergence of MSS evidencing new post-talmudic views (such as might affect our view of what was the majority position at a particular time) rather than new MSS evidence of the text of the Talmud itself. On the latter, see also his account of the views of *Hazon Ish* (quoted at 43-44) stressing divine providence in the transmission of the MSS tradition (but not, apparently, in the discovery of new MSS, much less the now-available forms of electronic searching of the talmudic text, which put the modern generation of talmudic interpreters at a significant advantage compared to earlier generations, notwithstanding the legendary recall and command of the text which some of the latter are reputed to have possessed). Rabbi Bleich refers also to an article by Rabbi Z.Y. Lehrer, "Manuscripts of the Early Commentaries [Rabbotenu ha-Rishonim] and their Qualifications to Rule on Jewish Law" (Heb.), *Tsefunot* IV/4 (July, 1992), 68-73, which had not become available before he finalised his text. In it, Rabbi Lehrer argues that when manuscripts to which the Aharonim had no access are uncovered and reflect disagreement with the *halakhot* of the Aharonim, then these manuscripts should be followed, since (as in Rema's qualification of *hilkheta kebatr'ai*) we presume that had the Aharonim had access to these manuscripts, they would have decided differently.

On the history of rabbinic text criticism of the Babylonian Talmud, see also D. Goodblatt, "The Babylonian Talmud", *Aufstieg und Niedergang der römischen Welt* (Berlin: W. de Gruyter, 1979), Bd. II.19.2, 257-336, at 268-70. P.S. Alexander, "Why No Textual Criticism in Rabbinic Midrash? Reflections on the textual culture of the Rabbis", in *Jewish Ways of Reading the Bible*, ed. G.W. Brooke (Oxford: Oxford University Press, 2000; Journal of Semitic Studies Supplement X), 175-190, observes (at 180) that "Gaonic commentators regularly solve problems in the Bavli through collation of old manuscripts and through conjectural emendation."

101 On this jurisprudential distinction of Hart, and its relevance (or not) to our approach to such issues, see further Jackson 2002b.

102 *Mishnah Ketubot* 5:7, quoted at n.86, *supra*.

maneh, she forfeits all of it" (*T. Ketubot* 5:7). But the account of this in the Yerushalmi states: "The court after them [ruled] that the *moredet* be warned for four weeks, [at which time] she breaks her marriage contract and leaves": והיא שוברת כתובתה ויוצאה. Riskin (1989:14) takes ויוצאה to imply "[with a bill of divorcement]". At the very least, the formulation does suggest that the wife is here entitled to take the initiative in effectively bringing the marriage to an end.

3.4 The Gaonim

3.4 I turn now to the practice adopted by the Gaonim. Two issues are of particular interest: (a) what measures exactly did they take in order to free the *moredet?* (b) by what authority did they do so?

3.4.1 The classical account of the matter is provided by Rav Sherira Gaon, who was asked about the position of "a woman [who] lived with her husband and told him, "Divorce me; I do not wish to live with you." In his *teshuvah,*[103] Sherira sets out the history of the matter, acknowledging that:

> The law originally provided that a husband is not compelled to divorce his wife when she demands a divorce, except in those instances where the Sages specifically declared that he is compelled to divorce her.

He takes *T. Ketubot* 5:7 as not necessarily involving total loss of the *ketubah:*

> Afterwards, another *takkanah* was enacted, which provided that a public proclamation should be made concerning her on four consecutive sabbaths and that the court should inform her: "Take notice that you have even forfeited one hundred *maneh* of your *ketubbah* ..."

Seemingly, he views the position of the *Yerushalmi* as *not* involving coercion:

> Finally, they enacted that public proclamation is to be made concerning her on four sabbaths and she forfeits the entire amount [of her *ketubbah*]; nevertheless, they did not compel the husband to grant her a divorce.

For Sherira, it is in fact the Babylonian Talmud which introduced coercion, after the twelve month waiting period:

> They then enacted that she should remain without a divorce for twelve months in the hope that she would become reconciled, and after twelve months they would compel her husband to grant her a divorce ...[104]

But the Gaonim, he indicates, were willing to go further, both in relation to the wife's right to parts of her *ketubah* in such circumstances and in abolishing the waiting period:

> ... After the time of the Savoraim, Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands; and some husbands, as a result of force and duress, did grant a divorce that might be considered coerced and therefore not in compliance with the requirements of the law [as under the law one may not use duress to force the giving of a divorce]. When the disastrous results became apparent, it was enacted in the days of Mar Rav Rabbah b. Mar Hunai that when a *moredet* requests a divorce, all of the guaranteed dowry that she brought into the marriage (*nikhsei zon barzel*) should be paid to her — and even what was destroyed and lost is to be replaced — but whatever the husband obligated himself to pay [beyond the basic *ketubbah* amount], he need not pay, whether or not it is readily available. Even

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103 Translation quoted here from Elon 1994:II.659; cf. Riskin 1989:56-59, for full Hebrew text and alternative translation. See also Libson in Hecht et al. 1996:235-238 ("The *takkanah* of the Rebellious Wife").

104 כופין את הבעל וכותב לו גט: *Otsar HaGeonim*, 8, pp.191-92. Cf. Riskin 1989:59, who observes: "It is clear that Rav Sherira Gaon interprets the final statement of the Talmud, "and we make her wait twelve months ...," to mean that the husband is forced to grant his wife a divorce at the end of the twelve-month period, even against his will." See also Elon 1994:II.660 n.68, citing also Nahmanides, *Hiddushei Ketubot*, ad loc., for Sherira's view, but noting that according to other commentators the talmudic rule was only that the husband was legally obligated to divorce after 12 months, but no judicial compulsion was applied to enforce that obligation.

> if it is available and she seizes it, it is to be taken from her and returned to her husband; and we compel him to grant her a divorce forthwith and she receives one hundred or two hundred zuz [the basic *ketubbah* amount]. This has been our practice for more than three hundred years, and you should do the same.

3.4.2 What exactly is meant by "we compel him to grant her a divorce forthwith" (וכופין אותו ובותב ל ה גט ל אל תר)? *Kofin* normally refers to physical coercion: thus, the husband is coerced (beaten)[105] into writing (or authorising the writing, and delivery) of the *get*. On this formulation there is no suggestion that the court itself takes over any of the required formalities. What, then, if the husband resists the coercion? Nowadays, it is assumed that this is the end of the matter. The case of the recalcitrant husband who preferred to spend 32 years of his life in an Israeli jail, and die there, rather than release his wife, is often cited.[106] Yet there are hints of the use of a greater judicial power in some Gaonic and later sources.[107] According to the *Halakhot Gedolot* (ascribed to Rav Shimon Kiara, 9th cent.): "... we grant her a bill of divorce immediately (ויהבינן ל ה גיטא אל תר)".[108] Similarly, Rav Shmuel ben Ali, Head of a Babylonian school in the second half of the twelfth century, writes**:**

> [The court] endeavors to make peace between [husband and wife], but if she refuses to be appeased they grant her an immediate divorce (נותנין ל ה גט ל אל תר), and do not [publicly] proclaim against her for four weeks".[109]

The use of the plural in these sources: ויהבינן, נותנין, suggesting that the *get* is here effected by an act of the court rather than the husband, becomes more explicit still in an anonymous 13th-cent. responsum, which uses the expression: "they wrote her an immediate bill of divorce" (וכתבי ל ה גט ל אל תר).[110] Such a view would seem to be implicit also in clauses from two Genizah *ketubot,* that already quoted in §2.1.2, *supra*, and a second, dated 1023:[111]

> And if this Rachel, the bride, hates this Nathan, her husband, and does not desire his p[artnership, she shall] [los]e the delayed payment of her *mohar*[112] and shall take what she brought in, and she

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105 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 (*hovtin*) the husband and say to him: 'Do as the Israelites tell thee'."

106 *Jerusalem Post*, February 22nd 1997, cited by Broyde 2001:156 n.23. Rabbi Broyde regards this as representing "the basic success of the system, not its failure" (at 51). He argues (156 n.24) that just as the presence of some crime is not proof that the criminal justice system does not work, so too the presence of some *agunot* is not proof that the halakhic system does not work. The analogy fails, however, if one takes the view that the presence of any *agunot* (which Rabbi Broyde himself would prefer not to see) represents a failure in the very structure of the halakhic system, and that modifications in the halakhic system are capable of removing it.

107 Rav Yehudai Gaon, Head of the Academy of Sura, c.760 C.E., mentions the use of a *herem* against the husband: "When a woman rebels against her husband and desires a divorce, we obligate [the husband] to divorce her, and if he does not do so we place him under the ban until he does it." See Riskin 1989:47f. Rabbenu Tam took the view that a *herem* is in fact more severe (and thus, in his view, objectionable) a measure than physical coercion: "If someone would wish to say that we do not force him by means of whips but by decrees and excommunication ... excommunication is more severe than stripes, and there is no coercion greater than that!" See Riskin 1989:98 (Heb.), 102 (Engl.).

108 Riskin 1989:48f.

109 Riskin 1989:62f.

110 Riskin 1989:52f.

111 Lines 33-34 of Friedman no.2, JNUL Heb.4 577/4 no.98, of 1023 C.E., at Friedman 1980:II.41, 44-45, Friedman's translation (quoted also by Riskin 1989:81, in a different translation, but not differing in substance). See further M.A. Friedman, "Divorce upon the wife's demand as reflected in Manuscripts from the Cairo Geniza", *The Jewish Law Annual* 4 (1981), 103-126; Jackson 2004:161f., arguing against the view of Katzoff 1987:246, that the clause indicates no greater powers on the part of the court (or the wife) than in traditional *halakhah*, and supporting that of Friedman 1980:I.328-46.

112 מאוחר מהרה, an interesting (and accurate) historical description of the rabbinic conception of the *ketubah* payment

> shall not leave except by the authorization of [the] cou[rt].

It is not entirely clear whether, under this régime, (a) a *get* was necessary at all (perhaps the condition was regarded as self-executing), or (b), if it was, whether the court would back up its permission with an order, *a fortiori* with coercion.[113] Indeed, the Rosh (R. Asher b. Yehiel (Asheri), Germany, 1250-1328), who followed Rabbenu Tam on the general issue of coercion of a *moredet*, appears to have interpreted the Gaonic practice not as coercion but rather as annulment (*hafka'at kiddushin*):

> ... For they relied on this dictum: "Everyone who marries, marries in accordance with the will of the Rabbis" [bKet 3a], and they agreed to annul the marriage when a woman rebels against her husband (*Resp*. 43:8, p.40b)[114]
>
> וסמכו על זה כל המקדש אדעתה דרבנן מקדש והסכימה דעתם
> להפקיע הקידושין בשתמרוד על בעלה

There, is, however, no necessary incompatibility in these various positions: they could be taken as steps which have to be taken in sequence — leading ultimately, but only as a last resort, to annulment. Indeed, we shall find support for such a progression in a responsum of Rashba, to be considered later (§4.3.3).

3.4.3 By what authority did the Gaonim proceed? The responsum of Rav Sherira Gaon uses the language of rabbinic *takkanah,* and explains it on the grounds that "Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands" (*shebnot yisrael holkhot venitlot bagoyim liytol lahen gittin be'ones miba'aleyhen*: §3.4.1, above). His meaning here is not entirely clear: he may imply simple recourse to Islamic courts on the part of a Jewish woman who sought to marry an Islamic man;[115] or he may refer simply to the use of gentile thugs, a

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(כסף כתובתה is used in the parallel clause in Friedman no.3. On the historical development, see Jackson 2003).

113 Riskin 1989:80 interprets it as referring to coercion ("Apparently, the courts would force the husband to grant his wife the divorce she sought"), even though he views such clauses as reflecting the Palestinian tradition of conditions rather than the Babylonian *takkanat hamoredet*. He argues, at 81-83, that though there is support for the coercion interpretation of the *ketubah* conditions in *Me'iri* (cf. 2002:32 n.9, where he cites *Me'iri*, 269 n.4 for the view that the Geonic decrees were based on the normative practice of inserting a stipulation such as that of R. Yose in the Jerusalem Talmud), that may not have been the original conception: "I would suggest that there were two different traditions, each of which was deeply concerned about rescuing the woman from an impossible marriage. The first tradition is that of the Land of Israel, which legislated the marriage contract stipulation in the early Amoraic period, and which continued this tradition at least into the eleventh century. It must be remembered that the Jerusalem Talmud never included the case of a woman who claimed "He is repulsive to me" under the law of the rebellious wife, and therefore had no recourse but to deal with the problem by means of a stipulation. The documents in the Cairo Genizah confirm that this was the normative practice in the Land of Israel. The second tradition was that instituted by the Babylonian Geonim, who were apparently unaware of the stipulation provided for in the Jerusalem Talmud and the inclusion of such stipulations in marriage contracts in Palestine, which began with the assumption that a woman who claimed "He is repulsive to me" is considered a *moredet*. They dealt with the problem by means of decrees based upon their interpretations of the Talmud: The husband is coerced into giving his wife a divorce after a waiting period of twelve months. They subsequently modified this Talmudic-Sabboraic decree by providing for an immediate (coerced) divorce, and monetary compensation of at least the woman's basic alimony. Hence by the eleventh century a woman who had no "objective reason" for her desire to be divorced save the claim that her husband had become repulsive to her was guaranteed a court imposed divorce and generous financial benefits in both Babylonia and the Land of Israel." Friedman 1980:I.325-30 also argues against the view of *Me'iri*, and maintains that the "stipulation in the Palestinian *ketubbot* from the Geniza is clearly a continuation of the same tradition which appears in the Palestinian Talmud" (at I.329).

114 Riskin 1989:125 (Heb.) 126f. (Engl.), and Riskin's own comments at 129; Breitowitz 1993:50f. n.135, 53. Berger 1998:72 n.72 seeks to consign this remark to "the realm of legal theory", noting that the Rosh, here and elsewhere, speaks in terms of coercion of the husband to give a *get*. Yet the fact that his own practice may have differed from that which he attributes to the Gaonim makes his account of the latter all the more striking.

115 Libson in Hecht et al. 1996:237f. writes: "To my mind, the mere possibility that wives might appeal to Muslim courts

practice attested in the responsa of Rashba.[116] The motivation of the *takkanah* is, however, amplified somewhat in other sources. The anonymous 13th-cent. responsum suggests that the twelve month delay (without financial support) prompted women to resort to "bad ends (לתרבות רעה), either prostitution or apostasy" (בין בזנות בין בשמד).[117] Conversion was, indeed, recognised by Islamic law (as, indeed in medieval English law[118]) as annulling the marriage of a spouse whose partner did not also convert.[119] Any coercion would thus, from an Islamic viewpoint, not have been to effect the divorce, but to compel the still-Jewish husband to let her go, given the judicial autonomy then granted to Jews under Muslim rule, following Abu Hanifa.[120] However this may be, the situation appears to have been construed by the Jewish authorities as amounting to an emergency: Sherira speaks of its "disastrous results" (§3.4.1, *supra*), and in what Riskin (1989:86f.) has identified as the earliest source to turn against the Gaonic practice, the *Sefer Ha-Maor* of Rabbenu Zerahyah Halevi written between 1171 and 1186, the Gaonic decree (*takkanah*) is attributed to הוראת שעה:

> And whenever she says, "I do not want him — that is, he is repulsive to me," we do not force her, and she loses her entire alimony immediately, and goes out [with a divorce, but only] *in accordance with the will of the husband* [Riskin's emphasis]. And it seems reasonable to me that the decree which was promulgated in the academy to give an immediate divorce to this rebellious wife was an emergency decision [הוראת שעה] in accordance with the need which [the Geonim]

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was motive enough for the enactment of this *takkanah*. For according to contemporary Islamic Law, the appeal of only one litigant to a Muslim court gave it jurisdiction over both parties, and also entailed the real possibility that the court could itself dissolve the marriage without requiring the husband to grant the divorce. This, then, was the principal motive for the preventive measure embodied in the *takkanah* of the rebellious wife." *Aliter,* Riskin 1989:74f., rejecting the view of Graetz and Weiss that Islamic law was more liberal in relation to the wife's claim for a unilateral divorce, the Gaonic stance thus reflecting the influence of this view, and perhaps even interference by the Muslim courts (in purely Jewish divorces).

116 See Yom Tov Assis, "Sexual Behavior in Medieval Hispano-Jewish Society," in *Jewish History, Essays in Honour of Chimen Abramsky*, ed. A. Rapoport-Albert & S.J. Zipperstein (London: Halban, 1988), 25-59, at 36, citing I, 73.

117 Riskin 1989:52f. The expression לתרבות רעה (but without the gloss בין בזנות בין בשמד) occurs also in a responsum of Rav Natronai Gaon (9th cent.), quoted by Riskin 1989:49-51.

118 Medieval English law appears to have held that where one Jewish spouse converted to Christianity, "he or she could treat the Jewish marriage as a nullity, so that the non-converted spouse lost all rights normally conferred by marriage": see Berkovits 1990:127, discussing a case where the Jewish widow of a convert to Christianity failed to secure her dower.

119 Riskin 1989:74f. sees the threat from Islamic law as consisting in its rule that a woman had a right to obtain a divorce from her husband when (both being non-Moslem) she adopts the Islamic faith and her husband refuses to be converted along with her (citing R. Levy, *The Social Structure of Islam* (Cambridge: Cambridge University Press, 1962), 122f.). According to Islamic law, however, conversion *automatically* annulled a woman's previous marriage: al-Maliki writes: "... If two unbelievers become Muslim, they are confirmed in their marriage, but if only one becomes a Muslim, then this is annulment without divorce" (as quoted in J. Neusner, T. Sonn and J.E. Brockopp, *Judaism and Islam in Practice. A Sourcebook* (London and New York: Routledge, 2000), 118); see also Marghinani, *The Hedaya, or Guide* (London: W.H. Allen, 1870), Book II, ch.V ("Of the Marriage of Infidels").

In modern times, the same issue can still arise (with greater consequences in civil law): "... when a Christian woman, Mrs. Al-Baqa'in, converted in the early fifties to Islam, seeking thereby to dissolve her marriage, a course impossible under the law of her Christian community, a Jordanian court of first instance in the town of Karak recognized the validity of the dissolution of her marriage. Mrs. Al-Baqa'in appealed, but the Jordanian Court of Appeal upheld the dissolution of the marriage": See Y. Meron, "The Contemporary Encounter Between Jewish and Moslem Law", in *The Jerusalem Conference Volume,* ed. B.S. Jackson (Atlanta: Scholars Press, 1986; Jewish Law Association Studies, II), 165-92, at 169f.

The converse, annulment of an Islamic marriage on the apostasy of one of the spouses, is well attested in *fatwas* issued by the Mufti of Istanbul in the early 16th cent., following Hanafi law, as indicated by C. Imber, *Studies in Ottoman History and Law* (Istanbul: Isis Press, 1996), 220-27.

120 See B. Johansen, *Contingency in a Secred Law* (Leiden: E.J. Brill, 1999), 229f. I am grateful to Professor Ya'akov Meron for this reference.

> saw in their generation. But in the succeeding generations we make judgment based on Talmudic law.

Rosh similarly claims that in the days of the Gaonim "there was a temporary need in their day to go beyond the words of the Torah and to build a fence and a barrier":[121] שהיה צורך שעה להסיע על דברי תורה ולעשות גדר סייג. He regards it as a temporary measure:

> ... the Geonim who made this decree made it for that generation [only], for it seemed to them that it was necessary at the time (לפי צורך השעה) because of Jewish women [who would otherwise rely on Gentiles for divorce but who nonetheless would not divorce their husbands lightly]. And now the matter seems to be reversed: Jewish women in this generation are vain. If a woman will be able to remove herself from under her husband['s rule] by saying "I don't want him," not a [single] daughter of Abraham our Father will remain with her husband. They [the women] will cast their eyes upon others and will rebel against their husbands. Therefore it is good to place coercion at a far distance.[122]

Nahmanides, by contrast, maintains:

> ... but in truth they decreed for [all] generations. This decree did not move from their midst for five hundred years,[123] and they practiced it into the days of our Rabbi, may his memory be a blessing, as is known from their responsum.[124]

Rabbenu Tam, on the other hand, pays no attention at all to the argument from צורך שעה.[125]

3.5 The Rishonim

3.5.1 The Rishonim are also at odds as to what precisely the Gaonim had done, and on what authority. Riskin comments that Nahmanides appears to believe that the Geonic decree introduced the coerced bill of divorce, whereas in fact the Geonim themselves believed this was already legislated in the Talmud. He observes that we have the texts of the original decrees of the Geonim, which

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121 Riskin 1989:125, 126 (Engl.).

122 Riskin 1989:125, 127 (Engl.). A sociological distinction is here made between the attitudes of women during the period of the Geonim and those in the present generation. Riskin, however, argues at 129 that the Gaonic decrees may themselves have been directed against "brazen" women, since these are precisely the ones most likely to invoke Gentile help.

123 In short, how temporary is "temporary"? We may recall, in this context, that the *herem* of Rabbenu Gershom on polygamy appears itself originally to have been conceived as a "temporary" measure: see further B.Z. Schereschewsky, "Bigamy and Polygamy", *Enc. Jud.* IV.985-90, at 987: "Many authorities were of the opinion that the validity of the *herem* was, from its inception, restricted as to both time and place. Thus, it is stated: "He [Rabbenu Gershom] only imposed the ban until the end of the fifth millennium," i.e., until the year 1240 (Sh. Ar., EH 1:10); others, however, were of the opinion that no time limit was placed on its application. At any rate, even according to the first opinion the *herem* remained in force after 1240, since later generations accepted it as a binding *takkanah*. Accordingly, the *herem*, wherever it was accepted ..., now has the force of law for all time (*Resp. Rosh* 43:8; Sh. Ar., EH 1:10; Arukh ha-Shulhan, EH 1:23; *Ozar ha-Posekim*, EH 1:76)."

124 *Milhamot* on *Rif*, *Ketubot* 27a, quoted by Riskin 1989:112.

125 Riskin 1989:108 quotes and approves Shalom Albeck, "Yahaso shel Rabbenu Tam LeVa'ayot Zemano", *Zion* 19 (1954), 104-41, for the view that Rabbenu Tam "never utilizes the argument that the conditions have changed since the days of the Talmud. He rather chooses to resolve the problem by presenting new interpretations to the statements of the Talmud ..." By contrast, Riskin 1995:188 himself provides a sociological account of the reversal: "It is easy to understand why the legal position of Rabbenu Tam was accepted without significant controversy by many subsequent generations. The small, cohesive Jewish communities, generally bound together by familial ties, isolated from the surrounding Gentile society by extreme anti-Semitism and internal religious strength, existed primarily against a backdrop of a culture that insisted upon the prominence of the marital bond and the stability of family life. Such a society would hardly rally serious opposition to a halakhah which effectively denied the woman the right to initiate divorce proceedings."

apparently were not available to Nahmanides.[126]

3.5.2 Other sources speak of the Gaonic practice in terms of *minhag*. Rabbenu Tam views this as illegitimate:

> And if we have learned [the rule] that custom may overcome a law, God forbid that [this should apply in a case which involves] a ritual prohibition, [the penalty of] strangulation, [the penalty for adultery], and the [birth of] illegitimate offspring.[127]

On the other hand, Maimonides rejects the force of any such Gaonic custom not on the grounds that it wrongly trespassed into the field of *issura,* but rather because it had not spread sufficiently:

> And the Geonim said that in Babylonia they have other customs concerning the *moredet*, but these customs did not spread to the majority the Jewish people,[128] and many and great people disagree with them in the majority of places. And [it] is proper to hold by and to judge in accordance with talmudic law [and not Gaonic decrees].[129]

Although Rambam here respects the objections of "many great scholars"[130] to the Gaonic position, he does *not* here adopt a criterion of consensus; rather, he looks to the "majority" (רוב) of communities and of scholarly centres. Rashba is also concerned with the "spread" of the Gaonic practice (here described as *takkanah* rather than *minhag*), claiming that "their decree did not spread in our countries at all (לא פשטה אותה תקנה בארצותינו כלל)".[131] Rosh, moreover, accepts that such custom may retain some validity even in his own day. In one responsum he advises:

> If [her husband's] intent is to "chain" her, it is proper that you rely on your custom at this time to force him to give an immediate divorce.[132]

ואם דעתו לעגנה ראוי הוא שתסמוך על מנהגכם בעת הזאת לכופו ליתן גט לזמן

This is a remarkable conclusion, given the overall view of the Rosh, who followed Rabbenu Tam and regarded the practice of the Geonim as a temporary necessity.[133] Despite all this, he was prepared to sanction coercion in a particular case, if there was evidence that the motivation of the woman was not that particular sociological factor which, in his view, had prompted the change of policy. In short, if it is not the woman who is morally at fault, in seeking to get out of the original marriage in order to marry someone else, but rather she claims *ma'is alay* precisely because it is the husband who is morally at fault in seeking to "chain her" (as, indeed, is the situation very frequently today, where the motivation is spite or blackmail), then in such circumstances even the

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126 Riskin 1989:113; Rashba, on Riskin's account, makes the same mistake: "And one should not bring a proof from the words of the Geonim ... because they all said that they do not force him to [divorce] her according to Talmudic law [but rather according to the specific decree of the Geonim] as Rashi ... wrote ..." (Riskin 1989:118f.). In other words, Rashba here is concerned to deny that the practice of the Geonim was based upon interpretation of the Talmud.

127 Riskin 1989:98 (Heb.), 101 (Engl.).

128 Riskin 1989:90, however, points to the testimony of R. Shmuel ben Ali that the Geonic decrees were normative practice throughout Babylonia during this period.

129 *Hilkhot Ishut* 14:14. Riskin 1989:88 (Heb.), 90 (Engl.).

130 Klein's translation of ורבים וגדולים in the Yale Judaica Series translation.

131 *Resp*. 572, 573 in Bnei Brak ed., 1948, Pt.1, p.215, quoted by Riskin 1989:114 (Heb.), 116 (Engl.). See also Elon 1994:II.664 n.84, noting that Rashba also wondered whether the Geonim "enacted it only for their own generation".

132 *Resp*. 43:8, p.40b, Riskin 1989:126 (Heb.), 128 (Engl.). Rosh says that in this case the brother of the woman claiming *ma'is alay* told him that she gave reasonable bases for her rebellion. Cf. Breitowitz 1993:48 n.129 and 1993:155.

133 Elon 1994:II.665, comments: "One may deduce from this decision that Asheri placed primary emphasis on his second reason [for rejecting the geonic enactments, namely that the circumstances of the time had changed], and he therefore permitted the enactment to be applied, when appropriate under the circumstances, in those places that had been following it."

Rosh argues that it is possible to follow a local custom and adopt coercion.

3.5.3 While for the most part rejecting the continuing validity of the Gaonic decrees,[134] the Rishonim were far from agreed on where this left the authoritative *halakhah*. Unilateral divorce for the wife who claims *ma'is alay* is still found in Raban,[135] Alfasi[136] and Rashbam.[137] It was, however, the view of Rabbenu Tam (R. Jacob b. Meir, France, 1100-1171, the younger brother of Rashbam) which was ultimately to prevail.[138] He held that the Gaonim did not have the authority to innovate, and at best were mistaken in their interpretation of the talmudic texts: there was no mention in the Talmud of any coercion of the husband other than in the cases stated already in the Mishnah where the wife was entitled to a unilateral divorce.[139] In matters regarding *issura*, moreover, we have to wait for the coming of the Messiah before changes can be made from the position stated in the Talmud:

> And that which Rabbenu Shmuel [Rashbam] wrote — that the Geonim decreed that we do not delay twelve months for a divorce but rather, they force him — far be it from our teacher to increase the number of *mamzerim* in Israel. We hold the halakhic principle that Ravina and Rav Ashi are the last authoritative halakhic decisors, and even were the Geonim able to decree that a woman could collect her alimony from movable property, whether it be on the basis of Talmudic law or their own reasoned judgment, that is only as far as monetary value is concerned. But as for permitting an invalid bill of divorce, we have not had the power to do so from the days of Rav Ashi [nor will we] until the days of the Messiah. And this is an invalid bill of divorce. After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Geonim] advanced the forcing of the divorce before [the time which] the law [allows].[140]
>
> שאנו שנינו בתלמוד שאין כופין עד תריסר ירחי שתא והם הקדימו טרם דין כפיית הגט

Here, we may note, Rabbenu Tam appears to have accepted that coercion after 12 months *was* sanctioned by the Talmud (an apparent conflict[141] within the *Sefer Hayashar* perhaps reflective of its

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134 Elon 1994:II.664 n.84 cites the view of the Rosh that those who followed the view of the Geonim on compulsion did so not because they had accepted the *takkanot* of the Geonim, but rather because the enactment is recorded in Alfasi's code.

135 Rabbenu Eliezer b. Natan (b. 1090, Mayence). See Riskin 1989:92f.

136 *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 1989:64 (Heb.), 65 (Engl.). It is clear that Alfasi contemplates coercion (*kofin*) in such cases. The passage concludes: "And according to all [authorities], anyone whom we forced to divorce [his wife], either according to Talmudic law, as we learn in the mishnah, "These are those who are forced to divorce," and similar cases [gross physical afflictions], or according to the Gaonic decree, if the woman dies before she is given a bill of divorce by her husband, her husband inherits her [property] because the inheritance of the husband is not canceled without a complete divorce, and this is the law." See also Riskin 1989:86; Westreich, 1998:128f., 2000:209f.

137 See Riskin 1989:93. Riskin comments that the "atmosphere among the early Franco-German leaders seems to have been one which was sensitive to the needs of the woman, and which therefore upheld the Gaonic decree (although there were still those who maintained that the divorce was Talmudically based)."

138 Riskin 1995:187 accepts that, with only rare exceptions, this has been the accepted halakhic opinion to the present day.

139 See n.97, *supra*.

140 *Sefer Hayashar le-Rabbenu Tam*, *Resp*., ed. Rosenthal, #24 (p.40), quoted by Riskin 1989:97 (Heb.), 98f. (Engl.); Elon 1994:II.661f.

141 However, he does not understand the measure of Rabbanan Saborai as applicable to the "*moredet*" who claims "he is repulsive to me" (*ma'is alay*): "How could a scholar make [such a] mistake as to say that we force a husband to divorce [his wife] when she says "He is repulsive to me! (איך יטעה חכם לומר שכופין הבעל לגרש באמירת מאוס עלי)", quoted by Riskin 1989:98 (Heb.), 101 (Engl.). Rather, he confines it to the *moredet* who wishes to remain in the marriage and cause her husband pain: see further Riskin 1989:95, 103f. Even so, there is a distinct tension with the statements quoted in n.97, *supra*.

collective, pseudepigraphical character[142]). What he appears here to object to is compelling such a *get* within 12 months,[143] and this he classifies as *issura*. Elon claims, however, that "most halakhic authorities held that the *geonim* did have authority to legislate even on matters of marriage and divorce, and even to adopt enactments that deviated from Talmudic law".[144] It is hardly surprising that Rabbenu Tam's seemingly intractable approach (construing narrowly the powers granted by the

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

143 According to the text at n.140, *supra*. Cf. Elon 1994:II.661f. What is not clear in Rabbenu Tam's position is whether the court should even order the husband to issue a *get* before the twelve months have elapsed. He understands the Mishnaic financial sanctions as applicable only to the *moredet* who withholds sexual relations "to cause him pain", understanding her motivation to be "to isolate him and cause him pain [so that] perhaps he will divorce her and give to her her alimony." She may well ultimately find herself divorced, but it will be without the *ketubah* which she had thus sought to preserve: that is the effect of the application of the Mishnaic sanctions. On the other hand, the wife claiming *ma'is alay* is understood by Rabbenu Tam to be saying: "I do not desire him, neither him nor his alimony; rather, I forfeit everything to him." In this case, financial sanctions are not used to try to persuade her to stay: "... anything against her will is called "forcing," [including the court] proclaiming against her, causing her to lose her alimony, and isolating her ..." (Riskin 1989:106: the continuation of the passage is obscure). In this case, if the husband is willing to divorce her (immediately) without alimony, there are conflicting texts: on the one hand: "but [in the case of one who says:] "He is repulsive to me" there is no delay, since she is willing to forfeit [her rights], and when the husband agrees to the divorce" (Riskin 1989:101); on the other: "But we make a rebellious wife wait twelve months for a divorce after the proclamation — perhaps she will change her mind. If she did not change her mind, he divorces her without alimony if he wishes" (Riskin 1989:105), and later (at 105f.) "... if she had forfeited [the alimony] to him in the case of her finding him repulsive, because she thought that her husband was preventing [the divorce] because the alimony he would owe her would be great — even so, we force her [to remain with him] so that her forfeiture will not be valid even if he wishes to divorce her, until an entire year passes. In this way, Jewish women will not be without dignity and respect [hefker]. But after twelve months, if he wishes to divorce [her], he may divorce [her], and he is exempt from paying] alimony."

If the husband is not willing to divorce her, Rabbenu Tam clearly rejects the Gaonic view that the court may, within the twelve months, coerce the husband; it is not clear whether he envisages the court ordering a divorce without compulsion during that period. The logic of his position appears to be that the discontented wife is entitled to a divorce if she forfeits her *ketubah,* and this forfeiture may come about either voluntarily (*ma'is alay*) or involuntarily (through the application of the mishnaic sanctions where she refuses relations "to cause him pain"). Against this, there is a strong hint that Rabbenu Tam thinks that such a wife should in fact be penalised by being chained: "But if the husband does not wish to divorce his wife, not in this manner, and not in this manner [i.e., neither with nor without alimony], we [the court] should not force him; but let him isolate her (יעגנה לעולם) [i.e., leave her in a status where she may not marry] forever ..." (Riskin 1989:105). This fits better with the remarks on coercion in the texts quoted in nn.97 and 141, but that in the text at n.140 is not easy to reconcile with it. In the light of other tensions in the text — that relating to delay where the husband is willing to divorce the wife claiming *ma'is alay*,(*supra*) and another relating to the correct categorisation of the talmudic case of the daughter-in-law of Rav Zevid (compare the texts at Riskin 1989:101 and 105) — the issues need to be addressed first at a text-critical level.

144 1994:II.662, though adding that most of these authorities nevertheless held that the geonic enactments concerning a divorce for a *moredet* should not be followed. Cf. II.665: "The majority view is that the legislative power of the *geonim* was not limited to monetary matters (as Rabbenu Tam held it was), but was fully effective even with regard to marriage and divorce." With Rabbenu Tam's approach, contrast particularly that later expressed by Rashba, who seems to reject the view that the Talmud is necessarily the highest authority. He does not wish to disparage the authority of the Geonim: "Heaven forbid I should dispute a decree of the Geonim, for who am I to dispute or to change that which the Geonim of the Schools — my masters — were accustomed to do?" The rejection of the Geonic decrees, he argues, is because of different circumstances: "it has already been nullified because of the generation (מפני פריצות הדור)." As for the general question of authority: "I rail against those who say that it is not fitting to follow the decrees but [rather to follow] the law of the Talmud": *Hiddushei HaRashba* (Jerusalem, 1963), pt.2, pp.97-98, quoted by Riskin 1989:117 (Heb.), 119 (Engl.).

Talmud, and the capacity of later authorities to modify them, whether through custom or צורך שעה) generated a "pragmatic" solution with which we have become all too familiar:

> A case was once decided by me regarding someone who had betrothed the daughter of R. Samuel in Chappes. The one who had betrothed her was ordered to divorce her, and I arranged it by having them give him money (השחידוהו בממון) and goods [to get him to agree]. These matters are well known and recorded, [and I state them] in order that people not say that he disagrees with his masters, since I continually so rule. I should be obeyed [in this].[145]

3.5.4 While Maimonides, as we have seen (§3.5.2), also took the Gaonic practice as non-normative, his view that it is proper to follow the Talmud itself led him to the opposite conclusion to that of Rabbenu Tam:

> The woman who refuses her husband sexual relations — she is the one referred to as "the rebellious wife". So we ask her why she is rebelling. If she says [she is rebelling] 'because he is repulsive to me, and I am unwilling voluntarily to engage in sexual relationships with him,' we force him to divorce her immediately, for she is not as a slave that she should be forced to have intercourse with one who is hateful to her. She must, however, leave with forfeiture of all of her *ketubbah* ...[146]

> האישה שמנעה בעלה מתשמיש המיטה--היא הנקראת מורדת, ושואלין אותה
> מפני מה מרדה: אם אמרה, מאסתיהו ואיני יכולה להיבעל לו מדעתי,
> כופין אותו להוציא לשעתו, לפי שאינה בשביה שתיבעל לשנוי לה
> ותצא בלא כתובה כלל

The difference between Rambam and the Gaonim resides not so much in the substance of their rulings,[147] as in their basis. As Riskin puts it: "His ruling is in no way bound up with any historical reasons of adultery, apostasy or dependence upon Gentiles, but is rather a humane consideration of the sensitivities of an unhappy wife."[148] Maimonides decides the Halakhah in accordance with his independent understanding of the statement of Amemar in the Talmud that [according to the traditional text] such a woman "is not to be forced [to remain married]", and interprets this to mean that the husband must be forced to grant a divorce."[149] Unless Rambam had access to the variant textual tradition, the most likely explanation of his stance is that it is based on *sevarah:* a free Jewish woman (*pace* Mar Zutra[150]) cannot be forced into marital relations. This reasoning, however, did

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145 *Sefer Hayashar leRabbenu Tam*, as quoted by Riskin 1989:98 (Heb.), 102 (Engl.).

146 *Hilkhot Ishut* 14:8, Klein's translation in the Yale Judaica Series translation; cf. Riskin 1989:88 (Heb.), 88f. (Engl.).

147 Both seemingly endorse an immediate divorce, backed if necessary by coercion, for a woman claiming *ma'is alay*. Maimonides, however, appears to have been less liberal than the Geonim regarding the financial provisions for the wife divorced on a plea of *ma'is alay*. Riskin 1989:91 concludes that the net effect of his cancelling the Gaonic decrees on the one hand, but interpreting the Talmud in terms of the position of Amemar (taken to refer to coerced divorce) on the other, was effectively to equalize the positions of husband and wife: "If the husband finds his wife repulsive he may divorce her even against her will, but must pay her the alimony provided for by the marriage contract. If she finds him repulsive, she may obtain a divorce even against his will, but receives no alimony at all." Haut 1983:52-54, while recognising the character of the financial provisions in Maimonides, nevertheless maintains, at 53, that the view of Maimonides differs from that of the Geonic *takkanah* "only in its breadth".

148 Riskin 1989:90f.

149 Riskin 1989:90f., noting that the incident of Rav Zevid in the talmudic *sugya* and the subsequent Sabboraic requirement of a delay of 12 months thus refers, according to Maimonides, only to a wife who claims: "I wish [to remain married to] him, but [I wish] to cause him pain" (91, noting, at 175 n.10, that this is contrary to the interpretation of Rashi, Rabbenu Tam, and Alfasi, all of whom interpret the case of Rav Zevid as dealing with a case of a woman who claims she finds her husband "repulsive". But the text of Rabbenu Tam is not consistent on this: see n.143, *supra*). At 1989:85f., Riskin notes that Alfasi, too, maintains that coercion goes back to the Talmud, and not merely the Geonim, and thus that rejection of the Geonic decrees would not entail rejection of the institution itself.

150 Rabbenu Tam also rejects what he takes to be the position of Mar Zutra in the Talmud (Riskin 1989:104f.): "But if she said "He is repulsive to me" — we do not force her [to remain married]. That is to say: if she said, "I do not desire him,

not command universal appeal. Rosh asked:

> ... what kind of reason has he given for coercing the man to divorce [his wife] and to permit a married woman [to someone else]? [Rather,] let her not have sexual relations with [her husband] and let her remain chained all of her days,[151] for, after all, *she* is not commanded to be fruitful and multiply! Because she followed the dictates of her heart, [and] cast her eyes upon another and desired him more than the husband of her youth, do we then fulfill her lust and force the man who loves the wife of his youth to divorce her? Heaven forbid that any judge should judge thusly![152]

Fear that a sinner may be rewarded is expressed also by Rabbenu Tam, who argues that if the Tannaim had been concerned that a wife claiming *accepted* grounds for divorce might in fact be using them so as to conceal the fact that she had really "cast her eyes on another",[153] all the more so was the "He is repulsive to me!" (*ma'is alay*) grounds liable to abuse, so that coercion in such cases should not be contemplated.[154] However, these different policy orientations — represented by Maimonides on the one hand, Rabbenu Tam on the other — do not stem exclusively from doctrinal considerations. As both Riskin (1989:110f.) and Westreich (2000, 2002) have argued, there is a close correlation between the Sephardi/Ashkenazi divide and the external legal environment. The Gaonim had been concerned that women might be tempted either to seek the assistance of Islamic courts or perhaps even to convert to Islam in order to free themselves from their husbands.[155] Such considerations were foreign to Rabbenu Tam, living in a Christian environment where the *moredet* had no possibility of seeking gentile help in order to obtain a divorce, and where, indeed, there was external moral pressure to restrict divorce itself — a factor, as Ze'ev Falk argued many years ago (1966:ch.IV), in the adoption by Rabbenu Gershom of the requirement that (absent specific cause) divorce required the consent of the wife, and could no longer be effected by the husband almost unilaterally. The fact that the *herem* of Rabbenu Gershom was accepted in Ashkenaz but not Sepharad may well also have been a factor in accentuating the divide over the *moredet*. For coercion where the wife claimed *ma'is alay* went some way towards balancing the rights of husband and wife, by giving the wife a unilateral right of divorce of her husband, corresponding to the unilateral right which he had to divorce her. In Ashkenaz, however, after the *herem* of Rabbenu Gershom, the husband no longer had such a unilateral right[156] in the absence of "statutory" cause, divorce had (in principle) to be by consent. Why, then, should the wife have a unilateral right to coerce the husband into giving her a *get* ?

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neither him nor his alimony; rather, I forfeit everything to him," this is not considered a forfeiture in error, and we do not force her to remain [in the marriage in the hope that] she will change her mind. If the husband wishes to divorce her without alimony he may divorce her, and he has no alimony obligation, for she has forfeited [it] to him; it is a complete forfeiture. Mar Zutra says: we force her; that is, we require her to remain, and perhaps she will change her mind, as with the case of "I desire him and I am causing him pain," for it is one case, and they are both considered rebellious [wives]; for since she forfeits on account of rebellion, it is not a complete forfeit, and if the husband wishes to divorce her, he gives her alimony. However, this is not [the law]; rather, as we explained before, [the woman who says] "He is repulsive to me" is not a rebellious wife."

151 Cf. יעגנה לעולם in the passage from Rabbenu Tam quoted in n.143, *supra*.

152 *Rosh*, *Resp*. 43:8, quoted by Riskin 1989:125f. (Heb.), 127f. (Engl.). Riskin 1989:114 (Heb.), 116 (Engl.), also quotes *Rashba*, *Resp*. 572, 573 in Bnei Brak ed., 1948, Pt.1, p.215: "This too is a marvel (פלא) in our eyes, because of the proofs we have written [disproving this], and all of his followers disagreed with him."

153 *M. Ned*. 11:12, quoted in n.14, *supra*.

154 *Sefer Hayashar LeRabbenu Tam*, quoted by Riskin 1989:98 (Heb.), 101 (Engl.). Yom Tov Assis, 1988:35, notes this issue as reflected in the responsa of Rashba.

155 See further nn.115, 119, *supra*.

156 The extent to which this equality in principle was compromised by (a) the capacity to constitute the court as agent to receive a *get* on the wife's behalf, and (b) the *heter me'ah rabbanim*, are beyond the scope of this paper.

3.6 Conclusions on coercion of the *moredet*

3.6.1 The Ashkenazi reaction to the Gaonic position ultimately prevailed, despite the fact that Rabbenu Tam may well have represented a minority position in his day.[157] Before commenting further on the issues of authority which arise, it may be worthwhile to rehearse the factual and related interpretive issues presupposed by arguments from authority, on which we have noted that there remains historical doubt:

(a) What was the original text of Amemar's ruling on the wife proclaiming *ma'is alay* in the Talmud (§§3.3.1-4)?

(b) Assuming the traditional text of Amemar's ruling, did it imply coercion of the husband or not (§3.3.2)?

(c) Did the ruling of Rabbanan Sabora'i, requiring the wife to wait 12 months for her *get,* imply (as the Gaonim clearly understood) that after that period the court would compel him (§§3.3.3, 3.5.1)?

(d) What did the Gaonim mean (and practice) by compulsion? Were they willing, in the final resort, to override the husband's resistance, whether by having the court authorise the writing and delivery of the *get,* or by *hafka'at kiddushin* (§§3.4.1-2)?

(e) By what authority did the Gaonim proceed: interpretation of the Talmud (or a different talmudic textual tradition), *takkanah,* custom (§§3.4.3, 3.5.1-2)?

(f) If they were motivated by *tsorekh hasha'ah,* did they themselves conceive their measures to be temporary, and if so how temporary (§3.4.3)?

(g) Did the Rishonim have accurate information as to what the Gaonim did and on what authority they based themselves (§3.5.1)?

(h) Do we have accurate information on the reasoning of Rabbenu Tam (§3.5.3 and n.143)?

On all these questions, we may ask whether the authority of the tradition is affected by what may turn out to have been historical errors concerning its prior development. For example, if Rabbenu Tam did take the view that coercion of the husband is never mentioned in the Talmud and that the Gaonim did not base themselves on talmudic authority (even a minority opinion in the Talmud[158]), and these claims turn out to be historically incorrect, does that affect the status of the objections Rabbenu Tam made to the reforms of the Geonim?[159] Or do we take the view that, like an erroneous textual tradition, error may be validated by subsequent acceptance? Not necessarily. We may well invoke Rema's justification of his exception to the principle of *hilkheta kebatra'i,*[160] that we need not follow later authorities when the latter were unaware of a previously unpublished gaonic responsum since, had it been known, the later authorities may have decided the other way.

3.6.2 But even if we take the view that the doubts regarding the Gaonic position do not fall within this

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157 So argued by Riskin 1989:108, 176 n.25, in relation to his denial of "authority to legislate other solutions beyond the Amoraic period of Ravina and Rav Ashi", in the context of the *moredet.*

158 Riskin 1989:76 implies that this is what the Gaonim did: "After all, the Mishnah itself teaches that the minority opinion is recorded together with the majority opinion in order to allow a later generation to decide in accordance with the former; and it is precisely because of such situations that the Sages teach, "[both] these and those are the words of the living God." Hence, the Geonim sought and found an Amoraic precedent for not forcing a woman to remain married to a husband she found repulsive. Moreover, the Talmudic decree of the Rabbanan Sabborai provided for a bill of divorce even against the wishes of the husband, according to Gaonic *interpretation.* This opened the way for subsequent Gaonic *legislation* when the Rabbis observed that Jewish women occasionally converted to Islam. The study of the development of the Gaonic decrees regarding the rebellious wife provides an excellent insight into the internal process of halakhic change."

159 Thus, Riskin 1989:86 argues: "If it was the Geonim who initially provided for a coerced divorce, then if the Gaonic decrees are ever rejected, their provision for a coerced divorce must be rejected as well. If, however, it was the Rabbanan Sabborai — i.e., the Talmud itself — who provided for a coerced divorce, then even if we were to reject the Gaonic decrees granting the wife monetary compensation, we would nevertheless be forced to uphold the provision for a coerced divorce. Such is the position of Alfasi."

160 *Rema* to *Shulhan Arukh Hoshen Mishpat* 25:2, quoted *supra* §2.2.2.

exception to *hilkheta kebatra'i*, the history here sketched suggests further issues of authority which remain relevant to the present. What is the current status of legislation motivated by צורך שעה? When the author of *Sefer HaMa'or* wrote that

> ... the decree which was promulgated in the academy to give an immediate divorce to this rebellious wife was an emergency decision [הוראת שעה] in accordance with the need which [the Geonim] saw in their generation. But in the succeeding generations we make judgment based on Talmudic law ... (§3.4.3, above)

he does not appear thereby to be claiming that later generations lack the authority to rule on the basis of הוראת שעה;[161] he argues rather that they may deviate from the Talmud only if circumstances of הוראת שעה exist (and they are assumed not to have existed from the Geonic period to that of Halevi). This does not mean that they may not exist in future. If such authority continues to exist for later generations, is it restricted to the kinds of צורך identified by earlier generations? Such a criterion might not appear too difficult to fulfil: recourse to gentile courts, applying their own criteria, is increasingly common, not only for a (required) civil divorce, but also to put pressure on the husband to grant a *get,* sometimes in ways which are halakhically problematic (§1.5).

3.6.3 If some of the Rishonim were able to maintain that the *Geonim* were in error in assuming an authority to deviate from talmudic principles, is it possible for later generations to take the view that their own predecessors were in error in their more restrictive conception of the degree of authority available within the system? Given the principle of *hilkheta kebatra'i*[162] (failing which the principle that "Jephthah in his generation is like Samuel in his generation"[163]) it is possible for a majority[164] in a later generation to adopt a minority view of an earlier generation.[165] There is, indeed, a reluctance

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161 In this paragraph, I use צורך שעה and הוראת שעה interchangeably, without addressing the history of the relationship (an issue between Riskin and Wieder, *infra* n.281). Both concepts are used to refer to the Gaonic enactments in the sources reviewed in §3.4.3 above.

162 *Shulhan Arukh Hoshen Mishpat* 25:8: "Since the later authorities saw the statements of the earlier ones but gave reasons for rejecting them, we assume, as a matter of course, that the earlier authorities would have agreed with the later ones." Elon 1994:I.266ff. notes that it applies even to a single individual later in time who disagrees with the views of a number of earlier authorities, and stresses (at 271) that it came to apply only if the later authority refers to and discusses the earlier opinion and shows by proofs acceptable to his contemporaries that, although contrary to the position of the earlier authority, his own view is sound. For an example of the use of the principle as recently as the mid-19th century (in the context of *hafka'at kiddushin* based on *takkanot hakahal*), see Elon 1994:II.874-78, on Isaac Abulafia, *Resp. Pnei Yitshak*, *Even Ha'ezer*, #16 (p.94d). See further §§5.1.1, 5.2.1-3, *infra*.

163 I. Ta-Shma, "The Law is in Accord with the Later Authority — *Hilkhata Kebatrai:* Historical Observations on a Legal Rule", in *Authority, Process and Method. Studies in Jewish Law*, ed. H. Ben-Menahem and N.S. Hecht (Amsterdam: Harwood Academic Publishers, 1998), 101-128, translated (with a 1994 Postscript) from *Shenaton Hamishpat Ha'Ivri* 6-7 (1979-80), 405-423, maintains that the idea that *hilkheta kebatra'i* confers authority on the *contemporary posek* to reject an earlier precedent (rather than provide him with a rule of preference as between earlier authorities) "is an entirely novel idea of Ashkenazic origin for which I can find no traditional sources" (at 107; see also 114, 125). Rather, "the principle conferring authority upon the current *posek* ... originates in an altogether different rule: "Jephthah in his generation is like Samuel in his generation.""

164 For the principle of following the majority view, the most famous source is the talmudic story of the oven of Akhnai, *B.M.* 59b, which derives this conclusion from the biblical phrase *ahare rabim lehatot*, *Exod.* 23:2. See further Elon 1994:I.261-264, and n.253, *infra*.

165 Indeed, non-normative views are themselves treated with sanctity: *elu ve'elu divre elohim hayyim*, *Erub.* 13b. Elon 1994:I.259 quotes Samson of Sens, commenting on *M. Eduy.* 1:5 (and relating it to *elu ve'elu ...*): "Although the minority opinion was not initially accepted, and the majority disagreed with it, yet if in another generation the majority will agree with its reasoning, the Law will follow that view." In practice, however, this becomes unlikely, if we argue, as does Breitowitz 1993:56, that "it is a well-established principle in *halachic* decision-making that opinions not recorded in the Shulchan Aruch or its classical commentaries may not be relied upon for any purposes whatsoever" (a veritable Jewish "Law of Citations"!), which he uses to justify discounting the view of Rambam on coercion of the husband of a *moredet.*

(at least) to do this if the effect will be to contravene the final decision of the Talmud,[166] but where the latter (as here) is unclear in its effect, the problem becomes one of interpretation of that final decision, and the principle of *hilkheta kebatra'i* may still apply. In any such argument, it is not sufficient simply to prefer the outcome of the Geonim and early Rishonim against Rabbenu Tam and his followers. There must be grounds for the view that the Geonim were not wrong in their interpretation of the talmudic passage. Any such argument, Elon maintains (1994:I.266ff.), must be acceptable to the contemporaries of the one propounding it. This latter criterion sounds like a demand for consensus — an issue to which I shall return later.

4.0 *Annulment*

4.1 The talmudic cases

The Talmud discusses a number of cases of annulment of marriage, often indicating clearly the grounds and basis of authority. Here, the problem in using this remedy for the benefit of the *agunah* resides not in doubts regarding its talmudic authority, but rather whether that authority has survived,[167] and if so how far the talmudic cases may be extended. Two types of case are considered in the Talmud: some concern defects in relation to the initiation of the marriage; others relate to subsequent behaviour (including a form of misuse of the *get* procedure itself).[168]

4.1.1 We may take the incident at Naresh as exemplifying the first type:

> Surely it once happened at Naresh that a man betrothed a girl while she was a minor, and, when she attained her majority and he placed her upon the bridal chair, lo another man came and snatched her away from him; and, though Rab's disciples, R. Beruna and R. Hananel, were present on the occasion, they did not require the girl to obtain a letter of divorce from the second man! — R. Papa replied: At Naresh they married first and then placed [the bride] upon the bridal chair. R. Ashi replied: He acted improperly, they, therefore, treated him also improperly, and deprived him of the right of valid betrothal.
>
> הוא עשה של א כהוגן לפיכך עשו בו של א כהוגן
> ואפקעינהו רבנן לקידושי מיניה.
>
> Said Rabina to R. Ashi: [Your explanation is] satisfactory where the man betrothed [her] with money; what [however, can be said where] he betrothed her by cohabitation?— The Rabbis have declared his cohabitation to be an act of mere fornication.[169]

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166 For the exclusion of "questions that were ... definitively decided in the Talmud as compiled by R. Ashi and Ravina" from the principle of *hilkheta kebatra'i*, see *Rosh*, *Piske ha-Rosh*, Sanhedrin, ch.4, #6, quoted by Elon 1994:I.269, and, in this context, Rabbenu Tam, *Sefer Hayashar leRabbenu Tam*, *Responsa*, ed. Rosenthal, #24 (p.40): "Legislation (*hora'ah*) ended with Ravina and R. Ashi", quoted by Elon at II.661.

167 Riskin 1989:176f. n.25 maintains that "the right to cancel *kiddushin* is granted to the Sages of every generation" by virtue of the view of Ritva and others, that every *kiddushin* effectively incorporates a stipulation that the marriage is "in accordance with the laws of Moses and Israel". He maintains that Me'iri, Rosh, Rashba, Rivash and Tashbets "would seem to hold that even in the post-Talmudic period there is such a right, and indeed was exercised", citing Freiman 1944, and E. Berkovits, *T'nai bi 'Nisuin uVe'Get* (Jerusalem: Mossad Harav Kook, 1967), esp. 119-150.

168 *Yev*. 90b, 110a, *Ket*. 3a, *Gitt*. 33a, 77a, *B.B*. 48b. For reviews of all the talmudic cases, see Breitowitz 1993:63f.; Riskin 2002:9-11; Jachter, 2000:29f., and (in somewhat more detail) at http://www.tabc.org/koltorah/aguna/aguna59.4.htm. At 30, he cites the view of *Rashba* (*Resp*. 1:1162 and commentary to *Ket*. 3a) that this is not a real retroactive annulment but rather "the rabbis merely render the *get* effective despite the husband's initial wishes." In the internet version he notes that "Rashi in these three cases explains that "Hafkaat Kiddushin" works because of the presence of the Get (despite its defects)." On this issue, see further n.176, *infra*.

169 *Yev*. 110a, Soncino translation (Slotki). Riskin 2002:44 rightly argues (against Wieder 2002:37) that the very need for these retrospective procedures imply that otherwise the *kiddushin* (by *kesef* or *biyah* respectively) would be valid despite

R. Papa explains the case on the basis of a local custom whereby *kiddushin* had already taken place before the bride was placed on the bridal chair. Thus, she was already betrothed when snatched, and no valid marriage could be effected by the second man. R. Ashi makes no such assumption: there is a valid betrothal by the second man, but the Rabbis have the power to annul it because of the groom's improper behaviour.[170] The discussion regarding the form of betrothal goes to the issue of authority. If the *kiddushin* was *bekesef* (conventionally, with a ring), the Rabbis in these cases invoke a power of (retrospective) confiscation, *hefker bet din hefker,* which has a biblical basis in the powers granted to Ezra (10:8, cf. §4.3.1, below). But even if the betrothal was by *biyah,* the view is taken that a procedural defect can be found: the intercourse will be regarded (conclusively) as motivated not by the intention to constitute *kiddushin,* but rather by *zenut*. In short, immoral behaviour on the part of the groom here justifies the Rabbis in constructing a procedural defect in the *kiddushin,* such as to render it void. No valid *kiddushin* having taken place, no *get* is required.

4.1.2 The second type of case, annulment based on subsequent behaviour, may be exemplified by *Gittin* 33a, where the problem resides in the husband's use (or abuse) of his (biblical) right to cancel a *get* at any time before it is delivered to his wife, even after he has committed the *get* to an agent for delivery. The right to cancel is taken to exist even without communication to the messenger. The Mishnah (*M. Gitt*. 4:2) records an earlier practice whereby the *get* could be annulled simply by the husband's convening a *Bet Din* to do so. Clearly, this placed the wife in an intolerable position: she might act in good faith on the *get* and remarry, only to find that her first marriage had not in fact been terminated. For this reason Rabban Gamliel the Elder enacted (התקין) a *takkanah* that any such cancellation of the *get* by the husband was invalid מפני תקון העולם, "to prevent abuses".[171] The Talmud here asks how this could happen, since apparently a rabbinic ordinance is allowed to invalidate an act of the husband in exercising a biblical right. The Talmud replies: "Yes, all who marry do so subject to the conditions laid down by the Rabbis, and the Rabbis annul this marriage":[172]

כל דמקדש אדעתא דרבנן מקדש ואפקעינהו רבנן לקידושין מיניה.

Gilat, discussing this passage, notes that the Jerusalem Talmud (*Gittin* 4:2) holds that the Rabbis do have the power to annul Torah law, even *without* the premise that all who betroth do so on the conditions laid down by the Rabbis.[173] We may ask what is the difference between the following

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the defect, in the light of the principle (as regards *B.B*. 48a) that "any legal transaction which is accepted under duress is considered legally valid under Torah law as long as the recipient receives all necessary compensation and benefits". See also Wieder 2002:37f. and Riskin 2002:44, 49 (*Maharam*) on the interpretation of *Yev*. 110a (Naresh).

170 Elsewhere, too, in a case where a woman consents to betroth herself under pressure of physical violence (*B.B*. 48b), R. Ashi is willing to annul a marriage, using the same formula:

הוא עשה שלא כהוגן לפיכך עשו בו שלא כהוגן ואפקעינהו רבנן לקידושי מיניה.

171 This non-literal (but appropriate) translation of מפני תקון העולם is that of Simon in the Soncino Talmud, noting (*Gittin*, 1936, p.131 n.2) that literally it would be rendered: "for the better ordering of society" (Danby renders it: "for the general good").

172 Cf. Elon 1973:722. See further Breitowitz 1993:64f., citing Freiman 10944:13f., on whether this was originally understood as a private condition or as reflecting an inherent judicial power. See further E. Berkovits, 1967:120-23.

173 Y.D. Gilat, "Gittin", *Enc. Jud*. VII.594. The power may have been inferred from the bridegroom's declaration of *kiddushin*. B.Z. Schereschewsky, "Marriage, Legal Aspects", *Enc. Jud*. XI.1046f., notes that the formula *harei at mekudeshet li ... kedat moshe veyisra'el ...* does not appear in the Babylonian Talmud and is only found in the Tosefta (*Ket*. 4:9) and in the Jerusalem Talmud, *Ket*. 4:8 (as "according to the law of Moses and of the Jews", *Yehudai*): it "means that the bridegroom reserves the bride unto himself "according to the law of Moses" — i.e., the law of the Torah — "and of Israel" — i.e., in accordance with the rules of the halakhic scholars as applied in Israel, so that the *kiddushin* shall be valid or void in accordance with the regulations laid down by the scholars (Yev. 90b; Ket. 3a; Git. 33a; Rashi and Tos. ad loc.; see also Rashbam and Tos. to BB 48b). The version thus formulated provided the basis for the *halakhah* which empowered and authorized the scholars, in certain circumstances, to invalidate a *kiddushin* retroactively in such a manner that even if it was not defective in principle it was deemed to be void *ab initio*."

two types of *get* abuse?: (a) he sends a *get* then withdraws it (on the basis of a power viewed as having biblical authority) before delivery (where the Talmud annuls); (b) he refuses to give it at all, though required to do so by a *bet din* (where contemporary Rabbis refuse annulment)? The traditional answer is that in (a) there was at least at some stage a voluntary issue of a *get* by the husband.[174]

4.1.3 David Novak has argued that the use of the כל דמקדש formula here, but not in the cases where the defect relates to the initiation of the marriage, is not accidental:

> In this case, however, the marriage was initiated properly. This point was not lost on the medieval halakhists. The Tosafists noted that in the former two cases[175] the key phrase "in consonance with rabbinic standards" is absent.[176] They infer from this absence that the aforementioned principle only applies where the marriage was properly initiated, that is, in consonance with rabbinic standards. In the two earlier cases this is obviously not so. In other words, the initiation of marriage in consonance with rabbinic standards carries with it the implication that if the marriage is to be terminated, it is to be terminated by those same rabbinic standards, that is, what they *now* require. (1981:198f.)

Indeed, in a responsum where Ribash[177] is invited to rule on the validity of a communal enactment requiring at a *kiddushin* the presence of the communal officials and a *minyan,* failing which "the marriage is void",[178] the principle "all who marry do so subject to the conditions laid down by the Rabbis" is said to be necessary only where there was an initially completely valid marriage but, because of some defect in the divorce proceedings, the divorce would otherwise have been invalid:

> In those cases, we rule that even though the marriage was valid, the Sages later decided to annul it retroactively, since the marriage was subject to their consent and they can annul it any time they wish.[179]

In short, the principle means, on this interpretation, not "all who would marry must do so subject to the conditions laid down by the Rabbis" but rather "all who have validly married have thereby done so subject to the conditions laid down by the Rabbis". The difference relates to the nature and role

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174 See n.168, *supra*.

175 I.e. *Yeb*. 110a (Naresh, at n.169, *supra*) and *B.B*. 48b, at n.170, *supra*.

176 Citing *B.B*. 48b, *Tos*., s.v. "*taynah*". Riskin 2002:12 also notes this distinction, but argues, on the basis of Rashi's commentary on *Ket*. 3a, that *hafka'ah* is based (in all cases) on "the conditional betrothal formula" (of כל דמקדש), and that new conditions may be imposed after the talmudic period. He acknowledges the contrary opinion of *Shita Mekubetset* on *Ket*. 3a, that *hafka'ah* when based on post-betrothal behaviour in fact requires a *get* that is valid at the very least by rabbinic decree. He notes, at 16f., that such a view, shared by a number of Rishonim (and see his reply at 2002:44-47, 52 (on Rashbam and Rashba) to Wieder 2002:37f., who seeks to read this even into the talmudic cases themselves), is based upon a fear of the possible misuse of retrospective annulment (though this argument is rejected by Rabbenu Tam and Ri): "... whenever a woman commits adultery — so that the woman is forbidden to her husband and lover, the adulterers are liable for the death penalty, and any child born from their relationship is a *mamzer* — all the husband has to do is send a *get* to his wife through an agent and then cancel the *get*, or attach to the *get* a condition that is likely to lead to unavoidable interference. Once this is done, the marriage will retroactively be cancelled, his wife will retroactively be considered a single woman, and she and their children will be saved from all the penalties of her adultery." Against this interpretation of Rashi, see Riskin 2002:33f. n.23. This strategy to avoid a conclusion of adultery is, however, accepted in order to rebut a presumption of adultery resulting from captivity: see Riskin 2002:26 on *Rema, Darkhei Moshe* 7:13, commenting on the ruling in *Terumat ha-Deshen* (241) which allowed Jewish-Austrian women who had been taken captive to return to their husbands, on the grounds, *inter alia*, that if these women were forbidden to their husbands they might have fallen into a life-style of sin: "the rabbinic authorities ruled leniently because they were concerned that a more stringent approach would lead to sinful behavior in the future. These considerations are no less valid today than they were in the time of Rema."

177 R. Isaac b. Sheshet Perfet, 14th cent.

178 *Resp*. #399, discussed in §§4.3.4, *infra*.

179 Quoted in Elon 1994:II.857f.

of consent in a Jewish marriage: in theory, marriage is not a standard form contract; its legal incidents may indeed be varied by conditions. However, there are "default" conditions — presumptively implied terms if not standard terms — and if the couple have actually entered into *kiddushin* without excluding them, they are binding. In this case, the implied term they have not excluded is the rabbinic decree that any cancellation of the *get* by the husband without informing the messenger (and thus his wife) was invalid, "to prevent abuses". We may ask whether there are not comparable abuses in the current operation of the *get* procedures? If a civil divorce has been obtained, does that not create a situation analogous to the commissioning of a messenger to deliver a *get,* a commission then cancelled when the husband decides to withhold it? Here, the "abuse" to be prevented may not be the "accidental" remarriage by the otherwise undivorced wife; it may be the choice presented to the wife either knowingly to enter into an halakhically adulterous "marriage" or to remain an *agunah.*[180] The wife who is protected in *Gittin* 33a (§4.1.2) may be more "innocent" (if she enters into a new marriage) than the *agunah.* But we have seen that the Gaonim were prepared to modify the law in order to prevent less than innocent "abuses" (where "Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands", §3.4.1, above).

4.2 Post-talmudic developments

4.2.1 Though there is merit in Ribash and Novak's interpretation of בל דמקדש (§4.1.3, above), we find its use already in the time of the Gaonim to justify the imposition of further rabbinic conditions on the very initiation of marriage. Hai Gaon tells us of a *takkanah* of Judah Gaon early in the 10th century, by which the writing of a *ketubah* was required to accompany (and not follow) the *kiddushin:*

> Take notice that you are causing great harm to yourselves in that it is your custom to permit betrothals without simultaneously writing a *ketubbah* or a betrothal document. Although a woman may [legally] be betrothed even in the marketplace in the presence of two witnesses, there is harm in this practice. Such a practice has not been heard of in Babylonia for a hundred years, and a betrothal at a time other than at the signing of the *ketubbah* is completely unknown.
>
> Over a hundred years ago there was a practice in Chorosan for a man to betroth a woman by means of a ring at parties and similar occasions. The disputes multiplied; there were claims in favor of and against the validity of the betrothals, and much harm resulted. Our forefather, teacher, and rabbi, Judah Gaon, enacted that a woman must be betrothed under the Babylonian procedure with the writing of the *ketubbah*, the signatures of the witnesses, and the betrothal benedictions, and that whenever this procedure is not followed, the betrothal is invalid on the basis of the principle that 'all who marry do so subject to the conditions laid down by the Rabbis, and the Rabbis annul this marriage.'
>
> You, too, should do away with such a practice [as yours], and whoever betroths a woman at a time other than at the writing of the *ketubbah* and the document of betrothal should be punished [lit. "fined"] until he rectifies the matter.[181]

The final paragraph should not be taken to cast doubt on the invalidity of a *kiddushin* in violation of the new regulations. Such a *kiddushin* is indeed voidable (*ab initio*) for this reason. The object, however, is not to terminate the relationship, but rather to ensure that the wife is properly secured.

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180 Cf. Morgenstern (internet version):end of ch.III: "This far outweighs any fears expressed by Rabbenu Tam and Rosh (that if we coerce the husband to give a Get when the woman pleads "my husband disgusts me" ... women will leave their husbands). This fear cannot compare with the great reality that if we do not free women from a dead marriage they will become promiscuous."

181 Assaf, *Teshuvot HaGaonim*, #113; translated in Elon 1994:II.657; see also Riskin 2002:19f. It was in this context, Elon notes ("*Takkanot*", *Enc. Jud.* XV.723), that we encounter "a solitary opinion — the first recorded" holding that the authority of the scholars to annul a marriage by virtue of the בל דמקדש principle is confined to those cases mentioned in the Talmud (citing Freiman 1944:20).

The husband may then be fined to encourage him to write the *ketubah*. But annulment is available (here as elsewhere as a last resort) should he fail to do so.

4.2.2 Yet when we reach the Rishonim of Ashkenaz, we find (here as in the issue of coercion for the benefit of a *moredet*), the beginnings of a tradition of rabbinic reticence regarding the use of annulment. A responsum of Raban (R. Eliezer b. Nathan of Mainz, 12th cent.) is particularly interesting, given the similarity of the case which prompted it to the Naresh incident in the Talmud (§4.1.1, above):

> An incident occurred in Cologne in which a young man was in the midst of negotiating with the parents of a young woman of his acquaintance for her marriage when another man of wealth appeared on the scene and arranged to marry her. Her father instructed her to marry the second man; and the public was invited, as is customary for a marriage. When the second man was about to marry her, the first man's relatives deceitfully got to her first and the first man married her [i.e., recited the marriage formula and gave her a ring] in the presence of witnesses who had been prepared in advance. When her parents realized what was happening, they told her, "Throw away the ring." She did so and married the second man on that occasion.
>
> The girl's father came to Mainz and gathered all of the scholars of the communities in the synagogue of Mainz. They all strongly condemned the act of the first man, for such deceit has no place among Jews. The scholars of the time — Jacob ha-Levi of Worms and his academy and Isaac ha-Levi of Speyer and the members of his academy — wanted to annul completely the marriage to the first man.
>
> They relied on the incident described in Tractate *Yevamot*, chapter *Bet Shammai*, which took place in the city of Naresh. A girl had been betrothed while still a minor. When she became of age and while her father was preparing to finalize the marriage by means of the *huppah* [the nuptial ceremony], another man appeared, abducted her, and married her. The court returned her to the first man and did not even require a divorce from the second. R. Ashi explained that the second man had acted improperly in abducting her from the first, whom she was supposed to marry.
>
> Even though the first man was not betrothed to her (since the betrothal of a minor is ineffective) and he had not yet married her when she became of age, the Sages annulled the marriage to the second man notwithstanding that the marriage ceremony had been correctly performed, because he [the second man] acted improperly. In this case too [*i.e.*, the incident in Cologne, the rabbis of Worms and Speyer argued that] we should annul the marriage of the first man who abducted her from the second man whom she was supposed to, and was about to, marry. ....
>
> My teacher and father-in-law, Rabbenu Elyakim, and my colleague, Jacob ha-Levi, and I, following them, said that even if the first marriage amounted to no more than a public rumor, yet inasmuch as a report did spread that she married the first man ... we must be concerned about a rumor ... Since the first man did negotiate a marriage to her, perhaps the girl agreed to the marriage even though she later threw away the ring as directed by her mother; and, furthermore, even if the Rabbis [*i.e.*, the Talmudic Sages] had the power to annul a marriage, we do not have such a power of annulment, and it stands to reason that we do not have such power ...
>
> We did not follow their opinion [*i.e.*, the opinion of the rabbis of Worms and Speyer] to annul the first marriage, because she was from our area [she was our relative (?)], and we feared a scandal in our city; those who committed the deed were influential with the government, and we had no coercive power. We advised her relatives to pay the young man some money to free her, and this is what happened. The first man gave her a divorce and the second one betrothed and married her and the matter was accomplished legally. I record this to teach future generations.[182]

Raban is here reluctant to follow the talmudic precedent for annulment; indeed, he seems to regard it as self-evident (despite the Gaonic use of כל דמקדש and the willingness of the local German

182 *Resp. Raban*, *E.H.* III, 47b, translated in Elon 1994:II.848f.; see also Riskin 2002:20f., noting at 35 n.34 the argument of Berkovits 1967:152, that Raban's reserve does not necessarily extend to annulment on the basis of post-betrothal factors.

scholars to do so) that no such power any longer existed: "... even if the Rabbis [*i. e*., the Talmudic Sages] had the power to annul a marriage, we do not have such a power of annulment, and it stands to reason that we do not have such power ..." Elon (1994:II.850) notes that this was also the view of Rabbenu Tam, who denied that even the Geonim had possessed authority to annul such marriages. It might be argued that this was not as suitable a case as was Naresh for the application of the maxim "He acted improperly, they, therefore, treated him also improperly" (... הוא עשה שלא כהוגן). After all, the groom at Naresh had abducted the bride with no semblance of justification; here, the groom might well claim — apart from the fact that the woman may well have gone along willingly with the first betrothal — that he had been "gazumped": he was the original intended, but had been supplanted by a wealthier alternative.[183] Nonetheless, Raban is at pains to deny the availability of annulment. But since this is clearly a case relating to a defect in the initiation of the marriage, we might argue, following the distinction of Ribash and Novak, that the כל דמקדש principle, as it might be applied to a typical *agunah* situation today (§4.1.3, above), is not necessarily thereby affected.[184]

4.3 Annulment in *takkanot hakahal*

4.3.1 The issue in the case presented to Raban (§4.2.2) was whether there existed an *inherent* power of annulment, to deal with abuses of the *kiddushin* procedure. But the power of annulment might be based either on (express) conditions or on rabbinic (e.g. Judah Gaon, §4.2.1) or communal enactments (see §§4.3.2-5, below). The Rosh provides an example in *Resp*. 35:1, where he was asked:

> May a court adopt an enactment that provides that any marriage that takes place without the consent of the bride's father or mother is invalid, and that the court shall expropriate the money [*i.e*., thing of value, customarily a ring] given by the groom to the bride to effect the marriage?[185]

He replied:

> The issue is whether the matter concerns religious law (*issur*), in which case the court may not enact a rule different from the law of the Torah, or whether it is a matter of monetary law (*mamon*), governed by the rule that any stipulation on a monetary matter is valid.[186] There is no room to argue here that it is a monetary stipulation; it is quite clear that this argument cannot

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183 The advice of Raban "to pay the young man some money to free her" might appear similar to that of Rabbenu Tam regarding the daughter of R. Samuel in Chappes (§3.5.3, above) and to *Resp*. *Rosh* 35:2 (discussed in §5.3.3, below), where a release is needed from a husband who had used pure trickery to procure the betrothal, without any claim of right. Here, however, the payment might be regarded as legitimate compensation to the original suitor for loss of his marriage (a loss entirely attributable to his father-in-law, who had preferred the wealthier alternative). If the original suitor was destined to lose his bride anyway, better for him that he be paid for a *get* than have the marriage annulled. Perhaps also the effect was to leave some stain on the reputation of the *gazumper*. Fine that "the first man gave her a divorce and the second one betrothed and married her and the matter was accomplished legally." But we had been told already that when the bride had thrown away the ring from the original suitor, at her parents' request, she had "married the second man on that occasion". Her own unilateral throwing away of the ring could not have had any legal effect. If she had lived with the second man prior to the (eventual) divorce from the first, she would have been committing adultery (and would then be prohibited from marrying him even after the divorce).

184 A more restrictive approach to the talmudic principle is taken, *inter alia*, by Jachter, who quotes Rashba for the view that only in those cases specifically mentioned in the Talmud is the marriage annulled (2000:32) and that "the rabbis do not annul a marriage unless the man has handed his wife a [rabbinically acceptable] Get (which is invalid biblically)", citing *Shita Mekubetset*, *Ketubot* 3a: http://www.tabc.org/koltorah/aguna/aguna59.4.htm. He concludes, at 33, by quoting Rav David Zvi Hoffman (*Melamed Leho'il* III: 51) as representing "the consensus Orthodox view on this topic": "No God-fearing rabbi will state that rabbis today are empowered to perform Hafkaat Kiddushin in the absence of a Sanhedrin."

185 Elon 1994:II.851f.

186 Elon, *ibid*., takes this to be part of the question.

sustain this enactment. But the enactment is valid for a different reason, as stated in chapter *Halshah Rabbah* [*Yev*. 89b]: "What is the source of the principle that the court may expropriate property (*hefker bet din hefker*)? It is written [*Ezra* 10:8]: Anyone who does not come in three days, as required by the officers and elders, will have his property confiscated."

All who marry do so subject to the conditions laid down by the Rabbis, and in every generation all who marry do so subject to the enactments that the halakhic authorities of that generation have adopted as protective measures. A marriage is valid only if it conforms to their legislation; even if the marriage is effected by means of intercourse, they have declared the act to be fornication. This applies even more so if the marriage was effected by means of money, in view of the principle of *hefker bet din hefker*; the court has expropriated the money he gave her and there is no marriage here at all.

The Rosh here applies to the powers of the court the same distinction, between *issura* and *mamona,* which was adopted (*pace* the Palestinian tradition) in relation to "private" conditions (*tena'in*, cf. §§2.1-2.2, above). On those grounds, he argues, the *takkanah* would be invalid, as interfering with *issura*. However, the principle of *hefker bet din hefker* is itself biblical, and may be used even in a case of *issura*.[187] Thus, the fact that *kiddushin* (a matter of *issura*) happens to involve property means that the court may enact rules about it, insofar as it may (as here) enact rules regarding the confiscation of property (the ring). And the Rosh has no qualms about applying the talmudic כל דמקדש principle here, understanding it to refer to conformity with the enactments of "the halakhic authorities of that generation". Annulment in this type of case is thus possible provided that there is an enactment which expressly includes reference to the (biblical) *hefker bet din hefker* principle.

4.3.2 Such powers, however, were not reserved to rabbinic courts. Rashba[188] discusses the authority of a *kahal* to impose conditions upon marriage, such that breach of them would result in annulment:[189]

Q: Does a community (קהל) have the power to adopt an enactment that provides, in order to punish scoundrels, that a marriage effected in the absence of ten persons is void (שלא יהא קדושיו קדושין)?

A: It is clear to me that under the strict law (שורת הדין) a community may lawfully do this, so long as the townspeople agree, but not if there is a halakhic scholar (תלמיד חכם) in the locality who does not agree. The reason [the community may do so] is that the community may expropriate

187 See further Elon 1994:I.203f., II.507-514, 685-690, and in "*Takkanot*", *Enc. Jud.* XV.717: "This rule lays down that in matters of the civil law *(dinei mamonot)*, and in every other matter — even in the field of ritual prohibitions and permissions — which is based on the ownership of property, the scholars have authority to enact even such *takkanot* as involve the uprooting of a law of the Torah by directing to "arise and do." The scholars deduced from the passage, "and that whosoever came not within three days, according to the counsel of the princes and the elders, all his substance should be forfeited, and himself separated from the congregation of the captivity" (Ezra 10:8), that the court has authority to divest the individual of his rights of ownership in property (TJ, Shek, 1:2, 46a; TJ Pe'ah 5:1, 8d). This authority was interpreted to extend not merely to a divestment of proprietary rights but also to the transfer of such rights to new owners of the same property — a conclusion based also on Joshua 19:51 (Yev. 89b; Nov. Rashba, Git, 36b)."

188 R. Solomon b. Abraham Adret, Spain, 1235-1310.

189 *Rashba Resp.* 1, 1206, translated in Elon 1994:II.853f.; Riskin 2002:21. See further S. Morrell, "The Constitutional Limits of Communal Government in Rabbinic Law", *Jewish Social Studies* 33 (1971), 87-107, at 103, seeing it as an example of Rashba's view of the function of communal authority as "repairing the breach". See also E. Kanarfogel, "Unanimity, Majority, and Communal Government in Ashkenaz during the High Middle Ages: A Reassessment", *Proceedings of the American Academy for Jewish Research* 58 (1992), 79-106, at 104f., on the view of R. Meir of Rothenberg that only a *rov* was required in regard to communal decisions classified as *migdar milta,* which included issues governed by talmudic law. M.P. Golding, "The Juridical Basis of Communal Associations in Medieval Rabbinic Thought", *Jewish Social Studies* 28 (1966), 63-78, at 74-76, distinguishes between *migdar milta,* where "there is hardly any disagreement that the individual is subject to the community" and matters of *reshut,* on which Rambam and Rashi differed.

(להפקיר) the property belonging to an individual, in which case he is considered to have effected the marriage by means of money that is not his. As stated in the Talmud,[190] "The Rabbis annul his marriage" (אפקעינהו רבנן לקידושי מיניה)

In [Tractate Bava Batra,] chapter *Hezkat ha-Battim* [48b] and in [Tractate] Yevamot, chapter *Bet Shammai* [110a] R. Ashi stated: "He acted improperly; therefore the Rabbis treat him 'improperly' and annul his marriage." The principle of *hefker bet din hefker* applies in every case; and the community, like the local court, may expropriate property if they believe the expropriation to be for the welfare of the inhabitants.

Hefker bet din hefker is derived from the Torah itself, as stated in [Tractate] Yevamot, chapter Ha-Ishah [89b] and in [Tractate] Gittin [36b] "What is the source of the principle that the court may expropriate property (*hefker bet din hefker*)? ..." And it was taught in the first chapter of Tractate Bava Batra (8b) "The townspeople may [obligate each other]...."[191]

However, if a halakhic scholar resides there, his approval is required, as stated in the first chapter of [Tractate] Bava Batra [8b] ... A case arose in our community and I so ruled in the presence of our rabbis, and my teacher, Rabbi Moses b. Nahman [Nahmanides], agreed with me. Nevertheless, the matter requires further consideration (ומכל מקום עוד צריך להתישב בדבר).

Rashba argues that the authority to make such an enactment exists if the people of the town agree, but subject to a veto by any halakhic scholar within the locality. Indeed, he attributes to the communal authority the power to apply both the principle "He acted improperly, they, therefore, treated him also improperly" (... הוא עשה שלא כהוגן) — despite the fact that elsewhere he confines annulment to the specific cases found in the Talmud (*Rashba, Resp*. 1:1185[192]) — and that of *hefker "bet din" hefker*. One might have thought that, though the power to expropriate in these circumstances is conferred by the communal enactment, its exercise in any particular case would be in the hands of a *bet din*. There is, however, authority for such a transfer of power from the *bet din* to the lay leadership.[193] Thus, in terms of legislative authority, the community is equated with the *bet din,* the only recognition of a difference being the additional invocation here of the powers conferred by the Talmud on בני העיר. We may, of course, assume that the בני העיר at this time were observant Jews; even so, they did not have any halakhic qualifications. There is, however, a sting in the tail of the responsum. It is framed between the opening reference to the "strict law" (שורת הדין), and the concluding note of hesitation: "Nevertheless, the matter requires further consideration" (ומכל מקום עוד צריך להתישב בדבר), which seems to suggest that powers may exist but the authorities may be reluctant to use them. We shall consider later the halakhic status of such reluctance.[194]

4.3.3 In another responsum, Rashba indicates clearly the importance of such communal enactments. Their presence or absence may make the difference between the availability of annulment and the need to resort to compulsion:

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190 Elon notes, as examples, *Ket*. 3a and *Yev*. 90b.

191 The Talmud specifies "fix weights and measures, prices and wages, and to inflict penalties for the infringement of their rules."

192 "We do not say that whenever a husband entered a marriage in an unethical manner the rabbis annulled the marriage, rather, we believe that only in those specific instances in which Chazal state that the marriage is annulled do we actually annul the marriage," as quoted by Jachter, 2000:29f.

193 See Morrell 1971:88 on a responsum of Hananiah Gaon at *Otsar Hageonim, Ketubot,* p.54, relating to the interpretation of *Ezra* 10:8: "In effect, Hananiah has transferred the locus of authority from the *beth din* (Court of law], the rabbinic court of high standing, to the lay members of the city represented by their elders." See further Morrell 1971:89 nn.22-23 for later authorities to this effect, including Ibn Adret (Rashba), *Responsa,* vol. iv, p.34, no.142: "*hefker tsibbur hefker"*. For views (including that of Meiri) opposing the need for the concurrence of the official resident scholar, see Morrell 1971:105f. On the interpretation in this context of the talmudic *adam hashuv,* see Kanarfogel 1992:90f. (on Rabbenu Tam's view of *hefker tsibbur*) and note esp. his comments on the relationship between talmudic scholars and communal leadership in Ashkenaz, at 83f.

194 §5.1.3, and see further Jackson 2002b:§§4.3.5-6.

Q: Our Master, the king, may his majesty be exalted, has asked me to rule on an incident here that involves a widow whom an acquaintance [relative (?)] would visit at her home daily. One day he came from the synagogue carrying a prayer book, and went to the widow's home together with some witnesses. He gave the prayer book to her in the presence of the witnesses and said to her: You are hereby betrothed to me. He then directed the town scribe to record a document containing the witnesses' testimony, and they [the witnesses] left the country.

The widow complained to the king that this marriage was against her will and without her consent. I could not investigate the matter by interrogating the witnesses to the marriage, since they had gone away. Now the widow cries out to me, and I have decided to order the man to give her a divorce and to flog him with whips. I request your opinion on this matter.

A: It is surely reasonable to conclude that he acted deceitfully toward her and that she is not married (אינה מקודשת); but questions involving marriage, because of their seriousness [since they involve prohibited sexual relationships], cannot be dealt with solely on the basis of conjecture as to probabilities, and I see no way out for her except through a divorce that he consents to give.

However, he should be fined in an amount to be decided by the judge appointed by the king, so that it will be a lesson to others and will deter them from following his example — and any competent court may legally do likewise ... A competent court may even impose corporal punishment as a protective measure (לצורך השעה) ..., for a court may impose punishment not provided for by the Torah (דבית דין מכין ועונשין שלא מן הדין).

... If the communities, or each individual community, should wish to erect a legislative safeguard against these unfortunate occurrences, let them all jointly adopt an enactment fully expropriating (ויפקיעו ... הפקעה גמורה הפקר גמור), whether permanently or for a fixed period, any money given [to effect a marriage] to any woman of their communities, unless the woman willingly accepts it with the consent of her father or in the presence of whomever they wish. I have found that Sherira Gaon and his forebears followed this practice, and he advised another community to do the same.[195]

Here, the questioner indicates that he had decided to order the man to give the woman a divorce "and to flog him with whips" for this purpose. Rashba replied that even though the woman may well not be betrothed, a divorce was here required (in the absence of both the witnesses and any explicit community enactment regarding the formalities of marriage), but that the man should be fined (rather than flogged) — at least in the first instance. The power of a rabbinic court to inflict corporal punishment even שלא מן הדין is, however, available in reserve, because of צורך השעה (the nature of which, in the present circumstances, is not further defined: it may well consist in the fact that the widow has invoked the assistance of the gentile authorities). He goes on, however, to indicate that such problems may be avoided by an appropriate communal enactment — one reciting the community's power of expropriation should the parties not comply with the marriage regulations stated in the *takkanah* — whether enacted by a single community or more: הקהל ות או כל קהל ה וקהל ה. If more than one, he indicates, they should act "jointly" (במעמד כל ם).

4.3.4 In a responsum by Ribash,[196] however, the reserve hinted at by Rashba (§4.3.2) generates a doctrine of consensus. I have labelled these extracted paragraphs A-K, for ease of reference

A. Your question[197] is: The community agreed to adopt an enactment providing that no one may marry any woman except with the knowledge and in the presence of the communal officials, and in the presence of ten persons; and that if anyone should violate the law and

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195 *Rashba Resp*. 1, 551, translated in Elon 1994:II.854f.; Riskin 2002:21f., rendering the final clause: "and told the community to act in this way" and comparing this with resp. 550, where he rules that the woman married in breach of the communal requirements still needs a *get*. But here, he argues, the enactment had not explicitly stated that the marriage would be void for such breach. Cf. n.294, *infra*.

196 *Resp*. #399, translated in Elon 1994:II.856-59.

197 Replying to a question posed to him by Abraham b. Alfual concerning an enactment adopted by the community of Tortosa.

marry contrary to these requirements, the marriage is void (שיהיו קדושיו נפקעין). At the time a marriage is contracted [in violation of the enactment], the community expropriates the money or other property given to effect the marriage, and the property is considered to be ownerless and of no value. The marriage is annulled (והקדושין יהיו מופקעין), and the woman may marry without any divorce (מבלי שום גט) and is not even required to obtain a divorce to remove any possible doubt.

B. You are in doubt whether the community has the power to expropriate the property of another ... [and] whether even if the rabbi and elder of the town approve the enactment, they have the power, on the basis of the principle that "all who marry do so subject to the conditions laid down by the Rabbis, and the Rabbis annul this marriage," to annul a marriage that the Torah regards as valid.

C. [You are concerned] as to whether this formula applies only to conditions laid down by rabbis who were great in wisdom and number and who also had the power to declare property to be ownerless, to punish, and to expropriate. But nowadays, when the halakhic authorities (החכמים) are regarded as being on the same level as laymen (בהדיוטות), you question whether they have the power to expropriate property (להפקיר ממון), much less to annul a marriage that meets the Torah's requirements for validity, and whether the statement "Jephthah in his generation is equal to Samuel in his generation" refers only to deciding in accordance with the Torah and [is] not [authority for] setting aside a rule of the Torah itself (לבטל דבר תורה) ...

D. Under the law of the Torah, the townspeople may adopt enactments, regulations, and agreements, and may penalize violators ... Since the townspeople agree on them, it is as if each one of them took them upon himself and became obligated to carry them out.

E. Therefore, if they enacted that if anyone marries a woman without the knowledge and presence of the communal officials, the money given the bride is to be considered as stolen money (since the community transferred it to someone else before it was given to her), then the marriage is not valid because it is as if he married her with stolen property. The conclusion in chapter *Ha-Ish Mekaddesh* [*Kidd*. 52a] is that she is not married (אינה מקודשת) ...

F. Even more so is the enactment effective if it was adopted with the approval of the scholar and elder of the town, Rabbi Moses (may God protect him), so that two elements are present: the agreement of the community and of the court ...

G. This being so, the money is not his [the groom's] and cannot be used by him to marry the woman, and therefore we need not resort to the principle that "all who marry do so subject to the conditions laid down by the Rabbis." This principle is necessary only where there was a completely valid marriage but, because of some defect in the divorce proceedings, the divorce would have been invalid under the law of the Torah and yet the Sages determined to validate it, as in the case at the beginning of Tractate *Ketubbot* [3a] ... and in chapter *Ha-Shole'ah* [Gittin 33a] ... In those cases, we rule that even though the marriage was valid, the Sages later decided to annul it retroactively, since the marriage was subject to their consent and they can annul it any time they wish.

H. In this case, however, when the community explicitly expropriated the money, the marriage was effected with stolen property and is invalid even if the man did not agree in the first instance that his marriage was subject to their consent.

I. ... In addition, even if we had to resort to the rationale of "all who marry do so subject to the conditions laid down by the Rabbis" to justify every annulment of marriage, we may also state that "all who marry do so subject to the conditions laid down by the community in its enactments," since all who marry without any express stipulations as to the terms of marriage do so in accordance with the customs of the town.

לטעם: דכל דמקדש, **אדעתא** דרבנן מקדש; הנה יש לנו לומר
ג"כ: כל דמקדש, על דעת הקהל ותקנתם, **הוא** מקדש.
שהמקדש סתם; מקדש על דעת מנהג העיר

J. .... Thus, we reach the conclusion that the community may adopt this enactment, and a marriage that contravenes a communal enactment is invalid, and no divorce is necessary.

ולפ"ז, על ה בידינו: שיכולין הקהל לעשות תקנה זו.
והמקדש בנגד תקנתם, אין קדושיו קדושין, ואינה צריכה גט

K. This is my opinion on this matter in theory. However, as to its practical application I tend to view the matter strictly; and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred, so that only a "chip of the beam"[198] should reach me [*i.e.*, so that I do not take upon myself the full responsibility, but only part of it].

להלכה. אבל למעשה, הייתי חובך להחמיר, ולא הייתי סומך על דעתי זה,
לחומר הענין: להוציאה בלא גט. אם לא, בהסכמת כל חכמי הגלילות.
כי היכי דלמטיין, שיבא מכשורא

It is clear that the communal enactment whose validity is here debated had sought to "cross the i's and dot the t's", by reciting the automatic expropriation of the *kesef* used to effect the *kiddushin* and by stating the effect of breach (of the requirement of the presence of the communal officials and a *minyan*) not simply as the annulment of the marriage but as including the capacity to remarry "without any divorce" (A). But the questioner is unsure whether the community (still) has authority to expropriate and whether even the local rabbinate may still exercise the power of imposing conditions on marriage under the principle of כל דמקדש (B), fearing that the status of the contemporary authorities is now no greater than that of laymen (C). We may wonder what prompted this questioning of rabbinic authority, despite the views of Rashba (§4.3.3) a generation or so earlier. Or had the movement to involve the laity, by attributing to the *kahal* some powers previously reserved for the rabbinate, backfired, so as to suggest that the status of the rabbinate itself was now no greater than that of the laity? Ribash seeks to reassure the questioner: there is an (independent) power conferred by the Talmud on בני העיר.[199] Moreover, he buttresses this with a "consensual" argument (D): the communal institutions represent the people, so that the people are by such *takkanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages. The classical talmudic basis of annulment, by expropriation of the *kesef*, is therefore present (E). He adds that the approval of the local scholar is an additional support (F), though seemingly Ribash does not here regard it as essential. This basis obviates the need for use of the כל דמקדש principle (G), which, as we have noted (§4.1.3), Ribash regards as necessary only where the initial *kiddushin* was valid (and not retrospectively invalidated by confiscation, the marriage having subsisted normally until the circumstances prompting a divorce). Here, however, there was no valid *kiddushin* at all, so that no question arises as to whether the groom entered such *kiddushin* having agreed to rabbinic conditions (H). He adds, moreover, that even if it were necessary to rely upon the principle of כל דמקדש in cases such as this (as well as cases of abuse of the *get* procedure), the questioner need not hesitate in attributing that power to the community (על דעת הקהל) as well as to the Rabbis (I); the consensual basis is here invoked again, to the extent of specifying that when the people of that town marry (after the *takkanah*) they need not even recite that they are doing so in accordance with the conditions laid down by the *kahal*. Having once agreed to those conditions by enacting the *takkanah,* the conditions will serve as implied terms (binding even on one who מקדש סתם). Ribash concludes unequivocally that the community has the power to adopt the proposed *takkanah* (J). That being so, the final paragraph comes as a surprise. Ribash is not willing to bear the responsibility for this decision alone; he requires the concurrence of "all the halakhic authorities of the region" (הסכמת כל חכמי הגלילות) — despite the fact that he had pronounced the approval of the local scholar as desirable but not essential (F). We are thus left with a paradoxical situation: such a power of communal enactment may itself be halakhically exercised without a consensus of rabbinic authorities, but a consensus is required for a formal *haskamah* for such exercise, since the individual authority consulted is reluctant to take sole responsibility for giving such an *haskamah*. As Elon observes (1994:II.856), this reflects a desire

198 שיבא מכשורא, cf. *Sanh*. 7b: "When a case was submitted to R. Huna he used to summon and gather ten schoolmen, in order, as he put it, that each of them might carry a chip of the beam" (Soncino Talmud, Sanhedrin I, p.28, translated J. Schachter).

199 *B.B*. 8b, cited also by *Rashba*, *Resp*. 1, 1206, §4.3.2, above.

"to divide the responsibility for the decision among as many authorities as possible".

4.3.5 Elon views this as the start of a trend against annulment, particularly from the 14th century[200] (which also saw the beginning of a decline in the use of *takkanot* as such[201]), but notes that such enactments were still being adopted in the 18th and 19th centuries by certain Sephardi communities.[202] The context for annulment, he observes, was the abuse of the *kiddushin* procedure specifically to put the "husband" in a position to demand money in exchange for a *get*. The "modern" problem of *agunot* thus appears to be of medieval origin. Elon notes that this kind of trick occurred in all eras, and although the argument could be made that the marriage was invalid *ab initio* (for lack of real consent on the part of the woman), the halakhic authorities required a divorce in order to permit her to remarry (especially where there might be doubt as to the evidence relating to consent). For a while, annulment authorised by *takkanah* (rabbinic or communal) provided a remedy; indeed, according to Schereschewsky, some *takkanot* provided for annulment specifically on the husband's wilful refusal to grant a *get*.[203] But with the demise of annulment, particularly amongst Ashkenazi authorities from the 14th century, a variant on the traditional "trick" has, in effect, returned to haunt us.

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200 1994:II.847. Cf. Riskin 2002:22f., comparing Tashbets 2:5 and 1:133 (cf. Elon II.861f.). Novak 1981:196 observes: "On the other hand, theoretical difficulties, aside from the question of practical implementation, were raised by other medieval halakhists. Thus the fifteenth century Italian authority, R. Joseph Kolon (Maharik), objected that if the annulment of marriages improperly initiated were indeed a current rabbinic option, then why did the rabbis not annul polygamous marriages which have clearly violated the ban (*herem*) of the eleventh century Franco-German authority, Rabenu Gershom? This is based on the opinion of the thirteenth century authority, R. Mordekai ben Hillel Ashkenazi, who argued that the rabbis refrained from annulling certain marriages: not only those in violation of the ban of Rabenu Gershom but also those in violation of rabbinic law (*sheniyot*) and even some in violation of Scriptural law (*averot de'orayta*). These counter-examples seem to indicate that one may not generalize from the two cases discussed in the Talmud, that the rulings there were ad hoc in character. This argument is repeated by R. Joseph Karo, R. Moses Isserles and R. Elijah of Vilna — a most formidable halakhic trio."

201 Elon 1973:726f., also dating the demise of *takkanot* as a source of halakhic innovation to this period: "Another material phenomenon in post-geonic Jewish legislation was the gradual consolidation of the view that the legal source of *takkanah* should not be resorted to in order to affect, in any manner contrary to the existing *halakhah*, the validity of a marriage or divorce. The already mentioned isolated opinions to this effect were reinforced, from the 14th century onward, by numerous other opinions holding that the operation of the guiding principle stated by the *amoraim* (on marriage subject to rabbinical requirements and its retrospective annulment) should be confined to the cases of its application in talmudic times."

202 1994:II.874-78. Riskin 2002:26 cites Freiman 1944:345, for a list of seven such enactments between 1804 and 1921 in Italy, France, Algeria and Egypt.

203 Schereschewsky, "Agunah", *Enc. Jud.* II.433, writes: "It was also sought to avoid the disability of an *agunah* by the enactment of a *takkanah* by halakhic scholars to the effect that the *kiddushin* should be deemed annulled retroactively upon the happening or non-fulfillment of certain specified conditions, such as the husband being missing or his willful refusal to grant a *get*. But this *takkanah*, based on the rule that "a man takes a woman under the conditions laid down by the rabbis ... and the rabbis may annul his marriage" (Git. 33a), has rarely been employed since the 14th century." He does not cite the primary source for this, but appears to be relying upon Freiman 1944:385–97; M. Elon, *Hakikah Datit* (Tel-Aviv: Hakibbuts haDati, 1968), 182–84, and the judgment in an Israeli case: PD, 22 pt. 1 (1968), 29–52 (Civil Appeals nos. 164–7 and 220–67). Similarly, Morgenstern (internet version):ch.1 writes: "The power was not limited to Kiddushei Ta'ut but virtually exercised when ever the marriage was deemed dead because of situations created by the husband and for situations intolerable to the wife, or for the inability of the Bet Din to coerce the husband to give the Get. It was also used to terminate the status of Mamzeruth." He cites, *inter alia*, Maharsham 1:9; Ohr Zeruah Rabbenu Simcha #761; lgros Moshe (Moshe Feinstein) part I, chapter 78 end; Dvar Eliyohu (Rav Eliyohu Klotzkin) Chapter 48 (towards the end); Ohel Moshe (Rav Moshe Zweig) Part 2 Chapter 123.

4.4 *Kiddushe Ta'ut*

4.4.1 Although several of the cases of annulment we have surveyed address issues of consent, the question of *mistake* vitiating consent does not appear in the literature until a relatively late stage.[204] Rabbi Howard Jachter has recently reviewed the history.[205] The Talmud discusses the effect of the discovery of unknown "defects" in the woman, not the man;[206] the remedy is a *get*. It is not until Tosafot that we encounter the view that in some cases — notably, that of an unambiguous *Aylonit*[207] — no *get* is required since the marriage is considered invalid, but even here many Rishonim (including Rabbenu Tam) rule that a *get* is rabbinically required for fear that the husband might have been prepared to marry her anyway.[208] Jachter concludes that "all opinions agree that there are precious few circumstances in which a marriage can be invalidated if the man finds a severe defect in the woman he married."[209] As for defects discovered in the husband after the marriage, the issue is not addressed until the Aharonim. Some take a strict view and hold the marriage valid even despite discovery of "an extremely severe flaw in her new husband, such as that his male organs are missing or damaged";[210] others are willing to invalidate the marriage in such circumstances, at least "if other lenient considerations exist, such as if a witness to the wedding ceremony was unqualified to serve as a witness or if the husband is missing and possibly may be dead".[211] In the absence of such considerations, the wife still requires a *get* "on a rabbinic level":

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204 Unusually, Jewish law has no principled objection to mistake of law, and two of the grounds published on behalf of the Rackman/Morgenstern court are of this character: that the wife did not realise, at the time of the marriage, that there was a possibility that she might ultimately find herself "chained" (*Kiddushei Ta'ut II*) and that "no woman views marriage as a transaction in which her husband "acquires" her" (*Kiddushei Ta'ut III*: Lack of Informed Consent to *Kinyan*): see Aranoff 1997. Both of these grounds are strongly attacked by Bleich 1998, but no objection is raised to the fact that they are based on mistake of law.

205 2000:40-47; *idem*, "Unaccepted Proposals ... IV and V", http://www.tabc.org/koltorah/aguna/aguna59.7.htm and ///59.8.htm.

206 Cf. Bleich 1998:101f., which leads him to a position impliedly less open to *kiddushei ta'ut* than Rav Feinstein, arguing (at 98f.) that such mistakes are not a ground for annulment: "the marriage here is merely of doubtful validity, and therefore a *get* is still required."

207 A sterile woman who is also "devoid of feminine characteristics" (Jachter, 2000:41). The term first occurs in *M. Yev.* 1:1. Bleich 1998:99f. notes that though there is a general presumption that a man would not knowingly enter into a marriage with such a woman, there is some dissenting opinion even here.

208 Jachter, 2000:41 n.3, and www.tabc.org/koltorah/aguna/aguna59.7.htm for sources. Cf. Bleich 1998, and n.206, *supra*.

209 In http://www.tabc.org/koltorah/aguna/aguna59.7.htm. Cf. 2000:47.

210 Jachter, 2000:43, and http://www.tabc.org/koltorah/aguna/aguna59.8.

211 *Ibid.* The importance of (but not necessity for) additional grounds is recognised by the *Beit din le'inyenei agunot*. (Rackman). The 2001 *psak* published by Rabbi Toledano states: "Thus, Rebecca's marriage to Saul may be annulled retroactively either on the grounds of mekah ta'ut or because of invalid witnesses. Certainly when both grounds are combined, as in Rebecca's case, even some halakhic authorities who accept the concept of mekah ta'ut in theory but hesitate to actually annul a marriage (halakhah le-ma-aseh) on its basis, even they agree to annul the marriage retroactively when mekah ta'ut is combined with some other factors (be-tziruf ta'amim aherim) such as the unfitness of one of the witnesses." He cites Rabbi Abraham Aharon Yudlovich, She'elot u-Teshuvot Bet Av, Vol. VIII, No. 28; Rabbi Moshe Rozen, She'elot u-Teshuvot She'elat Moshe, Eben ha-Ezer, No. 2. See also Aranoff, Response: "4. We reiterate that publication's statement that the *Beit Din L'Ba'ayot Agunot* usually adds many more reasons in the process of dissolving the marriages that come before it in light of the particular details of each case. For example, one basis for dissolving marriages which was not discussed in our publication is finding a technical defect in the wedding ceremony such as invalidating the witnesses. In his Shabbat Shuva drasha of September 26, 1998, Rabbi Haskel Lookstein cited the fact that Rabbi Moshe Feinstein was known to use this technique to free *agunot*. Rabbi Feinstein's grandson Rabbi Mordechai Tendler confirmed this recently in a November 23, 1998 Jewish Telegraphic Agency interview with Debra Nussbaum Cohen. Rabbi Tendler stated that he has annulled hundreds of marriages, applying the criteria mapped out by his grandfather who "freed" women … if the wedding itself was not Orthodox or if there had been some technical flaw in the ceremony."

Jachter cites the *Beit Halevi* for the view that "there is absolutely no room to say that she does not need a get, for even if a man finds a severe defect in a woman, a get is rabbinically required."[212]

4.4.2 It is against this background that a number of decisions of Rav Moshe Feinstein are regarded by Jachter as "extraordinary"[213] (though he does not take them to be erroneous or invalid). Citing *Igrot Moshe E.H.* 1:79, where Rav Feinstein annulled the marriage in a case where the husband was incurably impotent[214] before the marriage, he describes Rav Feinstein's position thus:

> He reasons that some defects are so severe that it is without a doubt that no woman would have married this man. Rav Moshe takes issue with Rav Yitzchak Elchanan and argues that no woman would marry an impotent man. Thus, just as a man who marries a women who is an "Ailoneet" does not require a Get, so too a woman who married a man who is impotent does not require a Get. Rav Moshe takes this exceedingly bold argument (it is bold because, as Rav Yosef Henkin notes in his Peirushei Ibra p.43, it lacks any textual basis in the classical sources) one even bolder step further. He argues that even Rabbeinu Tam, ... who rules that in a case where a man discovers that his wife [is] an "Ailoneet" a Get is needed to terminate the marriage, would agree that if a woman discovers a preexisting severe defect in the husband she does not require a Get to remarry.[215] This is because, argues Rav Moshe (with no textual support for this argument), only a man would possibly agree to marry a woman with a severe defect, because he has a relatively easy halachic exit from the marriage. However, it is obvious to all, argues Rav Moshe, that no woman would marry a man with a severe defect. She would never take a risk that perhaps she would tolerate the man's problem, because she knows that in the likely event that she will be dissatisfied, she has no easy halachic mechanism to escape the marriage.[216]

The cases in which Rav Feinstein "suggested applying this ruling" are listed by Jachter as (1) an impotent man" (E.H. 1:79); (2) "a man who concealed that he had been institutionalized prior to the marriage" (E.H. 1:80[217]); (3) "a man who concealed that he vehemently opposed having children

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212 Jachter 2000:44, and http://www.tabc.org/koltorah/aguna/aguna59.8.

213 Jachter 2000:45, and http://www.tabc.org/koltorah/aguna/aguna59.8. Reference is sometimes made to a responsum of R. Isaac Elhanan Spektor in the nineteenth century, as anticipating Rav Moshe Feinstein's approach. See, e.g., M.S. Goldberg, "Case Study Number One", *Jewish Law Watch* (Jerusalem: Schechter Institute of Jewish Studies, 2000), 13, citing *Responsa Ein Yitzhak*, Pt. I, *Even Ha'ezer*, no. 4, subpar. 41. It figures prominently in the three articles by Susan Aranoff, "Principles", "Response", and "Two Views of Marriage", all available at http://www.agunahintl.org/.

214 As quoted in Goldberg, *supra* n.196, at 16: "Regarding a woman who was married to a man and immediately after the wedding it became apparent that he was impotent and could not consummate the marriage ... for if she had known that he was not able to have sexual relations, she would certainly not have betrothed herself to him ... therefore, we see that it is an absolute defect ... and therefore we should rule this as a case of a mistaken transaction and annul the betrothal."

215 Goldberg 2000:13 quotes the responsum thus: "... there are many women who would not agree to marry a man who has even a small defect, and if he has a large defect, most women would not agree, because Resh Lakish's principle ["It is better for two to live together than to live alone"] applies only in cases where a woman would agree [to marry such a man]." On the principle "It is better for two to live together than to live alone" (*Tav Lemetav Tan Du Milemetav Armelu*), see Bleich 1998 and the response of Aranoff, "Two Views of Marriage ...", http://www.agunahintl.org/.

216 Jachter, http://www.tabc.org/koltorah/aguna/aguna59.8; cf., with very minor alterations, 2000:45.

217 As quoted in Villa 2000:16: "Regarding a woman who marries a man and after several weeks he disappeared from her ... because he has a mental illness that causes him to be afraid of people ... and she has been an *agunah* for fourteen years and is asking the rabbis to try and correct her situation ... and it is obvious that this mental illness is a major defect and makes him unfit to be anyone's husband ... it stands to reason that if she did not know her husband had this illness, and even if she did know but she thought he had been completely cured and only after the marriage did she discover he was ill and not completely cured, ... this should be considered a mistaken transaction and the betrothal should be annulled." With this, it is interesting to compare a case in the Haifa District Rabbinical Court, as 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). In this case, it was not denied that the husband had been in psychiatric care prior to the marriage and that "a short time after the marriage, while she was pregnant, it already became clear to the wife that the marriage had been

and later forced his wife to abort a fetus" (E.H. 4:13[218]); (4) "a man who concealed that he was a practicing homosexual prior to the marriage" (E.H. 4:113); and (5) "a man who concealed that he converted to another religion" (E.H. 4:83)."[219] In all these cases, he notes, the woman left the man as soon as she discovered the severe defect. As for the authority of these rulings, Jachter observed:

> Rav Moshe in these responsa certainly stretched the halacha to its outer limits and virtually no other halachic authorities have adopted his position (although a great rabbi may choose to issue a ruling in accordance with Rav Moshe's views in case of emergency when it is absolutely impossible to procure a Get from the husband).[220]

On this view, it would thus appear that even today it is possible for an outstanding Rabbi to extend the ambit of halakhic remedies, without a consensus as to the substance. Indeed, on this account he may set a precedent which, in limited circumstances, others appropriately qualified may follow.

4.4.3 Jachter does not, however, view the practices of the Rackman-Morgenstern *bet din*[221] as falling within these parameters.

> Rabbi Rackman argues that if a husband abused his wife during the course of the marriage, his actions indicate that at the time of the wedding he "had the seeds" of an "abuser personality." Since no woman wants to marry an abuser, the marriage is nullified on the grounds of "*Kiddushei*

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based upon mistaken assumptions" (at 332). It is acknowledged (at 342) that Rav Feinstein permitted annulment on the grounds of "erroneous purchase" (*mekah ta'ut*) if it is impossible to obtain a *get*. "However, the Rabbinical Courts in Israel have never taken such a far-reaching step as annulling a marriage; in our case as well, we must emphasise that the person in question is not considered to be completely insane, like the person described in the above *responsum*. Nevertheless, it seems that one may use this as support for resorting to a solution of "compelling by way of forcing the options," in a case in which it can be argued that the marriage was mistaken, and there is basis for drawing a connection between his illness and the treatment he received, and the peculiar relations between himself and his wife, and his anger and beatings." Indeed, most of the discussion relates to the permissibility of coercing a *get*, the court taking a *via media* between Rambam and his opponents by permitting coercion (albeit not by physical means) provided that the wife's plea of *ma'is alay* is supported by a reason for her claim (here, domestic violence). See esp. 343f., citing *Hut hameshulash* on *Resp. Tashbets*, Pt.II, no.8, and *Sefer Tashbets*, Pt.IV, sec.35. And see *Resp. Rosh* 43:8, at n.132, *supra*.

218 He notes however that this responsum is concerned only with the status of the children from the woman's second marriage, not the woman's ability to remarry.

219 2000:46; in his earlier treatment at http://www.tabc.org/koltorah/aguna/aguna59.8 Jachter limits himself to the second, fourth and fifth of these cases, described as cases where Rav Feinstein "applied this ruling", though in both texts he notes the Rav's hesitation in the last case, based on lack of certainty that the woman, who was not *shomeret mitsvot*, would not have married the man even had she known he was an apostate.

220 http://www.tabc.org/koltorah/aguna/aguna59.8.htm, section entitled: "Rabbi Rackman's Error". This paragraph does not appear in *Gray Matter*.

221 Established in 1996 under the title *Beit din live'ayot aginut*. In April 1999, Rabbi Rackman set up a new *Beit din le'inyenei agunot*. Rabbi Morgenstern continued to operate the *Beit din live'ayot aginut*: See Aranoff 2000:n.10. Aranoff 1997 (the "Advertisement") was published in response to demands that the court make public its arguments. In October 27, 1998, Rabbis Michael Broyde, Yona Reiss, Gedalia Dov Schwartz and Mordechai Willig of the Beth Din of America (a New York Orthodox *bet din*) mailed a detailed critique to the membership of the Rabbinical Council of America. The latter is not published, but see Broyde, "Error". Rabbi Rackman responded in a letter of December 14th 1998 (kindly made available to me by Rabbi Howard Jachter), as did Professor Aranoff in "A Response to the Beth Din of America" http://www.agunahintl.org/. A series of articles, more substantial in extent but difficult to use for lack of editing, was published by Rabbi Morgenstern at http://www.agunah.com, but has since been taken off the internet. In 2001, Rabbi Morgenstern made a series of essays available in the form of two A4 photocopied volumes, entitled *HATOROT AGUNOT - Sexual Freedom from a Dead Marriage* (New York: privately published), in which some of the transcription errors of the internet articles were corrected, but which still require substantial editing if they are to attract serious engagement. Purchasers would be aided by the availability of an electronic version, in order to locate parallel passages and the like. The printed version offers one of the volumes as a free e-mail attachment, but this purchaser's repeated requests for such have, thus far, elicited no response.

Ta'ut."[222]

This, he argues, is erroneous, for a number of reasons. It presupposes a situation in which the marriage has lasted for some time despite the "defect", a fact which in itself "creates the presumption that the parties accepted each others faults".[223] It is not clear, moreover, that no woman would agree to marry a man with an abuser potential: this potential may remain unrealised and in any event "part of entering into marriage involves taking a risk that the husband may choose to exercise his Yetzer Hara instead of his Yetzer Hatov" (*ibid.*). In short, "When a marriage fails, one cannot say that if the marriage fails, it was not valid in the first place. Indeed, when the Shulchan Aruch (E.H. 154:3) discusses the propriety of coercing a physically abusive husband to give a Get, the option of declaring the marriage null and void is not mentioned" (*ibid.*). Indeed, in a case where a husband hit his wife — not for the first time — when she became pregnant, to force her to have an abortion, Rabbi Feinstein ruled that her children from a subsequent marriage were not *mamzerim*, although she had *not* received a *get* from the first one. However, "if the issue would be whether she can remarry, I would be afraid to permit her, because of the severity of permitting a married woman [to do so]".[224]

4.4.4 Rabbis Rackman and Morgenstern (who himself studied with Rav Feinstein and claims to remain within Feinsteinian principles[225]) disagree: they apply the principle of *Kiddushe ta'ut* (amongst other arguments[226]) to the very circumstances of denial of a *get:* a woman would not consent to

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222 2000:48f.; cf., with minor differences, at http://www.tabc.org/koltorah/aguna/aguna59.8. One of his arguments here (and cf. *Gray Matter*, 49) against this is: "Just because one has an "abuser personality," this does not guarantee he will actually abuse his wife. Although some voices in the field of psychology are believers in determinism, the Rambam (Hilchot Teshuva 5:1) writes that the belief in free will is a core belief in the halachic world view. Thus, it is not clear that no woman would even agree to marry a man with the potential to be an abusive husband. This is especially so in light of the psychotherapies such as rational behavior emotive therapy which empowers a person to control their anger. The Beit Din of America (RCA-OU) summed up this argument well: "potential psychological tendencies do not create 'Kiddushei Ta'ut' since they may remain undeveloped."" Similar views are advanced by Bleich 1998:92f. (see n.229, *infra*). Riskin 2002:7f. also considers that the Morgenstern/Rackman approach wrongly expands the Feinstein criteria to include personality traits.

223 Jachter, http://www.tabc.org/koltorah/aguna/aguna59.8, citing *Arukh Hashulhan E.H.* 44:10. Supporters of the Rackman court have frequently responded to this that, if so, Rabbis counselling wives subject to domestic violence to persist with the marriage and seek *shalom bayit* should equally advise them that they thereby forfeit any prospect of annulment on the grounds of *kiddushei ta'ut*. See Rabbi Rackman's letter of December 14th 1998, p.3; Aranoff 1997; M.I. Rackman, "Communications: *Kiddushei Ta'ut:* Annulment as a Solution to the *Aguna* Problem", *Tradition* 33/3 (1999), 102-108, at 104 (a response to Bleich 1998); Toledano 2001; Freilich 2002. Of course, many such Rabbis would discount on principle any such prospect of annulment on the grounds of *kiddushei ta'ut*.

224 *Igrot Moshe*, *Even Ha'ezer* 4:13, as quoted by Dayan Berkovits, "Where 'agunah rabbi' is wrong", *The Jewish Chronicle*, Feb. 18th 2000.

225 Morgenstern (internet version):ch.II, writes: "My master Rav Moshe Feinstein freed entire classes of marriages amounting to annulling hundreds of thousands of marriages. In his day, 80-90% of the Orthodox Rabbinate opposed him. Rav Henkin, a leading Posek, told me 35 years ago that every one of the women Rav Feinstein freed, was an Eshes Ish — a married woman. All her children from the new relationship are mamzarim — illigitimate. The other alternative, when the husband refuses to grant a Get — a Jewish Divorce, is to have him beaten up by thugs until he gives a Get. Again, many Rabbis argue that such a Get is defective and the children from a second relationship are Mamzarim. The Gitin given in Israel by the Rabbonut are not recognized by the Haredim. Children from a second relationship are labeled Mamzarim. What is the woman to do? Commit suicide? Yes. In Israel and in America they do this. Many recorded cases are in my files. If one Rabbi or a group of Rabbis will disqualify the Gitin of another Rabbi, then everyone is a Mamzer."

226 Morgenstern argues, for example, that the avoidance of *mamzerut* is in itself a justification for the use of annulment: "Regardless who is at fault, all cases that approach our Bet Din Tzedek Labayot Agunot Inc. are all post mortem cases. In most cases — 90% — of the woman already have begun another relationship with man #2. In many cases children are born from man #2, without first having received a Get Jewish divorce from man #l. Thus, regardless of those Rabbis who oppose us, find a dispensation for the Agonot whose husbands refuse to give them a Get, 90% of them will

enter into a marriage had she known at the time that the husband could[227] or would arbitrarily refuse her a *get*. Such a refusal "may very well be a sign of sadism that existed before the marriage."[228] In such cases, Morgenstern argues, there is a presumption that the husband's later-manifested psychological condition existed prior to the marriage, and the husband has the burden of proving that the defect did not exist before the marriage.[229] More generally, his argument has been paraphrased thus:

> A Jewish marriage is a contract between two parties — if there is an element of misunderstanding or misrepresentation, then there is no marriage. So if a man's abusive, or addictive, nature is concealed at the time; if the woman thought she was marrying a loving Jewish husband who would abide by the terms of the contract, then she may be deemed to have made a mistake, which makes a get unnecessary. The marriage can be declared void retrospectively.[230]

However, this has been condemned as an unwarranted extension — even by Rabbi Michael Broyde, despite his view (§4.4.5, below) that what constitutes a significant defect for the purposes of *kiddushe ta'ut* varies according to the values operating in different times and places.

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go on with their lives anyway. This figure includes non observant Jews, who also come to our Bet Din. [Only 10% of Jews worldwide are Orthodox anyway]. Very few Jews are detered from going on with their lives by the red herring of Mamzarut advanced by those Rabbis who oppose us — if the Agunah marry without a Get from man #l. However they will leave Judaism, disgusted with the impotence of Orthodoxy. The Agunot we free, also, are saved and return to Judaism." ... "Of the 280 Agunot our Bet Din has freed there were cases where the first man finally gave a Get, but the Bet Din failed to use procedures during the issuing of the Get that would have, in effect, been an annulment of the marriage to man #l . In effect, the children from man #2 would have escaped the stigma of Mamzarut. The procedure was used in Israel by chief Rabbi Gorin and documented in a pamphlet known as the Get of the Mahrsham Vol I-Responsa #9. The Get is given by an agent rather than the husband. When the agent leaves the Rabbinical Court his agency is revoked." See Morgenstern (internet version): "Agunah Rabbi Is Right. Rejoinder To Dayan Berkowitz."

227 Morgenstern, *ibid.*, writes: "... All the Agunot that I met were never told by the Rabbis who officiated at their wedding what awaits them if their marriage dies and their husbands refuse to give them a Get. They were not told that the Bet Din would not use any of the remedies I enumerated above to save them from eternal prison and any children they have with man #2 if they do not have a Get from being branded as Mamzarim. How many thousands of other brides, likewise did not have full disclosure? The Rashbah Chidushei Gittin 88B 600-700 years ago ruled that no woman would have an Hallachic marriage if the Rabbinical Court would not force her husband to give her a Get when the marriage dies. Failure by the Rabbinical Court to save Agunot from the chains of a recalcitrant husband who refuses his wife a Get by annuling the marriage, in itself constitutes another ground for annulment - Mekach Tout - mistake in the marriage. No woman or her parents would agree to have an Hallachic marriage would they have had full disclosure of the consequences if the marriage dies and the husband refuse them a Get." Cf. *Kiddushei Ta'ut* II in Aronoff 1997.

228 Morgenstern (internet version):ch.IV.

229 Morgenstern, *ibid.*, citing, *inter alia*, Taz Yorah Dayoh 3:5, 2:7, Aruch Hashulchan Even Hoezer 37:42. Cf. Aranoff 1997: "Building on this concept of kiddushei ta'ut, a beit din may recognize other intolerable defects in the husband as grounds for a declaration of kiddushei ta'ut. These defects — which are in total discord with any reasonable concept of marriage — include: physical and psychological abuse, adultery (which more than ever endangers the life of the spouse), sexual molestation, abandonment, criminal activity, substance abuse, and sadism (the withholding of a get may be viewed as indicating a sadistic nature). A beit din, applying a psychologist's or psychoanalytic concept of human nature, may hold that the seeds of such deviant behavior are present in the groom at the inception of the marriage though they may not yet have expressed themselves in overt behavior." Bleich 1998:92f. rejects, as an expression of determinism, the claim to a causal connection between character defects and some pre-existent psychological state. He distinguishes between glaucoma and blindness on the one hand, and an unexpressed character defect and its later expression in conduct: in the former case, there is a "necessary causal nexus". Rather, Bleich applies the opposite presumption: if the husband did not display a salient defect (and he is doubtful as to the status of "sadism" in this respect) before the marriage, then there is a *hazakah* that his "healthy" state continued until there is evidence to the contrary. At 1998:96 he defines the concept of *hazakah* thus: "any known state or status, whether physical or a halachic construct, is deemed to persist unless and until there is tangible evidence that a change has occurred."

230 Adam Raphael, *The Jewish Chronicle*, September 25, 1998.

4.4.5 Broyde states the conditions for annulment on the basis of *kiddushe ta'ut* thus:[231]

(1) The woman must discover a serious defect present in her husband after they are married.
(2) That defect must have been present in the husband at the time of the marriage.
(3) The woman must have been unaware of the defect at the time of marriage.
(4) The woman must discontinue marital relations with her husband either immediately[232] or very soon[233] after the discovery of the defect.

We may note that nothing is here said about the husband's knowledge of the defect. This remedy is based on mistake, not fraud,[234] notwithstanding the fact that the cases decided by Rav Moshe Feinstein do appear to have involved knowing concealment on the part of the husband (§4.4.2).

Broyde (along with Rabbi Bleich[235] and others) argues that Morgenstern goes far beyond this, especially as regards condition no.2.[236] At the same time he recognises — contrary, apparently, to

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231 Broyde, "Error", *supra* n.72, cf. 2003:40*. For a slightly different formulation of the conditions, derived from the responsa of R. Moshe Feinstein, see Riskin 2002:7, who includes a requirement that the defect would have deterred "most people" from the marriage (based on *Igrot Moshe, Even Ha'ezer* I.179).

232 He notes the insistence of R. Moshe Feinstein on this: "One of the frequent issues in the area of *kidushai ta'ut* relates to what is the response of the woman or man upon discovery of the error in the creation of the marriage. Does he or she leave the marriage immediately? Rabbi Feinstein's final comments on the bisexual husband (Igrot Moshe EH 4:113) quoted above are worthy of further discussion. He states: "If as soon as she found out that he was bisexual she left him, it is logical that if one cannot convince him to give a *get*, one should permit her to remarry because of the rule of *kidushai ta'ut*....." Rabbi Feinstein repeats this again: "But all this [Her ability to leave without a *get*] is limited to when she leaves him immediately, but if she lives with him (sexually), it is difficult to rule the marriage void." This factor is significant to understand. Shulchan Aruch EH 31:9 rules that a couple that has an improper wedding ceremony for a technical reason (such as the wedding ring was worth only half a *prutah*), when they discover the defect and continue to live together (sexually), that decision creates a valid marriage at that moment of their sexual relationship since both parties were aware of the defect and aware of the fact that they could leave the marriage because of it, and chose not to. [n.67: Such is our practice, for example, when individuals who are married in a civil ceremony become religious. When they realize that their civil marriage was void in the eyes of halacha and yet continue to stay married, they are married.]"

233 Jachter, http://www.tabc.org/koltorah/aguna/aguna59.7.htm, cites *Aruch Hashulchan (E.H.* 39:13) for the view that if they remained together as husband and wife for "much time" the marriage is certainly valid despite the defect since remaining together indicates that the husband considered the *mum* to be insignificant.

234 Cf. Bleich 1998:99: "fraud or mistake". Comparing ordinary contractual situations, and citing *Hullin* 50a ("If one sells a cow and it turns out not to be kosher, the sale is void"), Broyde, "Error", observes: "It is important to grasp that the buyer's argument in the talmudic case is not predicated on fraud [in the sense of intentional misrepresentation] at all." By contrast, the following interview-based account (by Netty Gross, "The Annuller", *The Jerusalem Report*, June 8th 1998, http://www.virtual.co.il/news/news/j_report/98june08/jewish.htm) suggests that Morgenstern does place emphasis on fraud (though it does not necessarily imply that he requires it): "Morgenstern's panel relies on an old principle in Jewish family law that rabbis can void a marriage if the wedding agreement is based on fraud. A marriage between two people, one of whom fails, for instance, to disclose that he suffers from AIDS, simply isn't a marriage. By withholding crucial information, the infected spouse has misrepresented him or herself. Morgenstern's method expands on that: "I ask a woman who gets beaten every night for six years the following question: If you knew that your nice, handsome fiancé had a violent temper and would be beating you on a regular basis once you got married, would you have married him anyway?" If the answer, says Morgenstern, is no, he declares the marriage void, because "the guy knew he had a serious problem before he got married and hid it from her." ... "I had a British woman," says Morgenstern, "whose husband beat her, sexually assaulted her sisters and raped her mother. And yet for nine years, this man withheld the get and the rabbis in her community would not do anything about it. Upon studying the case, I posited that this man knew he was a sexual deviant before he married this woman, concealed that fact from her, and that the marriage was therefore null and void. She flew in from London and I arranged the annulment the same day."

235 "Survey of Recent Halakhic Literature: *Kiddushei Ta'ut:* Annulment as a Solution to the Agunah Problem", *Tradition* 33/1 (1998), 90-128.

236 In fact, Broyde, "Error", argues: "The recent use of the term *kiddushai ta'ut* by the new "bet din lebayot ha-Agunot" is

Bleich[237] — that there is a "sociological" (historical) factor at work here which has increased the importance of *kiddushe ta'ut* in modern times. What constitutes a "serious defect" (to the woman: in part, a subjective matter[238]) varies from time to time, place to place, group to group, according to the values operative at the time.[239] In fact, this is an area where, he claims, the applicability of the remedy has expanded in the light of modern conditions ("The rules remain the same, even as the results might change"):

> ... while the grounds upon which women could argue that *kidushai ta'ut* occurred were extremely narrow in talmudic times, broader in the era of the Rishonim, and have grown yet further in America in the last 50 years, this halachic truth was predicated on a social reality regarding marriage. Rabbi Moshe Feinstein recognized this, and understood that *kidushai ta'ut* was a factually more plausible argument in America in the last fifty years than in other times and other places, and he advanced arguments for *kidushai ta'ut*, and for what is a significant defect (*mum gadol*), in a much larger number of cases than other halachic authorities in other places did. This sociological response is caused by the recognition that there are more and more cases in America where — had the woman been aware of the full reality at the time of the marriage as it relates to her husband — she would not have agreed to marry. (Broyde, "Error")

Nevertheless, he insists, one has to look at the issue on a case-by-case basis: there remains a

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unprecedented in halacha in that they are prepared to void every marriage in which the husband or wife develops a defect in the course of the marriage, even though none of the conditions specified above, and explained throughout this appendix as needed for error in the creation of a marriage, are present." Against this, it is argued by Goldberg 2000:12: "Recent research shows that men who express verbal and physical violence against their wives have a tendency to violence which already developed during their adolescence" (citing *inter alia* the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Washington, D.C. 1994, pp. 609-612).

237 Bleich 1998:106 claims that *tav lemetav,* the presumption that a woman prefers a defective partner to no marriage at all (see further *infra*, at n.240), "is neither reflective of a psychological truism descriptive of all women nor of a sociological generalisation regarding the reactions of the majority of women. Hence, any consideration of the possibility of *nishtaneh ha-teva*, i.e., that sociological, psychological, economic and attitudinal facts or values may have changed, is irrelevant." At 124 n. 28 he quotes with approval an assertion (in a lecture) by Rabbi J.B. Soloveitchik, that such *hazakot* posited by the Gemara do not represent "transient psychological behavioural patterns, but are permanent ontological principles rooted in the very depths of metaphysical human personality." See further n.240, *infra,* for the biblical grounding of this argument of Soloveitchik.

238 Broyde, "Error", writes: "Defects or conditions that were present at the time of the marriage, but were not revealed, which if the other party to the marriage, as well as most people in that society, had known about would have caused that other party to the marriage to refuse to enter into the marriage, can make the marriage void *ab initio*." The objective element is stressed by Bleich 1998:113, in opposing *Kiddushei Ta'ut* III (lack of consent to *kinyan*): "Consummated acts and transactions can be rendered nugatory only on the basis of demonstrable error. In the absence of objective evidence of error there must be an *umdena de-mukhah*, i.e., a general presumption so widespread that the halakhic system can take "judicial notice" that the information or intention is known by all or, as in the case under discussion, that no one possesses the item of information in question ..." He argues (1998:114) that though some women might, on being informed of this, refuse to enter into such a relationship, there is no *umdena de-mukhah* that a woman not so informed will not enter into such a relationship.

239 "In the reality of practical halacha, this problem — of what defect is sufficiently serious that the marriage is void — is expressed in the technical literature as a discussion of what the minimally acceptable attributes of marriage are given the modern state of marriage, and the social and economic reality of the times. This varies from time to time, place to place, and as Rabbi Moshe Feinstein notes, from level of religious observance to level of religious observance", citing *Igrot Moshe E.H.* 4:83(2) in the last sentence of that section. Here, Broyde is closer to the Rackman court than to Bleich. Toledano 2001 writes: "Those who oppose expanding the scope of Rabbi Feinstein's use of mekah ta'ut to include other salient defects and personality disorders that make it impossible for the wife to stay with her husband apply the principles of niha lah and tav le-metav in an absolute way. They apply these principles indiscriminately to all women and in all situations regardless of the particular circumstances of any given case. Nor do they take into consideration the new social reality in which women are educated and economically independent and therefore do not have to settle for defective husbands when other healthy and honorable choices are available."

rebuttable talmudic presumption[240] that "women are better off married, even in ... less than ideal relationships, than single.[241] This principle ... can be deemed *inapplicable* in any given case when it can be shown to be untrue given the facts of any specific man and woman, or indeed any given category of specific men and women." For example, he cites Rav Moshe Feinstein, *Igrot Moshe E.H.* 4:83, for the view that the presumption is inapplicable to people who are not religious.

4.4.6 Who has the authority to pronounce annulments? While arguing that this power has not disappeared — indeed, its use, he argues, has become all the more necessary (and valid) given the effective disappearance of the power to coerce physically — Morgenstern accepts that any court exercising this power must be duly qualified:

> If anyone other than a Rav who has mastered the four codes of the Shulchon Aruch follows the procedures we discuss, there is no annulment. The reason is because every annulment, ipso facto, uproots Torah law that only the husband is empowered to divorce his wife. Only the Godol, one who mastered four codes of Shulchon Aruch, is empowered to overrule this Law.[242]

Naturally, he insists that he and his colleagues possess these qualifications.[243] Equally naturally, this is disputed by his opponents.[244] Yet even if the Rackman and Morgenstern courts were composed exclusively of persons universally acknowledged as *gedolei hador,* with authority not only to endorse the "extraordinary" approach of Rav Moshe Feinstein, but also to extend the category of "defects" regarded as salient, and interpret with some flexibility the demand for immediate termination of the relationship on discovery of the defect, the approach of annulment on the basis of *kiddushei ta'ut* could not provide a global solution to the problem of *iggun*, unless *get*-refusal were in itself to be viewed as conclusive evidence of such a defect, and one which pre-existed the marriage, and which, irrespective of the values of the particular wife, would have generated rejection of the marriage had it been known by the bride at that time. Just as advocates of *kiddushei ta'ut* may oppose what they see as the elevation, against them, of *tav lemeitav* to the status of a conclusive presumption that women prefer marriage to a defective partner to no marriage

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240 The status of *tav lemetav* (*supra,* n.237) is described by Bleich in somewhat equivocal terms. Though describing it as an "aphorism" (1998:106), it encapsulates a "principle" with a "technical halakhic application". At 1998:105, he describes it as generating a "presumption". Aranoff 2000, however, claims: "The concept of *tav lemetav*, Bleich says, is an immutable halakhic principle applicable to women" (see also n.245, *infra*) and argues at length (Aranoff 2000: "*Tav Lemetav* in the Talmud") for a far weaker status, in the context of its use in the Talmud. Her grounds for attributing to Bleich the view that *tav lemetav* has the status of an "immutable halakhic principle" appears to be his footnoted quotation from Soloveitchik (Bleich 1998:124f. n.28; cf. n.237, *supra*), in which the latter bases himself on *Gen.* 3:16: "And thy desire shall be to thy husband", which he interprets as "a metaphysical curse rooted in the feminine personality. She suffers incomparably more than the male while in solitude … And this will never change ... It is not a psychological fact; it is an existential fact." It may be doubted whether Bleich intended to derive from this the precise halakhic consequences attributed to him.

241 Citing Rav Moshe Feinstein, *Igrot Moshe E.H.* 4:113, *E.H.* 4:83 and *Acheizer* 1:27.

242 Morgenstern (internet version):ch.III.

243 Morgenstern (internet version): "Agunah Rabbi Is Right. Rejoinder To Dayan Berkowitz"): "I have the approbation of Horav Piekarski, the Hallachic expert of the late Lubavitcher Rebbi, on my works on the four parts of the Shulchan Aruch.-Code of Jewish Law. I equally have written numerous volumes on Hatorat Agunot Bnos Yisroel freeing chained Jewish daughters-Agunot. I have the approbation of Horav Steinberger, the greatest living sage of the twentieth century on this work. Thus our Rabbinical Court is qualified to free Agunot. We are one million percent sure that what we are doing is in accordance with Hallacha."

244 Jachter, http://www.tabc.org/koltorah/aguna/aguna59.8.htm, writes: "In August 1998 the Rabbinical Council of America, circulated a document signed by Rabbi Moshe Morgenstern. This document stated that a particular woman was permitted to remarry on the basis of a "Get" granted by a court on behalf of the recalcitrant husband. The document contained numerous errors in the basic procedures and laws of Gittin (such as the spelling of names), and appears to indicate Rabbi Morgenstern's lack of familiarity with the vital, practical intricacies of the laws of Gittin. The Shulchan Aruch (*E.H.* 154) Seder Ha-Get introduction rules that one should treat the Gittin of such an individual as invalid."

at all,[245] so too must they accept, as does Rabbi Rackman in his letter of December 1998,[246] that determination of *kiddushei ta'ut* has to proceed on a case-by-case basis: thus, some such cases will succeed, others fail.

4.5 *Takkanot* in Israel

4.5.1 Elon argues that the reluctance to adopt post-Geonic legislation in areas of marriage and divorce reflects the fear that different communities may adopt different rules. However, he maintains, the situation has changed with the establishment of the State of Israel, and the authority accorded to its halakhic institutions. In the 1930's and 1940's they were prepared (in general) to adopt *takkanot*:

> A certain change took place as from the 1930s, coinciding with the establishment of the organizational institutions of the Jewish settlement in Erez Israel, notably the Chief Rabbinate Council. The Jewish judicial authority in matters of family and succession introduced a period of legislative activity on the part of the halakhic institutions ... Thus payment of court fees was imposed in connection with litigation — contrary to the existing *halakhah*. Similarly, the introduction of adoption as a legal institution represented an innovation in Jewish law ... In 1944 the following three matters were enacted in different *takkanot*: the minimal amount of the *ketubbah* was increased "having regard to the standard of living in the *yishuv* and economic considerations"; the levir refusing to grant the widow of his deceased brother *halizah* was rendered obliged to maintain her until releasing her; the legal duty was imposed on the father to maintain his children until reaching the age of 15 — not merely until the age of six years as prescribed by talmudic law. Included in the matters laid down by *takkanah* in 1950 was the prohibition against the marriage of a girl below the age of 16. The introductory remarks to the *takkanot* of 1944 emphasize the twofold basis of their enactment, halakhic authority and the assent of the communities of the *yishuv* and their representatives.[247]

Since then, Elon observes, legislative activity on the part of the halakhic authorities in the State of Israel has dried up. He regards this as regrettable, and points particularly to the problem of the *agunah*. Elon thinks that the halakhic authorities in Israel may (or should?) now command sufficient "standing" to enact appropriate *takkanot,* again using the talmudic institution of annulment on the basis of כל דמקדש:

> ... there still remain diverse halakhic problems awaiting solution by means of the legal source of *takkanah*. There is particular need to give attention to a number of problems concerning the *agunah* and other cases involving hardship to women — among others, of the married woman whose husband is unable to give her a *get* on account of his mental illness and cases in which difficulties arise in connection with the granting of *halizah*. Solutions to these problems are capable of being found through the enactment of *takkanot* leading to an annulment of marriage in special cases, in the manner and by virtue of the talmudic principle described above in some

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245 Thus, Aranoff 2000: "Its representatives contend that the Talmudic phrase *tav lemetav tan du milemetav armelu*, "better to dwell two together than to dwell alone," is a binding halakhic principle that negates the new *beit din*'s approach to freeing *agunot* from their intolerable marriages." Cf. Toledano 2001: "Those who oppose expanding the scope of Rabbi Feinstein's use of mekah ta'ut to include other salient defects and personality disorders that make it impossible for the wife to stay with her husband apply the principles of niha lah and tav le-metav in an absolute way. They apply these principles indiscriminately to all women and in all situations regardless of the particular circumstances of any given case." But see n.240, *supra,* for Bleich's position.

246 "The crux of the B.D.A.'s argument is that "as a factual matter" all women, when they marry, know that they may be trapped. Our *bet din,* on the other hand, does not make such wholesale findings of fact." Cf. M. Rackman 1999:102f.: "The most unfortunate remark in R. Bleich's introduction is the last sentence: "Three separate grounds are advanced [in the *Jewish Week*] in support of a determination that the marriages of (apparently all) *agunot* were defective from inception and hence are the subject of annulment without need of a *get*" (p.91). The phrase (apparently all) is R. Bleich's creation. R. Rackman has never taken this position, and every case in his *bet din* is decided on its own merits."

247 Elon 1973:727f.

> detail. The already mentioned threat of a proliferation of laws and lack of uniformity on a matter of great halakhic sensitivity, which inhibited past generations from acting on the stated principle, has much abated in modern times in the light of the central spiritual standing which may be allocated to the halakhic authority in Israel in its relations with other centers of Jewry in the Diaspora.[248]

Yet even he puts this in terms of "special cases": he does not, seemingly, present annulment as a universal solution to the problem. A more radical resumption of the power to annul marriages was contemplated by Rav Yitzchak Herzog, in the event of the reconstitution of the Sanhedrin in Jerusalem.[249]

5.0 Conclusions

5.1 Consensus

5.1.1 It has become commonplace to hear that any proposed solution to the problem of *agunah* must command a consensus.[250] It is a matter of both academic and practical importance to identify the

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248 Elon 1973:728. See also Elon 1994:II.878f., advocating a revived use of communal enactments, in the context of the modern State of Israel, as the key to the solution of the modern problem: "It would seem that the great historic transformation of the condition of the Jewish people wrought by the restoration of Jewish sovereignty (a transformation seldom rivaled in magnitude during the entire course of Jewish history) should bring about a change in the existing reluctance to exercise the halakhic authority to legislate. Just as the reasons for this abstention were the fragmentation and dispersal of the Jewish people, the local character of communal legislation, and the absence of a central authority, so the new circumstances — the ingathering, the unification, and the creation of a central authority for the Jewish people — are reasons for renewed exercise of legislative authority. The halakhic center in the State of Israel should be, and actually is, the main Jewish center, with halakhic hegemony over the entire Jewish diaspora. Consequently, it must do whatever is necessary to exercise the authority to adopt legislation, which, upon its enactment, will be, or in the course of time will become, the legacy of the Jewish people everywhere ... this new situation warrants the renewal of the full scope of creative legislative activity in all branches of Jewish law, including the law of marriage, in order to strive to perfect the *Halakhah* and promote the welfare of the Jewish people."

249 See further Jachter, www.tabc.org/koltorah/aguna/aguna59.8.htm, on Herzog 1989:1:57-91, and §5.2.3, *infra*. See also Riskin 2002:28, 35f. nn.40-41.

250 E.g. J.D. Bleich, "The Device of the Sages of Spain as a Solution to the Problem of the Modern Day *Agunah*", in J.D. Bleich, *Contemporary Halakhic Problems, Volume III* (New York: Ktav, 1989), pp.329-343, at 332: "Given the extreme and well-founded reluctance on the part of rabbinic authorities to sanction any procedure which would render the *get* invalid even according to a minority view, the remedy must avoid the taint of *asmakhta* in a manner accepted by all authorities." And at 1998:118: "... to be viable and non-schismatic, any proposed solution must be advanced with the approbation of respected rabbinic decisors and accepted by all sectors of our community." Cf. Jachter, www.tabc.org/koltorah/aguna/aguna59.7.htm: "... there have been interesting proposals made to solve the Aguna problem which have been rejected by the Orthodox rabbinate. There have been other very innovative suggestions, such as proposals made by Rav Yosef Eliyahu Henkin (Peirushei Ibra pp. 115-117) and Israeli Chief Rabbi Rav Benzion Uzziel (Teshuvot Mishpetei Uzziel, *E.H.* 1:27) which have simply not been accepted. What is crucial to note is that these proposals were not implemented in practice, because the rabbinic consensus rejected these proposals. Radical changes to Gittin procedures require a rabbinic consensus because of the potential for a communal split if part of the community rejects the proposal." Cf. Zweibel 1995:145, for whom it is critical that the validity of *gittin* given as a result of any pressure be recognised by a broad base of halakhic consensus. Zweibel argues, at 149f., that this criterion was satisfied in relation to the halakhic acceptability of the 1983 New York *get* law, but not in relation to its 1992 successor: "It has been a longstanding policy of Agudath Israel, established years ago when the *Moetzes Gedolei HaTorah* was under the chairmanship of Rabbi Moshe Feinstein זצ"ל and reaffirmed many times over the years ..., that any secular Law impacting upon *halachah* ... must have a broad base of consensus support from authoritative *poskim* respected by all segments of the Torah community. That is why ... the concept underlying the original 1983 "*get* law" was first shown to a wide array of *poskim* from various circles, and only after each of these diverse *rabbonim* gave his halachic approval was the law advanced through the legislative process. Sadly, no such a procedure was followed with

nature of the operation of consensus in Jewish law. It is *not* listed as a source of Jewish law by Elon in his four-volume *magnum opus*; indeed, "consensus" does not even appear in his subject index! It would appear that "consensus" is not regarded as an independent source of law, but rather as a new and additional condition upon the operation (in practice) of any established source of law (a "meta-source", perhaps). Thus, for example, Elon indicates that arguments based on *hilkheta kebatra'i* "must be acceptable to the contemporaries of the one propounding it",[251] and Rav Moshe Bleich observes that "it is the consensus of contemporary authorities that inordinate weight not be given to newly published material."[252] How did this come about? The traditional position, after all, is that we follow *majority* decisions;[253] indeed, the very reason for the preservation of minority decisions is to serve as a potential resource for a later majority opinion.[254] So there are historical questions to answer regarding the role of "consensus" in Jewish law.

5.1.2 Some have identified the origins of the doctrine of consensus in Maimonides. In the Introduction to *Mishneh Torah,* Rambam justifies the binding character of "all matters stated in the Babylonian Talmud" on the grounds that "with respect to all matters stated in the Talmud there is universal agreement among all Israel [הסכימו על יהם כל ישראל]."[255] This prompted Salo Baron to see here a reflection of the Islamic doctrine of *ijma*[256] (which certainly plays a more central role in the doctrine of Islamic law — as one of the four "roots" of the system[257] — than it does in Jewish law). However, we have observed that in this very context Maimonides applied the talmudic principle of *majority* decision (here applied to a majority of communities, rather than scholars), when he rejected the view of the Geonim.[258] A more likely explanation is that consensus emerged in the context of

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respect of the 1992 "*get* law"."

251 1994:I.266ff., in §3.6.3, *supra*.

252 M. Bleich 1993:45, quoted in §3.3.4, *supra*.

253 *Supra*, n.164. At www.tabc.org/koltorah/aguna/aguna59.5.htm, Jachter cites Rabbi Walter S. Wurzburger, *Ethics of Responsibility. Pluralistic Approaches to Covenantal Ethics* (Philadelphia: Jewish Publication Society of America, 1994), 7: "What makes the halacha authoritative is the belief that, although there are numerous possible interpretations of the Torah, we are supposed to follow for normative purposes the decisions reflecting the majority opinion of the competent scholars of one's time." Breitowitz 1993:65 n.181 notes the view of Maharam Alashkar, *Resp*. #48, who permits annulment beyond the cases enumerated in the Talmud with the agreement of a majority of communities within a single country: see n.262 *infra*; and *Hilkhot Ishut* 14:14, *supra* §3.5.2.

254 See n.165, *supra*.

255 See also Michael S. Berger, *Rabbinic Authority* (New York and Oxford: Oxford University Press, 1998), 111.

256 S.W. Baron, *A Social and Religious History of the Jews* (Philadelphia: Jewish Publication Society of America and New York: Columbia University Press, 1958, 2nd ed.), VI.100 (I am indebted to Prof. Gerald Blidstein for this reference).

257 See, e.g., Joseph Schacht, *An Introduction to Islamic Law* (Oxford: The Clarendon Press, 1966), 60, 114; A. Hassan, *The Doctrine of Ijma in Islam* (Islamabad: Islamic Research Institute, 1976), who notes, at 80, that "the disagreement of even a single competent scholar invalidates ijma". Chapter XIII is devoted to a comparison of *ijma* with institutions of Hindu, Jewish and Canon law. Unfortunately, Hassan is entirely ignorant of Jewish law developments between the Talmud and the modern age, and identifies the operation of the Sanhedrin as the closest Jewish parallel with *ijma*. See also J.R. Wegner, "Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts", *American Journal of Legal History* XXVI (1982), 25-71, at 39-44, 55-58 (and note the preference given by Al Shafi'i to the consensus of the people (*ijma al-umma*) over the consensus of the scholars (*ijma al-ulama*) — which may be relevant to the development of the notion of consensus in respect of different communal enactments in medieval Jewish law). On Wegner's account (at 57), Shafi'i in fact advocated a converse development within Islamic law to that which has occurred in Jewish law: in the *halakhah*, consensus appears de facto to have replaced a majority of scholarly opinion [if, indeed, the majority rule did indeed originally refer to *scholarly* opinion], whereas Shafi'i was concerned to give majority scholarly opinion the (fictional) status of unanimity.

258 *Hilkhot Ishut* 14:14, in §3.5.2, *supra*. The concept may, however, have emerged in the context of relations between the Sephardi tradition of the Gaonim and the Ashkenazi tradition of Rabbenu Gershom. The Rosh contrasts the "spread" of the Geonic decrees with those of Rabbenu Gershom, who is himself described as living "in the days of the Geonim ... and his decrees and enactments are established and entrenched as if they had been given at Sinai, since [the Jews of

the increasing limitations imposed upon the authority of *takkanot hakahal* (which Morrell dates back to the twelfth century and associates with Rabbenu Tam[259]), particularly in their use of the power of expropriation[260] — as here where conditions (such as the presence of a *minyan*) are imposed upon the constitution of marriage, breach of which would justify annulment based on בל המקדש אדעתה דרבנן מקדש. Clearly, the autonomy of the individual *kahal* here threatened the unity of Jewish law. Elon sees this as underlying the demand, for example, by Ribash for the approbation of "all the halakhic authorities of the region".[261] Later, however, even the "region" becomes too local a basis for the operation of consensus.[262] If this analysis is correct, the demand for consensus appears to have been prompted by a problem of "popular" legislation, rather than being a restriction of the talmudic institution of the "majority rule" (of sages). Ribash, moreover, is clear about the reason for it: "so that only a 'chip of the beam' should reach me". Elon himself takes this to reflect a desire "to divide the responsibility for the decision among as many authorities as possible" (1994:II.856).

5.1.3 What, then, is the normative significance of the demise of *takkanot hakahal* in this area? Does consensus operate in a negative fashion, as desuetude, so that the cessation of a practice, or the cessation of the exercise of a power, becomes normative just because it is supported by a consensus? If we know that the reason for the cessation of the exercise of the power is not any question regarding the validity of the power itself, but rather a fear of taking individual responsibility for providing a *haskamah* for the exercise of the power, then if we can find ways of lifting the burden of this individual responsibility, may not the exercise of the power be revived? Ribash may not have been in a position to take an opinion poll of contemporary halakhic authorities. In the world of modern communications — relevant, of course, also to the problems of diversity of practice amongst different *kehilot*[263] — the halakhic authorities are in a very different position. Elon

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northern France and Germany] accepted them upon themselves and handed them down from generation to generation": *Resp*. 43:8, p.40b, quoted by Riskin 1989:125 (Heb.), 127 (Engl.). It is possible to see the emphasis on *kabbalah* in the rejection of the Geonic decrees as comparable to the Islamic notion of the *haddith*, and perhaps as forming the link, or transition, between majority decision-making and "consensus".

259 Morrell 1971:90: "But the twelfth century witnesses a reaction to lay communal authority, which took the form of an insistence on unanimous approval, rather than majority approval, for the passage of communal enactments." On the position of Rabbenu Tam, see further Morrell 1971:95, viewing it as based on a conception of the inviolability of property rights and personal liberty. Morrell provides an historical survey, concluding (at 119) with the view of R. Moses Schreiber (1763-1839), *Hatam Sofer, Hoshen Mishpat,* pp.46a-b, no.116, who "maintains that even the unanimity school insists on unanimity only in theory. In practice, however, its advocates would admit that custom is to be complied with, and custom dictates majority rule, because "if we wait until they all agree, no matter will be concluded and a general destruction will result.""

260 Kanarfogel 1992:87-97 relates it to the particular problem of *kinyan* in relation to *davar shelo ba le'olam.*

261 *Resp*. #339, §4.3.4, *supra*. Elon 1973:726f. argues: "Also, this phenomenon is largely attributed to the fact that the *takkanot* of this period were of a local character, obliging only a limited and defined public, a fact fostering the apprehension that this sensitive area of Jewish family law might come to be governed by many different laws lacking in uniformity ... The position was different, however, in the case of laws affecting matters of marriage and divorce. The possibility that a woman regarded in one place as married could be regarded elsewhere as unmarried — in terms of a local *takkanah* — entailed an inherent serious threat to the upholding of a uniform law in one of the most sensitive spheres of the *halakhah*, that of the *eshet ish*. The only way for its prevention was through a restriction of legislative authority in this area (see Resp. Ribash, loc. cit.; Resp. Maharam Alashkar, no. 48)."

262 Maharam Alashkar (end of the 15th, beginning of the sixteenth centuries) requires that "... the entire country and its Rabbis, with the concurrence of all or a majority of the communities", came to a decision, in reliance on those leading authorities (*Resp*. #48, in Elon 1994:II.867f.), partly on the grounds that any individual community has a power of confiscation (*hefker bet din hefker*) only in relation to the property of its own members, and so could not effect an annulment where the husband was from a different town. See also Riskin 2002:24.

263 The practical problem regarding the use of annulment in *takkanot hakahal*, Elon himself argues (1994:II.878), resided in the fact that legislation in the post-geonic period was local, leading to the result that "each Jewish center, and often each community, enacted its own legislation in various areas of the law, so that conflicting laws proliferated on the same

(1994:II.876) quotes R. Shalom Moses Hai Gagin as attacking Abulafia for his use of *hafka'at kiddushin* with the words: "It cannot possibly be contended that the world's great scholars ever gathered together and agreed to rule contrary to the saintly Caro even in a single particular." This would appear to imply that a convention of the world's great scholars is indeed capable of making such a ruling.[264] Nor need such an enterprise be conducted in the glare of publicity. Through modern communications, we may, for example, establish a rabbinic intranet, for private consultation and even decision. A consensus may even emerge, in such a context, to accept a majority view (an agreement to agree) or to delegate to named authorities. There is historical precedent for such a relationship between consensus and majority decision.[265]

5.1.4 I am struck sometimes by the paradox of the demand on the one hand for consensus, on the other for a *gadol hador*.[266] The name of Rav Moshe Feinstein is often mentioned in this context; little surprise, therefore, at the intensity of the exchanges regarding the cases in which Rav Moshe Feinstein is said to have annulled on the grounds of *kiddushei ta'ut*,[267] or the invocation of his authority by Rav Moshe Morgenstern for the proposition even that: "All doubts with respect to law and facts are resolved in favor of Agunot and even minority opinion of Gedolim in favor of annulment are relied upon (Rav Feinstein's view)."[268] The paradox, of course, is readily resolved

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subject." Such diversity was not tolerable in the area of marriage, since it might lead to the result that "the validity of a marriage would depend on whether the couple were members of a community that had adopted an enactment avoiding a marriage in violation of its provisions, or were members of a community that had no such enactment." Insofar as this diversity was, in earlier times, a function in large part of poor communications, it may readily be solved today. Indeed, modern communications today may be taken as a grounds on which to redefine the scope of the Jewish *kahal* as transcending not only regional and national boundaries, but also those between Israel and the Diaspora.

264 The International Council of Jewish Women, *inter alia*, has called for such a conference. However, the *Jewish Chronicle* reported on 18th February 2000: "In addition, a number of those rabbis who have given their support to the ICJW's call — among them Chief Rabbi Sacks and Dayan Toledano — have stipulated that Israel's two Chief Rabbis must be its convenors. And Israel's Chief Rabbis, at least so far, have been thunderously silent."

265 Kanarfogel 1992:103 summarises the position of R. Meir of Rothenberg thus: "In non-taxation matters, a majority of the *tuvei ha-'ir* could impose monetary fines and restrictions. But even for non-taxation issues, R. Meir preferred that the *tuvei ha-'ir* be selected by unanimous agreement. Only if unanimity was impossible to achieve does R. Meir recommend that the members of the community conduct communal affairs on the basis of majority rule."

266 Reflected in a story told by Elon 1980:89f. n.52, in support of his view of the difference in method and approach between traditional study and the activity of the *posek*: R. Hayyim of Brisk had a query regarding a practical matter. He decided to turn to the leading authority of these times, R. Isaac Elhanan of Kovno. He wrote: "These are the facts and this is the question; I beg you to reply in a single line – 'fit' or 'unfit,' Guilty' or 'not Guilty', without giving your reasons." When R. Hayyim was asked why he had done so, he replied "... decisions of R. Isaac Elhanan are binding because he is the *Posek* of our generation, and he will let me know his decision. But in scholarship and analysis my ways are different from his and if he gave his reasons I might see a flaw in it and have doubts about his decision. So, it is better if I do not know his reasons."

267 §4.4.2-5, *supra*. It is hardly surprising that the journalist Netty Gross (1998) observes: "But invoking Feinstein's name infuriates the establishment."

268 Morgenstern (internet version):ch.1. He supports this claim thus: "See Taz Even Hoezer 17:15. See Shach on Yoreh Dayoh 293:4. Opinion of Taz is that to free an Agunah we will rule like a minority opinion even if the matter is Mederaisa — Divine Law. Shach on the other hand applies this law only to matters that are Rabbinical Law, not Divine Law. Shach admits that when there are numerous doubts concerning a case, the Deuraisa Divine Law is converted to a Rabonan — Rabbinical Law. This revolves around the classical dispute between Rambam Laws of Tumai Mes 9:12 and Rashba. Toras Habais Bais 4 Shaar I Aruch Hashulchan Yoreh Dayoh 110:89-96, 29:25. Rambam holds that in the entire Torah only what is definitely forbidden is Divine. Any doubt about the matter either as to the applicability of the Law ... converts the question even if Divine matter-to the gravity of a Rabbinical Law. Thus we say, according to Rambam Sofek Deuraisa Asur Rak Mederabanan Even a Divine doubt is prohibited by Rabbinical Law. Rashba maintains that even in the case of doubt, it is still forbidden Meduraisa by Divine Law ~ Sofek Deuraisa Osur Meduraisa. A Divine doubt is prohibited by Divine Law. However, Rashba agrees that if there exists more than one doubt, certainly more than two; then the item in question is permitted even Rabbinically. See Aruch Hashulchon

if we interpret the demand for consensus not as consensus on the substance of the law, but rather consensus as to which authority to follow. Recall the observation of Rabbenu Tam: "But as for permitting an invalid bill of divorce, we have not had the power to do so from the days of Rav Ashi [nor will we] until the days of the Messiah" (§3.5.3, *supra*). It is in this context that we may understand the "drying-up" of *takkanot* in Israel since 1944:[269] perhaps it is attributable to a fear that such activity might be misinterpreted in messianic terms? But can we be sure that Rabbenu Tam would not have interpreted the foundation of the State as *atchalta di-ge'ulah*? Is there not theological reason, today, to "begin" at least to redeem the *agunah*? Or is the current gridlock to be regarded as a providential "plague", a punishment for our sins, a new form of vicarious punishment? In order to overcome the "chip of the beam" argument, perhaps we have to address more directly its theological roots.

5.2 Other issues regarding sources of law

5.2.1 The demand for consensus becomes all the more inhibiting when deployed together with a traditional view of the "decline of the generations". Elon notes that the attribution of greater weight to earlier authorities has been a persistent characteristic of the *halakhah* in all periods. This extends, he argues, to the relationship between the Gaonim and the Rishonim: "Similarly, the early authorities in the rabbinic period (the Rishonim) accorded special veneration to the *geonim* ..."[270] He notes that the principle of *hilkheta kebatra'i* appears, on the surface, contrary to this principle of priority, but it was "essential in order to empower the authorities of later generations to make legal rulings responsive to contemporary problems and consonant with contemporary conditions".[271] There is, then, a normative basis for change. Indeed, Elon argues, the principle that the views of the most recent authorities are accepted applies even where a single individual later in time disagrees with the views of a number of earlier authorities.[272]

5.2.2 The operation of *hilkheta kebatra'i* is, however, subject to revision in the light of new evidence not available to the later authorities (in their assessment of the earlier position). Thus (cf. §3.6.1, above), we may ask whether the status of the objections Rabbenu Tam made to the reforms of the Geonim is affected if it turns out that Rabbenu Tam based himself on the historical claims that (i)

Yoreh Dayoh 110:99; also Aruch Hashulchon Yoreh Dayoh 29:25. Now, in all our cases, we have 20-30 doubts existing. Thus in each case, it is permitted to rely on the minority opinions even according to Shach Yoreh Dayoh 242. See Ohel Yitzchok Vol. 1. Rav Yitzchok Herzog who employs similar reasoning as above mentioned. See Shridei Esh Book 3 Responsa 25." He refers also to the traditions of leniency regarding evidence for the *agunah* whose husband has disappeared: "We permit one Rabbinical authority to free an Agunah, rather than the required number of three Rabbis. See also Rambam end of Laws of Divorce 13:29 at the end. Shelo tishamu Bnos Yisroel Agunos Hikulo Bo Hachomirn. We relax the rules of evidence in order to free an Agunah. See Laws of Yivom and Chlitza Rambam 4:31 end. See Rambam for the same reasoning: Laws of Sanhedrin 24:1 end. Some authorities hold that the Rabbis even have the power to uproot a Divine Law if necessary in order to free an Agunah. See Tosphos Bava Basra 48B." Bleich 1998:117 denies that the one-witness permission in respect of the disappearing husband has any relevance to the context of the recalcitrant husband.

269 See the comments of Elon, quoted in §4.5.1, *supra*.

270 1994:I.267f. But clearly, this has not operated in relation to coercion of the *moredet* (or, indeed, to the Gaonic use of *takkanot*).

271 1994:I.268. On the history of the principle, see further Ta-Shma 1998.

272 1994:I.269. He quotes at n.105 the reply of *Pithei Teshuvah*, *Shulhan Arukh Hoshen Mishpat* 25:8, to the objection that this is contrary to the rule that we follow the opinion of the majority: "Since the later authorities saw the statements of the earlier ones but gave reasons for rejecting them, we assume, as a matter of course, that the earlier authorities would have agreed with the later ones. Consequently, this principle applies even to the view of a single [later authority] against [the view of] the many [earlier authorities]." Note the legal fiction: the earlier authorities *would have agreed*. Elon also quotes Asheri (at I.269), for the view that if a later authority fails to follow the opinion of an earlier authority out of ignorance, then he must correct himself when it becomes known to him.

coercion of the husband is never mentioned in the Talmud and (ii) the Gaonim did not base themselves on talmudic authority, and if these (and other) claims turn out to be historically incorrect. Rema accepted, within the doctrine of *hilkheta kebatra'i,* that discovery of a new responsum renders non-binding the views of later authorities made in ignorance of it.[273] Moreover, we are entitled to ask whether "Jephthah in his generation is like Samuel in his generation" can apply not only to primary, but also to secondary rules.[274] Indeed if, as seems to me likely, the doctrine of the *halakhah* does not itself recognise a difference between the operation of primary and secondary rules, we are entitled to ask why "Jephthah in his generation is like Samuel in his generation" should not itself apply to secondary rules.

5.2.3 Jachter discusses another potential qualification of *hilkheta kebatra'i.* He refers to a case where annulment was apparently used by Rema in the mid-16th century (despite the view of the later authorities that the power to annul had disappeared):

> The Rama, in his commentary on the Tur (7:13) called the Darkei Moshe, notes an application of Hafkaat Kiddushin in the post-Talmudic age. The application was in a case that occurred in Austria in which a group of women were captured by non-Jews. Chazal (see Shulchan Aruch, Even Haezer chapter 7) forbade Kohanim to remain married to a "Shvuyah" (women who was taken captive) for fear she had been raped (a Kohen may not remain with his wife if she is, God forbid, raped). In the aftermath of this tragic incident, the question arose as to whether the women who were married to Kohanim had to separate from their husbands. The Rabbis of the time ruled that they were not required to separate from their husbands. The Rama suggests that the rabbis annulled the marriages of these couples, thus permitting the women to remain with their Kohein husbands.[275]

Jachter notes that the case is discussed by Rav Yitzhak Herzog, who suggests that the lenient ruling was based on a "double doubt" (*s'fek s'feika*). One doubt is whether the women were in fact raped. The second is whether *hafka'at kiddushin* may indeed be utilized even in the post-talmudic era. Rav Herzog concludes that the matter requires further insight and clarification. Rabbi Jachter, however, argues that we cannot extrapolate from this a general power to apply *hafka'at kiddushin* in cases of *s'fek s'feika,* on the grounds that (a) the Austrian Rabbis may have exceeded their powers, and (b) in any event the leniency is applied to a rabbinic institution, *shevuyah.*[276] This is not the place to enter into the details. Suffice it to note, for the moment, that *s'fek s'feika* can in some circumstances serve as a grounds for leniency, and that here the "doubts" were a combination of doubt of fact and doubt as to the law. Rav Herzog's own conclusion was that consideration should be given in the future to the suggestion that *hafka'at kiddushin* might be restored when the *Sanhedrin* in Jerusalem[277] is reconstituted.[278]

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273 §2.2.2, *supra*, at n.39.

274 For this distinction, see §3.3.4 at n.101, *supra*.

275 At www.tabc.org/koltorah/aguna/aguna59.5.htm.

276 Jachter, *ibid*.: "It should be noted, though, that nowhere in the Shulchan Aruch or its commentaries is the possibility of Hafkaat Kiddushin raised as a viable option or even as a consideration in a lenient ruling. Accordingly, the ruling of the Austrian rabbis is rejected by normative Halacha. Moreover, the fact that Chazal were exceedingly lenient in applying the halacha in the tragic case of "Shvuyah" and the fact that "Shvuyah" is only a rabbinic halacha, precludes any extrapolation from being made from "Shvuyah" to any other area of halacha."

277 On this, see the remarks of Elon 1994:I.238, on Maimonides, *Mamrim* 1:1-2.

278 Jachter, www.tabc.org/koltorah/aguna/aguna59.5.htm, writes: "Nonetheless, Rav Herzog conclusively rejects the possibility of Hafkaat Kiddushin in the absence of a central rabbinic authority that is recognized by most Jews. Rav Herzog notes that although the Shulchan Aruch (Choshen Mishpat, Chapter two) notes that the right of a communally recognized Beit Din to impose extrajudicial punishments (Makin V'onshin She'lo K'din) applies in all times, no mention is made anywhere in the Shulchan Aruch or its commentaries that communally recognized Batei Din have the right to be "Mafkia Kiddushin"." But this silence of the Shulchan Aruch and its commentaries cannot erase the history of the matter: see §4.3, *supra*. We have to ask what normative conclusions are to be drawn from this silence (not rejection); it is consistent with the approach of Ribash, discussed in §4.3.4, *supra*.

5.2.4 What is the current status of emergency legislation? We have seen that several sources, including Sherira Gaon himself ("When the disastrous results became apparent, it was enacted ...", §3.4.1, above), attribute the Gaonic measures on the *moredet* to pressure of the circumstances of the time,[279] and some of the Rishonim, in rejecting the continuing validity of those measures, indicate that those circumstances no longer apply (e.g. *Sefer Hama'or*, §3.6.2 above). This would not appear to imply that later generations lack the authority to rule on the basis of *tsorekh sha'ah*; nor even to define in advance what kind of circumstances will count in the future as a צורך. Even so, the closer any present "emergency" to the circumstances which were recognised as an "emergency" in the past, the easier it would appear to justify the exercise of emergency powers.[280] Riskin argues that halakhic development on the basis of the exigencies of the times does remain possible (noting, in particular, its endorsement by Rema[281]), at least if combined with a ruling on the basis of an halakhic precedent. Such an halakhic precedent, moreover, need not be a majority[282] or still-normative opinion.[283] In this respect, Riskin argues, Rabbenu Tam's stance is uncharacteristic of the *halakhah*:

> Although Rabbenu Tam was unquestionably a defender of the Ashkenazic tradition and a champion of the truth as he understood it, the current of the times often plays an unconscious role, and the needs of the people must be a conscious consideration in the mind of the religious legal authority. Such an attitude was considered Biblically ordained; the Jews are commanded to approach the "judge of those days,"[284] and traditionally ordained, by the principle: "The law is in accordance with the latest authority." Of course, legal precedent, as discussed above, must remain the basis of any future legal determinations, but current interpretations of precedents will often be dictated by the exigencies of the times and the prevailing spirit of the land. Hence the dialectic between past and present, precedent and currency, which is the primary force behind the creative halakhic process. (1989:109f.)

Riskin further remarks (at 76f.): "... Halakhah ... takes into full account the personal as well as national exigencies of the period." Where a disposition to violence in the husband manifests itself after the marriage takes place, there is an argument for annulment on the grounds of *pikuah nefesh*. Morgenstern writes: "... many of the agunot and their children are so shattered emotionally, physically and spiritually, that I see helping them as *pikuah nefesh*, saving their lives, something which overrides other concerns."[285] Employing a more traditional approach, Chief Rabbi Shear-Yashuv Cohen of Haifa refers to a case in the Haifa Bet Din, in which domestic violence was

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279 Cf. Riskin 1989:76f.: "When, in the Gaonic period, the threat of conversion to Islam was introduced, the Sages shifted the balance to the latter position. This is a perfect example of the internal development of Halakhah, which takes into full account the personal as well as national exigencies of the period."

280 Riskin 1989:135 argues that "the very situation which caused the Geonim to enact their legislation ... certainly applies today."

281 Riskin 2002:26 on *Rema, Darkhei Moshe* 7:13: see n.176 *supra*. See further his response at 2002:50 to Wieder 2002:42 n.3, emphasising the distinction between *hora'at sha'ah* and *tsorekh hasha'ah,* the latter being "a very different concept, one which can serve as a precedent whenever the particular need still exists." He cites a discussion of this distinction by Rav Kook, *Mishpat Kohen* 143, "who proves conclusively that *tsorekh sha'a* must itself be based on halakhic precedent and process, and can thus serve as added halakhic precedent for future cases."

282 Morgenstern (internet version):ch. IV, also argues in favour of reliance on minority opinions "in the case of extreme pain and suffering inflicted on the woman."

283 See Riskin 1989:77f. on a responsum of Rav Moshe ben Yaakov, which speaks of a Gaonic measure allowing creditors to claim debts and widows claim alimony from the moveable property of a deceased, contrary to talmudic principles.

284 *Deut*. 17:9. Cf. *Kohelet Rabbah* 1:4: "The generation of your day and the halakhic authority of your day should be in your eyes the equal of the past generation and of the earlier Sages who lived before you ... Scripture considered three judges of insubstantial quality to be equal to three who were the greatest authorities ...", quoted by Elon 1994:I.266.

285 Interview with Gross 1998.

regarded as a grounds for *kefiyah*.[286] One can clearly see the point of that where the wife is already a battered wife (and the parties are still living together). But is it possible to go a step further and say that the degree of marital conflict represented by the *agunah* situation is in itself such as to raise the danger of domestic violence, even if there has been no evidence of it hitherto in a particular case? Again, might not the very lack of clarity in the secondary rules of Jewish law in itself create a *tsorekh hasha'ah,* a situation where there is no defence to the charge of cherry-picking from the proponents of halakhic objectivity, since there is no agreement as to the criteria for halakhic objectivity itself? Is gridlock then inevitable? I think not. We may compare the history of Jewish criminal law. Much of it effectively disappeared with the demise of the original form of *semikhah* plus the loss of jurisdictional autonomy (factors which are both clearly paralleled in the present context). What was the response? The creation of a new (rabbinic) system of criminal law, using alternative means (and sanctions) to the same ends. Indeed, in the responsum of Rashba noted above (§4.3.3), we find the explicit invocation of בית דין מבין ועונשין שלא מן הדין in this very context.[287]

5.2.5 We have been considering issues of the authority needed for the interpretation, development and change of generally binding rules of *halakhah*. The same considerations do not necessarily apply at the level of adjudication of the individual case.[288] Recent research has addressed the question of Jewish judicial discretion: a case may be made for the proposition that the *bet din* has a residual discretion, deriving from the original conception of the divinely inspired judge, to make decisions not in accordance with the prevailing *halakhah*.[289] In this very context, the responsum of the Rosh, in which he concludes (against his general principles) 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" (§3.5.2 above), raises the choice between case-by-case or radical reform. This, perhaps, is the context in which we should view the claim that Rabbi Feinstein annulled far more marriages than is indicated by his *teshuvot*.[290] One wonders, however, whether the globalisation of Jewish law has taken us to a situation in which such case-by-case approaches are no longer possible. Reliance upon the application of discretion in the individual case is hardly likely to satisfy the Jewish

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286 Cohen 1990:201f., citing *Rema* 157:7. See further n.217, *supra*.

287 Morgenstern (internet version):ch.I argues thus for the power of annulment as exercised by his court: "Otherwise there would be a complete breakdown in the Jewish Judicial system. Even though the Sanhedrin no longer exists today ... never-the-less Bet Din, throughout the centuries, has been delegated the authority — Rabbinically — to exercise its authority in crucial matters. Matters of marriage and divorce and annulment are among those matters. The position of the Rashba is codified in Choshen Mishpat 2 in Tur Choshen Mishpat and Choshen Mishpat 2. It thus follows that in our day and age when Batei Din, Rabbinical Courts no longer can flog the husband into submission to grant his wife a Get, they can annul the marriage directly without flogging. Otherwise, the entire marriage institution would break down. If women have no relief or recourse in an impossible marriage, women will refuse to have a halachic marriage. Thus, the combination of Rashba Gittin 88B and Yevomus 48B supports our position. Such is the position of Ohr Zehu Rabbenu Sirncha #761, and Ohel Moshe, Book 2, #123 who explicitly state that the marriage can be annulled ..." (plus further citations).

288 For discretion to rule in a manner *stricter* than the (then) accepted *halakhah*, see the approach of Nahmanides to compulsion according to the Gaonic decrees, as discussed by Riskin 1989:112f.

289 See Haninah Ben-Menahem, *Judicial Deviation in Talmudic Law* (Chur, etc.: Harwood Academic Press, 1991); see also, more broadly, his "The Judicial Process and the Nature of Jewish Law", in Hecht et al 1996:421-437; B.S. Jackson, "Judaism as a Religious Legal System", in A. Huxley, ed., *Religion, Laws and Tradition. Comparative Studies in Religious Law* (London: RoutledgeCurzon, 2002), 34-48, at §3. Elon 1994:I.248-51 quotes at length Isaac Arama, *Akedat Yitshak*, from which he derives the proposition that: "There exists the general truth of legal laws and the individual truth of specific cases" (at 251).

290 Aranoff, "Response", n.12: "We note that a well known rabbi who was close to Rabbi Feinstein has written that Rabbi Feinstein annulled marriages on broader grounds than those listed in the BDA letter. A member of the Feinstein family has also told *AGUNAH* Inc. that Rabbi Feinstein annulled far more marriages than is indicated by his teshuvot." See also Aranoff, "Response", n.4, as quoted in n.211, *supra*.

community in present circumstances.[291] It does not address the symbolic significance now widely perceived to attach to this issue; moreover, in a world of global communications, it is arguable that there is a need for a truly global solution.

5.3 Interaction of Remedies

5.3.1 Much of the discussion of the problem of the *agunah* proceeds along parallel (and thus non-intersecting) paths, and on each of these paths obstacles are encountered:

- (a) the path of conditions, where one encounters the problems of:
  - (i) conditions contrary to the *halakhah* in matters of *issura,* and
  - (ii) the relationship between conditions and normal marital relations (until the marriage breaks down);
- (b) the path of coercion, where one encounters Rabbenu Tam's rejection of the Gaonic measures in favour of the *agunah* who has proclaimed *ma'is alay*;
- (c) the path of annulment, where one encounters problems regarding:
  - (i) the continuing availability of the remedy at all, and,
  - (ii) if available, the definition of the circumstances where it is available.

Of these, (b) and (c) raise problems of authority very directly. The issues in (a) are more technical: the classification of particular conditions, and the relationship between conditions and the presumptions regarding the intent accompanying marital relations. Yet there is much in the *halakhah* which recognises that the problem is more complex that this: the paths do interact, and this may turn out to provide opportunities, rather than simply compound our problems. In particular, there is a relationship between conditions and annulment on the one hand, and between coercion and annulment on the other.

5.3.2 Though conditions and annulment have been presented here as alternative strategies, further analysis might suggest that they may both function as aspects of the same remedy, viewed from different perspectives. The kind of condition we are here considering (if it is to fulfil our criterion of preventing the *agunah* problem from arising) is one which provides for annulment (i.e. termination of the marriage without the need for a *get*) in the event of breach of condition; conversely, annulment works primarily through the theory of *kol hamekadesh,* i.e. through conditions imposed by rabbinic (or communal) authority.[292] Indeed, we have seen that this latter institution sometimes explicitly evokes a consensual basis: the people are by such *takkanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages (§4.3.4). The issue is thus whether standard terms can be imposed upon the parties to a marriage. While *kol hamekadesh,* in its traditional form, might suggest a positive answer,[293] the implications of

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291 One may compare the fate of the "Brichto proposals" on conversion a decade ago. Rabbi Brichto was prepared to recommend that progressive applicants for conversion submit themselves to Orthodox *batei din*, in return for a more "flexible" attitude on the part of the latter. However, he was seeking public assurances of such a flexible attitude. For the proposal and reactions to it, see *The Jewish Law Annual* VIII (1989), 247-99. Comparison may now be made with developments in Israel: the reported acceptance by the rabbinic *batei din* of the first "graduates" of the Conversion Institute established in the wake of the Ne'eman Commission.

292 For Rishonim who explicitly base *hafka'at kiddushin* on a condition, see Riskin 2002:15, esp. Maharam of Rothenberg, in *Mordekhai*, *Kiddushin* 3:522: "At the time of betrothal he did nothing wrong, and we judge him according to that time, and say that he betrothed her on condition that if he later violates a rabbinic regulation ... his betrothal will not be valid." See also his comments on *Me'iri* on *Yev*. 89b, at 2002:18, distinguishing this basis from that of declaring the husband's property to be ownerless, and maintaining that there is no reason to say that this authority does not obtain today. He suggests that *Me'iri*'s position may be based on the Jerusalem Talmud (apparently referring to Jerusalem Talmud, *Ket*. 4:8 (see n.173, *supra*, alluded to at 2002:11). On Riskin's interpretation of *Me'iri*, see also Wieder 2002:39f., and Riskin's response at 2002:47f.

293 Novak 1981:199 argues from *Mordekhai* that all marriages are now conditional: "R. Mordekai goes further and indicates that this legal fact is a condition (*al tenai*) of every properly initiated marriage, namely, that if the husband should in the future transgress (*ya'avor le'ahar zeman*) rabbinic standards, then his marriage is thereby annulled (*shelo yihyu kiddushin*

Ribash's "all who marry without any express stipulations as to the terms of marriage do so in accordance with the customs of the town" are less clear: the customs of the town might be taken to represent the (antecedent) consent of the parties to the marriage. However this may be, the history of *takkanot hakahal* shows a growing concern that any terms so imposed, and any powers assumed in order to enforce such terms (such as the power of confiscation of the *kesef*), should be made explicit in the *takkanah* itself.[294] This may be viewed (merely) as a necessary rather than a sufficient condition, but it is a principle which can be applied not only to a *takkanah* imposing conditions on a marriage, but also to the marriage contract itself: the latter might well recite not only the conditions of the marriage but also (acceptance of) the authority by which such conditions are to be enforced. We may note that the correlated use of a *takkanah* in conjunction with explicit terms in the *ketubah* adopting the provisions of the *takkanah* was the strategy advocated by Rav Isaac Herzog in his (unsuccessful) attempt to provide equal succession rights for women.[295] It also forms the basis of the recent proposal by Rabbi Riskin, who argues, in effect, that this enables us to bypass arguments that the authority to annul no longer exists[296] (though this, too, he seeks to contest[297]). By contrast, the PNA in use in the United Synagogue in England, and similar agreements elsewhere,[298] do not seek a foundation in any *takkanah,* but only in the will of the parties themselves to adopt the

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halin). From this two highly significant points emerge. First, whereas in the Talmud conditional marriage is treated as the exception rather than the norm, now all properly initiated marriages are considered to be conditional as the norm, and only improperly initiated marriages are considered to be unconditional as the exception. Second, whereas the view of R. Mordekai was used by R. Joseph Kolon as the main precedent for limiting the power of communities to annul marriages improperly initiated, the same view of R. Mordekai, when analysed in its entirety, serves as an excellent precedent for granting communities the power to annul marriages where there are irregularities in the delivery of the *get* or no *get* is possible."

294 As in Ribash, *Resp*. #399, H (§4.3.4, *supra*). See Elon 1994:II.850-56 on annulment of marriage on the strength of an explicit enactment: in the thirteenth century, Asheri and Rashba claimed that while the post-talmudic authorities do not have the power to annul a marriage on the ground that it was effected improperly or that it was entered into "subject to the conditions laid down by the Rabbis", they did have such authority if there existed an enactment which explicitly stated that a marriage in violation of its provisions was void.

Though *takkanot* complying with these conditions, and explicitly empowering the court to annul on the basis of *hefker bet din hefker*, were increasingly discouraged (e.g. by Karo, *Bet Yosef* to *Tur*, *Even Ha'ezer* ch. 28 (end); *Rema* to *Shulhan Arukh Even Ha'ezer* 28:21; Elon 1994:II.870f.; Riskin 2002:24-26), Elon finds evidence of their continuing use: see 1994:II.872-74 on 16th-17th cent. Italy and II.874-78 on Abulafia in the 19th cent.

295 See B. Greenberger, "Rabbi Herzog's Proposals for Takkanot in Matters of Inheritance", in B.S. Jackson, ed., *The Halakhic Thought of R. Isaac Herzog* (Atlanta: Scholars Press, 1991), 49-112 (Jewish Law Association Studies, V). Elon 1973:727f. claims however that there was already a *takkanah* to this effect dating from the Mandatory period: "Another important innovation introduced by *takkanah* was the engagement by the rabbinical courts to hold equal the rights of sons and daughters and those of husband and wife for purposes of intestate succession."

296 Riskin 2002:28: "We have seen that many Rishonim maintained that *hafka'at kiddushin,* even when implemented many years after the marriage, is based on implied conditions attached to the betrothal ... Hence, there is reason to allow *hafka'at kiddushin* many years after the betrothal even without a *get*. According to this opinion there is no reason to say that the authority to cancel a marriage ends with the close of the Talmud, for the mechanism of the *hafka'a* is built into the marriage formula that is still in practice to this very day."

297 Riskin 2002:28f.: "... throughout the ages ... the sages in every generation have used their authority to cancel marriages. To be sure, over time the rabbinic authorities have hesitated more and more to invoke that authority, but they never gave it up altogether or doubted the possibility of executing it with a specific enactment of a regional bet din ... in times of need, and when no other halakhic solution was available to them, the rabbis have invoked their authority to cancel marriages even without a *get*. Enactments allowing for the cancellation of a marriage never stopped, as we have seen in the enactments passed in Egypt less than a hundred years ago." See in particular his comments on *Rema, Darkhei Moshe* 7:13 (*supra* n.176) at 2002:50; Maharam (as cited by Mordekhai, *Kiddushin* 522) at 2002:49; and his quotations of statements relying on Rema by Rav Y.Y. Weinberg *(Seridei Esh* 90), Rav Ovadiah Yosef, Rav Itshak Herzog, Rav Kook (*Ezrat Kohen* 69) and Rav S.Z. Auerbach *(Torah she-be-Al Peh* 8), at 2002:51.

298 Discussed *supra*, §2.4.2.

conditions it contains.[299]

5.3.3 The relationship between Annulment and Coercion[300] has given rise to a number of different formulations. Traditionally, we encounter a hierarchy of remedies.[301] Starting at the top, the most desirable is a voluntary *get* given by the husband. If there is initial reluctance to grant it, the carrot (persuasion by payment) is preferred to the stick (coercion).[302] In *Resp.* 35:2, the Rosh indicates that he will not go beyond coercion to annulment, even in a case which he concedes is similar to that at Naresh in the Talmud (§4.1.1, above), where annulment was used:

> ... a widow who was a member of a prominent family, and an elementary school teacher who was living in her house. It happened that he married her in the presence of two witnesses. [The responsum indicates that the teacher married the widow through all manner of schemes and trickery, and the widow declared that she] despises him and sooner than being married to him, she would rather be an *agunah* all her life. She is a member of a prominent family and the widow of a scholar ... [As to the question of fraudulent marriage] It may appear to you, being close to the matter, that the man is not worthy or fit to be married to a woman of good family and that he misled her through schemes and trickery, so that the matter is quite similar to the incident at Naresh described in Tractate Yevamot, chapter *Bet Shammai*, where a marriage was annulled because a man acted improperly. If so, although we will not annul the marriage in our case, yet we may rely on the opinion of some of the Rabbis who ruled that a divorce may be compelled in a case involving a *moredet* (wife who refuses to cohabit with her husband). Nevertheless, the attempt should be made to appease him with money; if he is not willing, I will support you in compelling him to divorce her. (Elon 1994:II.850f.)

Coercion — based on a ready acceptance of the widow's claim of *ma'is alay,* which qualifies her to be treated as a *moredet* — is here viewed as a fall-back, available now in the absence of (the self-denied) annulment. Morgenstern now wishes to reverse the argument: he argues that it is precisely because coercion is no longer available (being denied to the Rabbis by secular law, at least in the Diaspora) that annulment now becomes available: "The power was not limited to Kiddushei Ta'ut but virtually exercised when ever the marriage was deemed dead because of situations created by the husband and for situations intolerable to the wife, *or for the inability of the Bet Din to coerce the*

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299 Even so, we may compare the stated motivation of Rabbi Jachter in this context with that of Rav Herzog in relation to succession. Jachter, "Viable Solutions ... I", http://www.tabc.org/koltorah/aguna/aguna59.1.htm, writes: "Finally, it should be added that signing a proper prenuptial serves "L'hotzi Milibam Shel Tz'dukim," to counter the claims of the heretical "Sadducees" (Chazal instituted a number of practices to counter the heretical claims of the Sadducees, especially in the area of Korban Ha'omer and Parah Adumah). Universal adoption of the practice of signing a halachically sound prenuptial agreement counters the unjustified claim that halacha is unsympathetic to those suffering with a problem of Igun. It also proves the capability of halacha to effectively grapple with the challenges of the contemporary situations. Rav David Zvi Hoffman (Melameid L'hoil III: 33) writes, in the context of discussing the establishment of a tradition how to write Gittin in Brussels, Belgium that, "In our time it is a Mitzva for us to take proactive steps so that the skeptics should not be able to criticize us by saying that Orthodoxy has severely declined and is incapable of doing anything unless previous generations have done it for them.""

Cf. the motivation of Rav Herzog, as described by Greenberger 1991:50: "Rabbi Herzog's aspirations to achieve the adoption of Jewish law as the law of the State were ... tempered by the sober realization that many aspects of Jewish law were simply unacceptable to the vast majority of Israelis ... A cardinal case in point is that of Jewish inheritance law, which denies any right of inheritance to women, whether as wives or daughters, in all cases where the decedent leaves male heirs, and which grants the firstborn son a double share vis-a-vis the other heirs. These are entirely inconsistent with modern notions of equality, and were frequently cited as examples par excellence of the kind of rules that made Jewish law inappropriate for the modern State of Israel."

300 Jachter, http://www.tabc.org/koltorah/aguna/aguna59.4.htm, quotes *Rema*, *Even Ha'ezer* 28:21: "A community that institutes a policy, accepted by the entire community, that anyone who marries in the absence of a Minyan will have his marriage considered invalid - must, nevertheless, be strict and require a Get [in this circumstance]."

301 See, e.g., §§4.2.1, 4.3.3, above.

302 See further n.16, above.

husband to give the Get."[303] Indeed, in his view: "All coercion of the husband to give a Get is in reality annulment."[304] But this, for him, is not merely a conceptual equation: the process of annulment he adopts involves a *get zikui*.[305]

5.4 Towards a Solution

5.4.1 The responsum of Ribash (§4.3.4, above) suggests very strongly that the problem exists on two levels, that of *halakhah* and that of *ma'aseh*.[306] The former may be termed substantive: is there a solution which can survive the various objections? The latter is systemic: can the strands of halakhic authority be weaved together in such a way as to generate a consensus which would grant a *haskamah* for a solution, and thus meet the "chip of the beam" argument (and any theological assumptions it may carry)? Much further work is required to answer these questions. For the moment, I conclude by indicating the directions for such further work which I think are indicated by the foregoing analysis.

5.4.2 As for the substantive issues:

(a) *Takkanot* should be adopted, first in Israel[307] and then in all *kehilot,* requiring the inclusion in a PNA, perhaps reiterated in the *ketubah*, of an appropriate condition (d-g, below).

(b) *The takkanah* should also state that such a condition shall be implied where it is not explicit.

(c) *The takkanah* should recite the authority on which it is based (§5.4.3, below), and the powers to be exercised by the *bet din,* including the power to confiscate either the *kesef* by which the *kiddushin* is effected (thus rendering the marriage retrospectively annulled)

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303 Morgenstern (internet version):ch.I (emphasis supplied). Historical support for this may be found in the rules established by the court of R. Eliyahu Hazan, Chief Rabbi of Alexandria, in 1901: see Freiman 1944:337; Riskin 2002:26f., who also quotes Rav I. Herzog 1989:I:73, arguing that earlier authorities did not resort to annulment precisely because physical coercion or a *herem* was available to them. Morgenstern goes on to link this with his argument from *kiddushei ta'ut*: "The rabbis held that the use of coercion against the husband was her way to get out of the marriage for justifiable cause. The very fact that physical coercion is not available to her now means that she can legally demand annulment since she never would have agreed to marry if no way to get out was available to her. Since the exercise of coercion is not available to her, and had she known this at the time of the marriage, she certainly would not have entered the marriage and this can ... be seen as a marriage by mistake."

304 Morgenstern, *ibid*., citing, *inter alia*, *B.B.* 48A; *Rambam*, *Laws of Divorce* 2:20 and *Ohr Someyach ad loc*.; *Maharik* Chapter 63. See further Cohen 1990:198-200.

305 Morgenstern (internet version):ch.III: "Suffice it to say that without a Get Ziku there is no annulment. ... As part of the annulment process, a Get is given by a court, the appointed agent in place of the husband." He argues that this is necessary since the principles of *mekah ta'ut* render a contract voidable, not void, so that a declaration by a rabbinic court (not merely by the wife) is necessary. He cites in support R. Eliyohu Klotzkin, *Dvorim Achodim* 43,44. For a critique of the use of the *get zikui* in the context of the *agunah* problem, see J.D. Bleich, "Survey of Recent Halakhic Literature: Constructive Agency in Religious Divorce: An Examination of *Get Zikkuy*", *Tradition* 35/4 (2001), 90-128; also in *The Zutphen Conference Volume,* ed. H. Gamoran (Binghamton: Global Publications, 2001), 3-36 (Jewish Law Association Studies XII).

306 On the distinction between *halakhah* and *ma'aseh* in the context of jurisprudential analysis, see further Jackson 2002b:§§4.3.4-5.

307 According to Rav Riskin's version of this strategy, "this can only be done by a large gathering of the rabbis of Israel who must decide on the matter, so that many authorities share the burden of the decision." This immediately prompted an objection claiming, in effect, that this falls short of an (assumedly required) consensus. Thus Wieder 2002:43 n.6 maintains that a "large gathering" is not enough; "virtual unanimity of "all of the rabbis of Israel" is necessary." Moreover, he comments (at 41): "The probability of the entire *Heredi* community agreeing to R. Riskin's solution, be it because they don't see the problem or because they cannot swallow the solution, is somewhere between slim and none, with slim having left town."

or the full value of the *ketubah* (thus rendering the marriage non-retrospectively void), and/or by declaring marital intercourse to be (whether retrospectively or not) *be'ilat zenut*.

(d) The condition should provide for automatic termination, without a *get,* of the marriage on refusal to comply with the order (or even recommendation[308]) of a *bet din* to grant a *get,* this refusal being certified by the *bet din*.

(e) This termination may operate either retrospectively or non-retrospectively, according to the decision of the *bet din*.

(f) The condition shall recite the fact that husband and wife agree that until any breach of the condition, every act of intercourse between them shall be assumed, without further evidence but in the absence of evidence to the contrary, to have been accompanied by a declaration that they reiterate their intention that the *tenai* shall remain in force, despite the marital intercourse.

(g) The parties further declare that they enter into the marriage in accordance with the conditions laid down in the *takkanah* and elsewhere in rabbinic law, and that any annulment declared by the *bet din* shall be regarded as a legitimate form of coercion, based upon (i) the wife's regarding the husband as "repulsive" as a result of breach of the condition, (ii) the inability of the wife to meet any special terms for delivery of a *get* demanded by the husband, and (iii) considerations of *pikuah nefesh*.

The strategy implicit in the above suggestion is designed to meet a number of alternative analyses of the present problem, and thus to operate whether or not conditions may operate to terminate the marriage prospectively or only retrospectively, whether or not annulment remains available to post-talmudic authorities, and whether or not coercion remains possible in the case of a *moredet* in contemporary conditions. Clearly, however, it does depend upon acceptance of at least ONE of the following claims:

(i) Conditions providing for termination of a marriage without a *get* are halakhically permissible, at least if backed by an appropriate *takkanah;* or

(ii) Annulment remains available to post-talmudic authorities in the circumstances of the contemporary *agunah;* or

(iii) Coercion remains possible in the case of a *moredet* in contemporary conditions.

5.4.3 How might the halakhic authorities persuade themselves to provide an *haskamah* for such measures? The *takkanah* might include a series of recitals such as the following:

a The Palestinian tradition of *Tena'in* classifies conditions terminating marriage as *mamona* rather than *issura* (*Jerusalem Talmud, Ketubot* 5:9 (30b); §2.2.1, above), and in other respects too showed particular concern for the needs of the wife (§§3.3.5, 4.1.2, above).

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308 Rav Riskin observes at 2002:30 that much thought is needed in order carefully to define the circumstances in which *hafka'a* would be implemented, as well as to formulate the stipulation that would have to be added at the time of betrothal. He suggests that the Chief Rabbinate in Jerusalem adopt an enactment stipulating that "if a religious court orders a husband to divorce his wife, and he refuses to do so even after sanctions have been imposed on him, then a special court should be established with the authority to cancel his marriage and free his wife to remarry." Against this, Wieder 2002:41 observes that this "misses the larger problem": "The larger problem, it seems to me, is the situations in which the courts cannot force the husband to give a *get*, even though they recommend one. One striking example of this would be a husband who provides for his wife financially and maritally, but regularly beats her. The *Shulhan Arukh* rules that we cannot force the husband to divorce his wife in such a case, although we would certainly encourage him to do so [citing *Rema, E.H.* 154:3 and 154:21]. Such cases are ripe for extortion on the part of the husband, who knows that the *get* will be given purely at his discretion, and in most of these cases, the wife will get a *get* only after paying his price. For this problem, the solution of a prenuptial agreement that can be applied to a much broader set of scenarios, even if not perfect, will go a lot farther." Rabbi Wieder goes further, in arguing (at 2002:43 n.8) that: "... There are marriages … in which it might be argued that using the *get* as financial leverage may be perfectly reasonable. In a marriage where there is no abuse, neglect or fundamental breakdown, but one partner for whatever reason wants out, it may be perfectly reasonable for the other spouse to demand compensation. It might be regarded no different than a financial partnership where one partner may have to pay a king's ransom to get out of the partnership. In such cases, the wife as well, is able to use a refusal to accept the *get* as leverage in the financial arrangements."

b The return to Palestine and the establishment there of new halakhic institutions justifies a revival of the tradition of *takkanot hakahal* (cf. Elon, §4.5.1; see also §5.1.4), of invocation of "Jephthah in his generation is like Samuel in his generation" (§§3.6.3, 4.3.4, 5.2.2), and of exercise of the powers of בני העיר (§§4.3.2, §4.3.4).

c The willingness of many Jewish women to ignore halakhic requirements, or to rely exclusively on the judgements of civil courts, threatens the unity of the Jewish people and therefore establishes an emergency situation (§§4.3.3, 5.2.4).

d In many cases the *agunah* problem creates a situation of *pikuah nefesh* (§5.2.4), such that it may not be possible to await a court determination as to whether such a situation actually exists in the individual case.

e There are historical doubts concerning coercion of the *moredet,* as regards the positions of (i) the Talmud, (ii) the Gaonim, (iii) the Rishonim (§3.6.1).

f The combination of halakhic and factual doubts in itself justifies leniency, on the principle of *s'fek s'feika* (§5.2.3).

g Use of the principle of כל המקדש remains particularly appropriate in relation to behaviour after entry into the marriage (§§4.1.2-3), even if the consequence of such misbehaviour is a sanction other than annulment.

h The adoption of a communal enactment may serve to remove any need to provide a *get* simply "for the avoidance of doubt" (§4.3.4, Ribash s.A)

i The adoption of a communal enactment removes from the court any problem of lone responsibility (the "chip of the beam": §4.3.4). Accordingly, the *herem* of Rabbenu Tam against casting a slur on the validity of a divorce after it had been delivered in a Jewish Court[309] may now be applied to the decisions of *batei din* acting under the authority of the present *takkanah.*

309 See L. Finkelstein, *Jewish Self-Government in the Middle Ages* (Westport, Connecticut: Greenwood Press, Publishers, 1972, reprinted from New York: Jewish Theological Seminary of America, 1924 edition), 44-46, 105-106 (accepting the possibility that Rabbenu Tam may have admitted nevertheless the need for a new divorce in such cases). Morgenstern (internet version):ch.II cites Mordecai, Gitin #455; Ramo, Even Hoezer 154:22 and Noda Beyahudoh, and notes that the *herem* was reiterated by Rav Moshe Feinstein in *lgrot Moshe Even Hoezer* 1:137.

Appendix A (n.3): Divorce Procedures in Biblical Times

Hosea 2:4 appears to preserve evidence of the use of an oral formula, "she is not my wife, nor am I her husband" (הִיא לֹא אִשְׁתִּי וְאָנֹכִי לֹא אִישָׁהּ), which Falk[310] thinks may reflect a stage of oral divorce preceding the introduction of the written document. The formula may well be the "*formula contraria*" of an original (positive) declaration of marriage. The latter is attested in marriage contracts from the Aramaic papyri of Elephantine in the 5th cent. B.C.E., which record the husband's declaration: "She is my wife and I am [her] husband from this day to eternity".[311] There is no indication of the use of a written document of divorce at Elephantine; rather, an oral formula (e.g. "I divorce my wife ..., she shall not be to me a wife"[312]) was pronounced in the assembly (*edah*),[313] whose role in this respect is thought to have been evidentiary rather than judicial.[314] The *sefer keritut*, which may well have included Hosea's formula,[315] already appears to be presupposed as the normal procedure in *Isa*. 50:1, cf. *Jer*. 3:8, though its role (like that of the assembly at Elephantine) may originally have been evidentiary rather than constitutive.

Biblical sources say very little about divorce at the initiative of the wife, though Zakovitch has argued from narrative sources that she (or her father) might terminate the relationship, on being deserted by her husband, by removing herself from the marital home.[316] At Elephantine the wife appears to have had the same right as her husband, unilaterally to divorce her spouse by an oral formula pronounced in the assembly.[317] Yaron views the equality of husband and wife in divorce at Elephantine as "probably due to the Egyptian environment".[318] Riskin (1989:30) comments: "To be sure, it is difficult to determine the extent of this community's assimilation, and therefore to ascertain how closely the evidence of these documents conforms to what was then normative Halakhah. Nevertheless, these documents show that divorce could be initiated either by the husband or the wife." A number of documents and literary sources from the Second Commonwealth and Bar Kochba periods appear to refer to the delivery of a *get* by a wife to her husband, though their interpretation is disputed.[319]

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310 Z.W. Falk, *Hebrew Law in Biblical Times* (Jerusalem: Wahrmann Books, 1964), 154.

311 A. Cowley, *Aramaic Papyri of the Fifth Century B.C.* (Oxford: Clarendon Press, 1923), 15:4 at pp.44-46; Emil G. Kraeling, *The Brooklyn Museum Aramaic Papyri: New Documents of the Jewish Colony at Elephantine* (New Haven: Yale University Press, 1953), 7:4 at p.204f.

312 Kraeling 7:21f., cf. 7:25; shorter forms in Cowley 15:23 and 15:27, Kraeling 2:7 and 2:9.

313 Cowley 15:22 and 15:26, Kraeling 2:7, 7:21.

314 R. Yaron, *Introduction to the Law of the Aramaic Papyri* (Oxford: The Clarendon Press, 1961), 54f.

315 Cf. D.L. Lieber, "Divorce, In the Bible", *Encyclopedia Judaica* (Jerusalem: Keter, 1973), VI.123, noting a Sumerian parallel where the husband pronounced the oral formula "you are not my wife" and "cut" the corner of his wife's garment to symbolize the severance of the marital bond.

316 Y. Zakovitch, "The Woman's Rights in the Biblical law of Divorce", *The Jewish Law Annual* IV (1981), 28-46, esp. 43.

317 See, e.g., Kraeling 7:24-25, quoted *supra*, §2.1.1; Cowley 15:22-23 "(if) [Miv]tahiah should stand up in the congregation and say, 'I divorce Ashor my husband ...".

318 1961:53. Cf. Lieber, 1973:123.

319 See further Jackson 2004:155-63; *idem,* "The Divorces of the Herodian Princesses: Jewish Law, Roman Law or Palace Law?", forthcoming.

Appendix B (n.21): Secular Laws Inhibiting Civil Divorce in the Absence of a *Get*

Commenting on the 1983 New York "*Get* Law" (section 253 of the 1983 Domestic Relations Law, according to which the petitioner for divorce must file an affidavit stating that "to the best of his or her knowledge, he or she has ... taken all steps solely within his or her power to remove all barriers to the other party's remarriage"), Rabbi Jachter, 2000:20f., writes (footnotes omitted):

> A helpful tool in procuring a *get* from a difficult spouse is the 1983 New York State *Get* Law (Domestic Relations Law 253). This law calls for the judge in a civil court to withhold a civil divorce until the party who filed for divorce removes all barriers to remarriage (i.e., gives a *get*). Rav Moshe Feinstein (*Teshuvot Igrot Moshe*, E.H. 4:106) and Rav Yosef Eliyahu Henkin (letter printed in *Techukah Leyuisrael Al Pi Hatorah* 3:206) rule that this law is not considered coercion of the husband to give a *get*. I.A. Breitowitz, *Between Civil and Religious Law. The Plight of the Agunah in American Society* (Westport Conn.: Greenwood Press, 1993), 203 note 599, cites several other prominent rabbis who also approve of this law.
>
> This law is not coercive, as it in no way punishes the husband. He merely gives a *get* in exchange for a civil divorce. Rav J. David Bleich (*Bintivot Hahalachah* 12:37) explains that, according to civil law, one does not have a "right" to a civil divorce. Rather, it is a privilege bestowed on a citizen by the court. Withholding a civil divorce until the husband gives his wife a *get* is the equivalent of not giving the husband a gift until he gives a *get*.
>
> This "Get Law," enacted in New York State, has proven effective in motivating many recalcitrant spouses to give a *get*. In light of its moderate success in New York, we should consider lobbying to pass such legislation in all jurisdictions where Jews live. Interestingly, Rav Asher Ehrentreu (a member of the administration of Israeli rabbinical courts) related to this author that he persuaded a judge in a former Soviet republic to withhold a civil divorce until the husband gave his wife a get. (Cf. Rabbi Jachter's "Viable Solutions to the Aguna Problem - Part II", http://www.tabc.org/koltorah/aguna/aguna59.2.htm (with minor differences)

South Africa is another jurisdiction where this has been attempted, with mixed results. The Divorce Amendment Act No. 95 of 1996 provides that a civil court judge may refuse to grant a civil divorce "unless the court is satisfied that the spouse within whose power it is to have the (religious) marriage so dissolved or the said barrier (to remarriage of the spouse) so removed, has taken the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed."

It is a common feature of the English, New York and South African legislation that they do not assist an *agunah* whose husband resists the civil divorce. The wife's choice in such cases is between a civil divorce without a *get* or no civil divorce at all.

An early version of legislation of this kind was proposed by B. Berkovits (in his private capacity), "*Get* and *Talaq* in English Law: Reflections on Law and Policy", in *Islamic Family Law*, ed. Chibli Mallat and Jane Connors (London: Graham & Trotman, 1990), 119-146, at 143-46; his draft is stronger than both the Divorce (Religious Marriages) Act 2002 and the earlier Family Law Act 1996, s.9(3-4), which had been sponsored by Chief Rabbi Jakobovits but had never been brought into effect: in the Berkovits proposal, withholding the civil decree absolute would have been mandatory, subject to a discretionary power to grant it, whereas under the 2002 Act an order that a decree of divorce be not made absolute "may be made only if the court is satisfied that in all the circumstances of the case it is just and reasonable to do so."

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