Towards a Solution to the Problem of the *Mesorevet Get*

Preliminary Report of the Agunah Research Unit*
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NB: The contents of this paper are purely theoretical. Nothing written or cited herein is intended for use in practice. Any practical question in the area of personal status in Orthodox Judaism, whether touching upon marriage, divorce, bastardy or conversion, must be submitted to those with the appropriate Orthodox halakhic authority.

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* This Preliminary Report draws extensively on a series of Working Papers of the Agunah Research Unit, all of which may be downloaded from the Unit's web site, at http://www.mucjs.org/publications.htm, and are here referred to, respectively, as "Directions", "Conditional Marriage", "Consensus", "Za'aqat" and "Morgenstern" and cited by paragraph numbers. This Report was drafted by Professor Jackson and extensively revised and supplemented in consultation with other members of the Unit. All other papers are authored by Rabbi Dr. Yehudah Abel, with the exception of "Directions", the Unit's initial agenda paper, authored by Professor Jackson. For full bibliographical details of secondary literature cited in these footnotes only by abbreviated references (normally, author and date). see the References at the end of this article Other abbreviations used here are:

EH	*'Even Ha-'Ezer*
ET	*Encyclopedia Talmudit*
ETB	*'Eyn Tenai BeNissu'in* (Lubetsky)
HM	*Ḥoshen Mishpat*
TBU	*Tenai Be-Nissu'in Uv-Get* (Berkovits)

1.0 Introduction: History and Authority[1]

1.1 The problem of the *agunah* involves the interaction of questions of history and authority. It cannot be resolved by appeals to history alone, whether by arguments that we revert to an earlier stage in the development of the *halakhah,* or by invoking the fact that major historical changes (not least, in the areas of marriage and divorce) have been made in the past.

1.2 Historical study must always be accompanied by investigation of such "dogmatic" questions as: (i) by what authority was any change (including changes in the authority system itself) made in the past?; (ii) do we today possess comparable authority? We are not entitled to argue: "just because changes have been effected in the past, the authority must exist to make further changes today". But the converse proposition also follows: we cannot argue that "just because changes have *not* been effected in the past, the authority cannot exist to make changes today". Issues of authority themselves also entail the interaction of historical and dogmatic questions.

1.3 One aspect of the complex interaction between history and dogmatics arises when the application of dogmatic rules depends upon historical claims which turn out (from historical analysis) to be problematic. If the Talmud ranks as the highest authority, we need to establish the text (as well as the meaning) of the talmudic text we seek to apply. Suppose we encounter (as we do in the text of Amemar's ruling on the *moredet* in *Ketubbot* 63b) a halakhically relevant variant reading in a newly discovered talmudic manuscript, are we entitled to take it into account? If so, with what effect? Does it cast a *safeq* over the normative conclusions previously derived from that talmudic text? Does it count as a previously unpublished *qamma*, for the purposes of Rema's qualification of *hilkheta kebatra'ei,* and if so with what effect? And who has the authority to decide such questions?

Establishing the authentic text is an issue not confined to the Talmud. Rabbenu Tam's *Sefer HaYashar* had an enormous influence on the history of our problem, yet its text — both in general and in a vital particular relevant to our issue — is problematic. And even if we are able to establish the authentic view of Rabbenu Tam on the geonic practice of coercion, did he have accurate information as to what that practice was, and on what authority it was based? If it turns out, from historical enquiry, that his information was not accurate, how does that affect the authority of his pronouncements?

1.4 It goes without saying that the members of the Agunah Research Unit,[2] the authors (even where with *semikhah*) of this preliminary report, claim no halakhic authority. In approaching the above questions, we seek to deploy a combination of academic (historical and analytical) and traditional approaches to the issues. In using academic approaches, we claim no necessary privilege for them. Nor, conversely, do we accept that they may be excluded as "external". Halakhic argumentation has its own history, and methodological innovation is neither excluded (witness the Brisk school) nor does it exclude interaction with external traditions (witness Rambam). It is for contemporary *posqim* to judge the value of the argumentation here offered, and to use their authority in relation to it as they see fit.

1.5 Though much of the literature seeking halakhic solutions to the problem of the recalcitrant husband debates the relative merits of three broad approaches, conceived as distinct

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1 See further Jackson, "Directions" 1.1-2.

2 For details of the five year project, funded thus far by private donors, the Hanadiv Foundation and the Leverhulme Trust, see http://www.mucjs.org/agunahunit.htm and http://www.mucjs.org/publications.htm for the Working Papers published by the Unit to date. The personnel consists of the Director (Professor Bernard Jackson), Senior Research Fellow (Rabbi Dr. Abel) and two PhD students (Shoshana Knol, Nechama Hadari), to be joined in the latter stages by a number of Israeli scholars, including Avishalom Westreich, who kindly provided a number of references incorporated in these footnotes.

"remedies" — the use of conditions (whether in marriage or divorce[3]), coercion (in its various forms) and annulment (on whatever grounds) — further analysis indicates the close interaction of these remedies, both conceptually and in practice. At root, the issues resolve into two basic questions: (a) how and when may a *bet din* secure the release of the wife in the absence of an uncoerced *get* delivered by the husband?; (b) what role is open to the married couple in providing the *bet din* with the authority to secure such a release?[4] This "interaction of remedies"[5] informs much of the discussion below, even though separate sections are devoted to the problems of conditions, coercion and annulment, respectively.

1.6 It was not our original intention to issue a Preliminary Report at this stage. We are slightly more than half way through a five year project, which commenced in January 2004, and anticipate further additions to our research team. The rapid compilation of this report has been prompted entirely by the convening by Chief Rabbi Amar of a Global Rabbinic Conference on November 7th and 8th 2006, to address this issue. This report is addressed primarily to the members of that conference. In submitting it, we stress that (even as a preliminary report) it is an unfinished document which represents work in progress. Nevertheless, we hope that it will stimulate discussion, and we will welcome responses and collaboration.

1.7 We work entirely within an Orthodox framework, and take account of all serious work compatible with such a framework, whatever its source. We seek to review conscientiously the research of others, in order to draw our own conclusions rather than rely on second-hand opinions. Not infrequently, valuable sources and insights are found even in works whose overall value may not be great.

2.0 Conditions

2.1 The R. Yoseh tradition in the *Yerushalmi*

2.1.1 For the purposes of this study, which seeks to investigate the possibility of a *global* solution to the problem of the *mesorevet get,* we are interested only in "terminative" conditions, i.e. conditions which facilitate the termination of the marriage without a *get*.

2.1.2 One such condition appears to have been endorsed by R. Yoseh in the *Jerusalem Talmud, Ketubbot* 5:8 (30b):

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

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3 Za'aqat ch.4. Rabbi Yosef Eliyahu Henkin proposed the *delivery* to the wife of a *get* at the time of *qiddushin* to take effect in the future and, in addition, a communal enactment declaring that every marriage shall be on condition that if the *get*, when required to avoid *'iggun*, would be lost, destroyed or halakhically invalid, the *qiddushin* shall not take place (which Rabbi Henkin expresses by saying that "the *qiddushin* will be retroactively annulled"). Rabbi Berkovits bemoans the fact that Rabbi Henkin abandoned his proposal because it was brought to his notice that the *Gedolim* of the previous generation had, in *'Eyn Tenai BeNissu'in*, proscribed the use of any condition in *nissu'in*. The truth is, writes Berkovits, that the opposition recorded in *ETB* was aimed at the French condition only and *never* is it there suggested that it is forbidden to apply *any* condition to *nissu'in*. There was, therefore, no reason for Rabbi Henkin to withdraw his proposal. Can it not be resurrected?

4 This is the one of the functions of "conditions", as appears to have been recognised by the Geonim, if we accept the view of the teachers of the teachers of Mei'ri, as discussed in 2.2.2 below.

5 See, earlier, Jackson, "Directions" 5.3.

2.1.3 There is dispute, in both rabbinic and academic sources, regarding the nature of this condition, which is not fully reproduced in the text (an indication, perhaps, that it was well-known). 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[6] represents the dominant academic view,[7] namely that there is here an entitlement to divorce (even against the objection of the other party, and without proof of any further "cause"), and this derives support from a clause found in some *ketubbot* in the Cairo Genizah.[8] However, there is also academic support for the dominant rabbinic view, that the condition related *only* to (special) financial terms of (a voluntary) divorce.[9] The latter view is certainly supported by the context in the Yerushalmi, though this is not necessarily conclusive as regards the original meaning of the clause, outside that context.

2.1.4 The dominant rabbinic view is also supported by the general rules relating to conditions contrary to Torah-law.[10] Most pertinent here are the examples given in *Tosefta Qiddushin* 3:7-8:[11]

> [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.

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

2.1.5 A more radical (and persuasive) view has, however, recently been proposed by Dr. Yeḥezkel Margalit, who sees R. Yoseh's *tenai* as part of a pattern of specifically Palestinian conditions[12]

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6 Riskin 1989:29f., supporting this, at 31, by reference to *Y. Ket* 7:7 (31c). See further Jackson, "Directions" 2.2.1.

7 E.g. Epstein 1927:198 n.19; Friedman 1980:I.316-322; Brewer 1999:349-357, at 353f., 356.

8 "And if this Maliha hates this Sa'id, her husband, and desires to leave his home, she shall lose her *ketubba* money, and she shall not take anything except that which she brought in from the house of her fathers alone; and she shall go out by the authorization of the court (על פם בית דינה) and with the consent of our masters, the sages": TS 24.68, ll.5-7, Friedman 1980:II.54 (dating), 55f. On the meaning of על פם בית דינה, see Friedman 1980:I.328-46, Katzoff 1987:246; Jackson 2004:161f. Cf. 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, quoted in 3.3.3 below. 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 to terminate the marriage, even against the husband's will."

9 Katzoff 1987:245f.

10 See further Abel, "Conditional Marriage" IX.70-76.

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

12 See also Breitowitz 1993:59. *M. Kidd.* 3:1 already knows of a deferred betrothal, which Falk 1978:II.286 compares to the Alexandrian form of *ketubbah* on which Hillel is said to have adjudicated in *T. Ket.* 4:9:

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

(reflected also in some Genizah *ketubbot*) which (a) were more "egalitarian" than the Babylonian tradition,[13] and (b) give the parties to the marriage a greater discretion to modify the normal incidents of marriage than is suggested by the distinction between monetary and non-monetary conditions.[14] Thus, it appears to have been possible, by *tenai*, to (i) exclude the triple obligations of Exodus 21:10 (*sh'erah, kesutah ve'onatah*);[15] (ii) to deny the husband his (then) right to take a second wife, on pain of automatic termination (without a *get*) of the first marriage.[16] It may well be that the acceptance by Rashba of a condition: "If I divorce you (by a certain time) then you are betrothed to me…but if I do not divorce you (by that time) then you are not betrothed to me"[17] is to be viewed as reflecting the same tradition.

2.2 Use of R. Yoseh's condition

2.2.1 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.[18]

2.2.2 One very specific — and initially surprising — answer to this question is that it formed a basis

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and Israel.'

The Alexandrian provenance of such betrothal practices is confirmed by Philo, *De Specialibus Legibus* iii.72 (who is critical of them). Segal, in Hecht et al. 1996:137f., sees this form of *ketubbah* as evidence of "a law allowing one to make a condition under which the betrothal could be cancelled retroactively without the necessity of a *get* ... Thus, by virtue of the conditions laid down in the *ketubbah*, the acquisition made by the betrothal was cancelled without the requirement of a *get* even though the act of betrothal did result in the creation of the status of 'married woman'." See further Jackson, "Directions" n.40, for further literature.

13 In another respect, too, the Palestinian tradition appears to have been more favourable to the woman. The Mishnah, in introducing the issue of the *moredet,* had sought to "persuade" her back into compliance by reducing her *ketubbah* by 7 *denarii* per week, until it was entirely exhausted (*Mishnah Ketubbot* 5:7). Whether, at this stage, such exhaustion of the *ketubbah* was already taken to entail an obligation to terminate the marriage, is not clear. But such a view was not long in emerging. The Tosefta indicates that subsequent to the compilation of the Mishnah, "our Rabbis decreed that the court warn [her] for four and [or] five consecutive weeks, twice each week. If she continues [her rebelliousness] beyond this point, even if her marriage contract is worth one hundred maneh, she forfeits all of it" (*T. Ketubbot* 5:7). But the account of this in the Yerushalmi states: "The court after them [ruled] that the *moredet* be warned for four weeks, [at which time] she breaks her marriage contract and leaves": 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.

14 For example, the Babli preserves a *baraita* (*Qidd.* 19b) in which R. Meir contests the view of the Tosefta (2.1.4, above), that a condition excluding food, clothing, or conjugal rights is valid.

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" (*Y. Gittin* 4:2), cited by Gilat 1973:VII.594, and Morgenstern (internet version):ch.III, rather than (as Breitowitz 1993:62 n.171 observes) the Babylonian Talmud's common rationale כל דמקדש.

15 *Tosefta Qiddushin* 3:7-8, in 2.1.4 above. On the later halakhic attitude to such a condition, see Abel, "Conditional Marriage" IX.71 n.81 and IX.74 at n.85.

16 On the later rejection of any conditions in *nissu'in* in *Tsafenat Pa'neaḥ,* and Berkovits' discussion of that argument, see Abel, "Conditional Marriage" IX.82-92.

17 Rashba, *Novellae*, *Gittin* 84a; see Abel, "Conditional Marriage" IX.70, and see "Conditional Marriage" IX.73-76 for Berkovits' use of this source. Abel's statement in "Morgenstern", 21.2.6.7.1, n.121, based on *Nedarim* 29, that *qiddushin* cannot be contracted for a limited period (referring to a case where the marriage declaration was, for example, "You are my wife for the next week only") concurs with this ruling of Rashba where the time limitation on the marriage comes not in the marriage formula but in an attached condition making the marriage dependent upon the delivery of a *get* at a future point in time.

18 See further Jackson, "Directions" n.36.

for the later geonic reforms regarding coercion of the *moredet* (§3.3.4, below).[19] Me'iri writes:[20]

> And my teachers testified that their teachers explained that the Geonic innovation in this matter is based on what is written in the Western Talmud היל ין דכתבין אי שנאי אין שנאית תניי ממון הוא וקיים ... i.e. that anyone who stipulates that if he hates her he may divorce her, with payment of the *ketubbah* or the *tosefet*, and similarly (if they stipulate that) if she hates him, that he may be forced to divorce her (שיזקק הוא לגרשה), whether on payment of all the *ketubbah* or with less, everything is valid in accordance with what they have stipulated. And they wrote on this that the Geonim innovated as they did because they were accustomed to write in their *ketubbot* אי שנאי אין שנאית ...

Clearly, the teachers of Mei'ri viewed R. Yoseh's condition as terminative, and even if this ran against majority opinion, it may create a *safeq* as to the authoritative interpretation of R. Yoseh's condition.

2.3 Authority of R. Yoseh's condition

2.3.1 R. Yose's view is not disputed in the Jerusalem Talmud, and is not mentioned in the Babli. It may well fall within Rema's qualification to *hilkheta kebatra'ei*:[21] even though it was "recorded", we may have to determine whether it was "well known".[22] Moreover, there is specific authority for the view that, in the absence of explicit disagreement by the Babylonian with the Jerusalem Talmud, the authority of the latter is unaffected.[23]

2.3.3 An objection to this may be made on the basis of the maxim *eyn tenai benissu'in*.[24] However, there is a strong argument, based on Tosafot: *'eyn regilut le-hatnot be-nissu'in*,[25] that the maxim, at least in origin, was no more than a *descriptive* statement, that people normally do not make such conditions (in that most conditions people would want to attach to marriage could be resolved one way or another in the (then) customary 12 month interval between *qiddushin* and *nissu'in*).[26]

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19 See Riskin 1989:82, 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.

20 Rabbi Menaḥem Ha-Me'iri, *Bet Ha-Behirah* to *Ketubbot* (ed. A. Sofer, Jerusalem, 1968), p.269.

21 "In all cases where the views of the earlier authorities are recorded and are well known (מפורסמים) and the later authorities disagree with them — as sometimes was the case with the later authorities who disagreed with the *geonim* — we follow the view of the later, as from the time of Abbai 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 (Aḥaronim), 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": *Rema* to *Shulḥan Arukh Ḥoshen Mishpat* 25:2, as quoted by Elon 1994:I.271.

22 On these criteria, see further Abel, "Consensus" III.17-18.

23 Ritba on *Kidd*. 60a; Ma'arik 100; *ET* IX.251 at n.155. Dr. Y. Margalit argues in a forthcoming paper that this is particularly so where the Yerushalmi is explicit and the Babli vague. Rambam's inclination towards the Yerushalmi has been documented by Rabbi Krasilchikov, the Poltava Gaon, in his commentaries on the Yerushalmi. See his introduction to the first volume of the ongoing publication of the Talmud Yerushalmi by *Makhon Mutsal Me'Esh*, Jerusalem. See also Lieberman 1947.

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

25 *Ketubbot* 73a s.v. *Lo' Tema'*; *Yevamot* 107a s.v. *Bet Shammai et al.*: see Abel, "Conditional Marriage" IX.90.

26 See further Abel, "Conditional Marriage" IX.77-78, noting and dismissing the following argument of Rabbi Danishevsky in *ETB*: Accepting the word of *Tosafot* that *'eyn tenai benissu'in* is not a prohibition and means no more than that it was *unusual* for people (in talmudic times) to stipulate conditions in *nissu'in* (though it was possible to do so), how can we accept the French rabbinate's proposal of introducing a condition into *all nissu'in* thus making it *usual* to stipulate conditions in *nissu'in*? Are we not in violation of *Tosafot* who declare it unusual?

2.4 The condition of the *aḥ mumar*

2.4.1 One post-talmudic example of a terminative condition is universally recognised as valid, that relating to the *aḥ mumar*: Following a ruling of Rabbi Yisra'el Bruna, in his Responsa, Rema held valid a clause annulling the marriage in the event that the husband dies childless, where the husband (at the time of the marriage) had only one brother, who had abandoned Judaism for another faith.

> If someone takes a wife and he has an apostate brother, he may marry her stipulating a … condition that if she should come before the apostate for levirate marriage [or *ḥalitsah*] then she shall not [now] be married [to him]. (Rema, *Even Ha-'Ezer*, 157:4)

2.4.2 Clearly, this clause was designed to avoid placing the wife in a position where she would require *ḥalitsah* from someone who was most unlikely to grant it. Care is required in the drafting of any such *tenai*, in order not to endorse a condition contrary to Torah law.[27] *Responsa Noda' BiHudah* draws the distinction as follows:

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

2.4.3 There were some who even widened the use of this mechanism in order to solve additional problems of problematic *yibbum*/*ḥalitsah* (for example when the brother of the groom suffers from mental retardation and the like). One such decision was that of the *Turey Zahav*, in the name of his father-in-law the *Bayit Ḥadash* (*ibid.*, sub-para 1), regarding a man whose brother's whereabouts are unknown:

> And it seems that the same law applies to one who has a brother who has gone abroad and it is not known if he is alive: he also is allowed to marry on a condition that if he dies without children and nothing will be known of him (the brother) that she will not be married, and it is permitted to make such a condition even *ab initio*.[28]

2.4.4 Much of the contemporary debate on the possible use of a terminative condition to solve the problem of the *mesorevet get* revolves around the significance of a basic factual difference between this problem and that of the *aḥ mumar*. In the latter case, the original husband is dead; in the case of the *mesorevet get* he is still alive. For example, *Naḥalat Shivah*, it is claimed, maintains that only a condition that takes effect after the husband's death, such as Mahari Bruna's, can be valid. Berkovits' reply to this objection deserves serious consideration.[29]

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

28 Full details of this condition are set out *inter alia* in Rabbi Y.M. Epstein, *'Arokh Ha-Shulḥan*, *EH* 157:15-17.

29 See further Abel, "Conditional Marriage" IX.22, 33-35.

2.5 The 20th century debate

2.5.1 Current attitudes to the idea of solving the problem of the *agunah* through conditional marriage are often informed by the view that the publication of *'Eyn Tenai Be-Nissu'in* (*ETB*) in Wilna in 1930 put the issue to sleep, despite the later attempt of R. Eliezer Berkovits to reanalyse the issue in his *Tenai Be-Nissu'in Uv-Get* (*TBU)* (1966). Both the historical background to *Eyn Tenai Be-Nissu'in*, and Berkovits' replies to its arguments, are reviewed in detail in Rabbi Dr. Abel's paper, "The Plight of the *'Agunah* and Conditional Marriage". This section merely summarises the essential points.

2.5.2 It is important to be clear about the nature of the (French) proposals against which the *teshuvot* collected by Rav Lubetsky in *'Eyn Tenai Be-Nissu'in* were directed. The earliest French proposal, in 1887, was for a *tenai* stating: "If the State judges should divorce us and I will not give you a divorce according to the Law of Moses and Israel, this betrothal shall not be effective." A later version, proposed in 1907, amended the marriage formula to read: "Behold you are betrothed to me on condition that you will not be left an *'agunah* because of me, so if the State judges should divorce us this betrothal shall not be effective." The arguments in *'Eyn Tenai Be-Nissu'in* were directed against these proposals, and were initially communicated privately, resulting in the withdrawal of the proposals. It was only after pamphlets were published in London in 1928 and 1929 by Rabbi Yosef Shapatshnik,[30] declaring the author's intention to solve the *agunah* problem by a combination of condition and annulment, that *'Eyn Tenai Be-Nissu'in* (without supplementation to address post-1907 proposals) was published.

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

2.5.4 The crucial weakness of the French proposals had been that they gave no role to the *bet din:* the condition authorised termination of the marriage solely on condition of action by the secular state (in granting a divorce) and, at most, the failure of the husband to grant a *get* (irrespective of whether a *bet din* considered that the wife was, in the circumstances of the case, entitled to a *get*). It would thus apply in *every* case where civil divorce action was initiated by the wife, but resisted by the husband. For these reasons, it appeared a direct threat to the stability of Jewish marriage. The Constantinople proposal, on the other hand, did not suffer from this problem of "frequency". Rather, it built on traditional Jewish grounds for divorce, each of which occurred only in (relatively) exceptional circumstances:[31] illness, abandonment or a Judgment of the *Bet Din*, while

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30 *Ḥerut 'Olam*, London 5688 (1928) and *Liqrow La-'Asirim Deror*, London, 5689 (1929): see Freimann, *Seder Qiddushin VeNissu'in,* 390. We have not had access to these pamphlets. Freimann also records that Shapatshnik opened an "international office" for this purpose, and even went so far as to forge the signatures of leading rabbis to promote his work.

31 As Rabbi Jachter puts it, referring to Rema's case of the *aḥ mumar:* "... 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, to see that he gives his wife a *get* prior to his death, to insure that the marital relations will not be retroactively considered promiscuous": H. Jachter, "Unaccepted Proposals to Solve the Aguna Problem", http://www.tabc.org/koltorah/aguna/agunah59.1htm and linked pages.

not infrequent, are not everyday occurrences.

2.5.5 The distinctive features of the Berkovits proposal were that (a) unlike the French proposals, it did make operation of the condition dependent upon a decision of the *bet din,* and (b) unlike the Constantinople proposal (not considered in *'Eyn Tenai Be-Nissu'in*), it confined itself to *get* refusal in the face of a request or order[32] of a *bet din* to do so — a relatively infrequent occurrence.[33] Berkovits does not propose an exact text of any such condition[34] but offers a few suggestions for making the marriage dependent on the bride's never becoming an *'agunah* therefrom.[35] Berkovits recognises important weaknesses in the French condition and does not set out to defend it,[36] and argues that the objections in *Eyn Tenai Be-Nissu'in* were aimed only at the condition(s) proposed by the French rabbinate and that nowhere in that pamphlet is a ban on conditional marriage *per se* promulgated.[37]

2.5.6 Berkovits' proposal has not hitherto received serious consideration, but has often been dismissed (without necessarily having been read) on the basis of the *teshuvot* in *Eyn Tenai Be-Nissu'in*. It has nevertheless received influential support. Thus Rav Y.Y. Weinberg wrote in his initial *haskamah:* "There is no doubt that this work merits publication and broad deliberation by the leading halakhic authorities … I have not seen the equal of this work amongst the books of the various Aḥaronim amongst contemporary authors."[38] Rav Menachem Mendel Kasher (who later sought to discredit Weinberg's *haskamah*[39]) is said initially to have been enthusiastic about the proposal of conditional marriage;[40] indeed, Marc Shapiro states that he is in possession of a copy of a letter sent by Kasher to Berkovits congratulating the latter on the publication of *Tenai Be-Nissu'in Uv-Get*![41] A letter from Rabbi Mosheh Tendler, quoted by Rabbi Leo Young in an undated letter to Berkovits,

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32 Berkovits does not limit his suggested condition to cases where the Talmud says *kofin* or *yotsi* (we *force him* to divorce or *he must* divorce) but includes all cases where it is proper, becoming, to do so — using the term *min ha-ra'uy* (one could also describe the required behaviour as *ke-hogen*). By this, he appears to mean cases where there is a moral obligation to give a *get* (a sort of *ḥiyyuv be-diney shamayim*) rather than cases where the husband is in the right but is asked to act piously beyond even moral obligations (*middat ḥasidut*).

33 It might be argued that while the infrequency of the operation of the *aḥ mumar* condition stems from unusual circumstances utterly outside the couple's control — a combination of widowhood, childlessness and the brother-in-law's apostasy — the problem of *get* recalcitrance is a problem completely within the control of the partners involved and the *Bet Din*. Yet the *mumar* may repent, and social as well as religious factors may affect the frequency of the *aḥ mumar* situation. See Berkovits, *Tenai beNissu'in UveGet* 32-34; Abel, "Conditional Marriage" IX.29.

34 *Tenai Be-Nissu'in Uv-Get*, pp.2, 166.

35 Any such condition might best be incorporated into the *qiddushin* by adding to the *herei at ...* formula a reference to the *taqqanah* suggested in 7.3-4 below. See also Rav Henkin, in relation to the proposal (ultimately withdrawn) described in nn.3 above, 199 below.

36 *Tenai Be-Nissu'in Uv-Get*, 67.

37 *Tenai Be-Nissu'in Uv-Get*, 57-58, 106-108; see further Abel, "Conditional Marriage" IX.6-7.

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

39 See further Abel, "Conditional Marriage" XI.4-12, notably Berkovits' claim that the letter from Rav Weinberg published in 1989 by Rav Kasher, regretting the *haskamah,* was a forgery. Marc Shapiro has now published a letter from Rabbi Mosheh Botchko to Rabbi Leo Young, three weeks before Weinberg's death in 1965, claiming that Rav Weinberg had asked him to write on his behalf, to indicate that he had not changed his mind.

40 Goldberg and Villa 2006:143 n.255.

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

states that R. Mosheh Feinstein expressed theoretical approval of Berkovits's position.[42] The late Dayan Berkovits wrote in 1988 that "... I think that the way forward is to reopen that avenue and to re-examine it".[43] More recently, Dayan Broyde, while acknowledging that "the custom and practice is not to use any conditions in a marriage", has written: "(T)he *tenai* procedure — if correctly followed — works for almost every imaginable contingency, including those currently not present ... when a *tenai* is made at the time of marriage, and kept in effect during the sexual relationship and then the *tenai* is breached, the marriage ends without any divorce, as if there never was a marriage. Nevertheless, the marriage is fully valid until such time as the condition is breached."[44]

2.6 Preserving the *tenai*

2.6.1 The foregoing discussion has been concerned, in the main, with the question whether, in principle, it is possible within the *halakhah* to adopt a (suitably drafted) terminative condition which will bring the marriage to an end on *get* refusal.

2.6.2 If it is possible, there is still a need to devise a means to ensure that the *tenai* is preserved in force throughout the marriage, despite halakhic assumptions that the very act of marital intercourse is assumed to be unconditional, and thus to imply waiver of any preceding condition. Some, indeed, have suggested that, in order to preserve the *tenai,* it is necessary for the parties to repeat it[45] before witnesses not merely at every stage of *nissu'in* (*ḥuppah*, *yiḥud* and *bi'ah*) but also on every subsequent occasion of marital relations.[46] Of course, the need to repeat at *nissu'in* a *tenai* entered into at *qiddushin* goes back to the period when the two were separated in time (customarily, by a year). Nowadays, when *qiddushin* and *nissu'in* are performed together, there is no reason to think that the parties intend the condition at *qiddushin* to be cancelled at *nissu'in*;[47] indeed, even the *Ḥatam Sofer* states (in the context of the condition of the *aḥ mumar*) that the repetition of the condition at the various stages of *nissu'in* is only a stringency and is not essential.[48]

2.6.3 There are, however, strong arguments against the need for any repetition,[49] based on the intentions of the parties and the very purpose of the condition. At its simplest, we may observe that release of a condition voluntarily entered into (as a contractual term) by both parties equally requires the consent of both parties, and any presumption of cancellation due to fear of retroactive *zenut* must surely be countered by the benefit to the woman of preserving the condition.[50] Why, otherwise, would she have entered into the condition in the first place? This, it might be argued, should at least

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42 Shapiro, *ibid*.

43 See further Abel, "Conditional Marriage" XI.12.

44 "Error ...", at http://www.jlaw.com/Articles/KidusheiTaut.html, now reprinted with minor differences in Broyde 2003. See further Jackson, "Directions" 2.4.4.

45 *Tosafot*, *Yevamot* 107a., s.v. *'Amar Rav Yehudah*: see Abel, "Conditional Marriage" II.4.

46 Rabbi Aqiva Eiger – who proposes instead a non-annullable oath that they will never forego the condition at any future intercourse: see Abel, "Conditional Marriage" IX.41. So, apparently, Broyde, *ibid*., when he writes: "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." However, some opinions even in *Eyn Tenai BeNissu'in* do not require repetition at the first *bi'ah*: see Abel, "Conditional Marriage" IX.23.

47 Berkovits notes that this was already pointed out in *Responsa Terumat ha-Deshen* (end of no. 223): see Abel, "Conditional Marriage" IX.40(i).

48 *TBU* 48, citing *Resp. Ḥatam Sofer* vol. IV (= *EH* 2), no.68 s.v. *Wa-'ani*: see *Za'aqat Daalot,* p.145 n.260; Abel, "Conditional Marriage" IX.37-39.

49 Discussed in detail in Abel, "Conditional Marriage" IX.20-41.

50 Cf. Berkovits, *TBU* 37, citing *Responsa Me'il Tsedaqah* no.1: see further Abel, "Conditional Marriage" IX.40(ii).

reverse the *ḥazaqah,*[51] making it necessary for the woman to declare before witnesses her release of the condition, if she wishes to do so. We have seen, moreover, that the Constantinople rabbinate, amongst others,[52] thought it possible to avoid this problem by fortifying the condition *ab initio*, through a *shevu'ah* that it would not be cancelled (though this may well have been intended *in terrorem,* rather than as an automatic means of guaranteeing the preservation of the *tenai*; the latter view, however, is found amongst some *posqim*[53]). Besides, Berkovits has argued eloquently that even with retroactive annulment during the husband's lifetime there *would be no promiscuity* in the case of his condition.[54]

2.6.4 A more technical argument is based on an analogy with the conditional *get* given by a soldier going on active military service, when the soldier returns home on leave. Dayan Abramsky 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."[55] A similar argument, Berkovits maintains,[56] can be applied to a condition in *nissu'in* for the avoidance of *'iggun*.

2.7 Effect of the *tenai*

2.7.1 We need also to consider the effect of the *tenai,* if activated. The general assumption has been that the operation of such a *tenai* is equivalent to retrospective annulment of the *qiddushin*.[57] If so, questions arise as regards the status of the relationship, as thus retrospectively defined, and the need to avoid even the impression of *zenut* (since the belief that this would be the effect of the condition might in itself prove a deterrent to entering into it).

2.7.2 Views have been expressed, however, contrary to this general assumption that the operation of such a *tenai* is equivalent to retrospective annulment of the *qiddushin*. Dayan Broyde appears to maintain that such conditions need not be retrospective.[58] The matter requires further investigation.

2.7.3 If the general assumption of the retroactivity of such a condition is correct, where does that leave the spouses?[59] The common answer is that it leaves them in "*zenut*",[60] and it is precisely because of the

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51 There is, in fact, an argument that *'eyn 'adam 'oseh be'ilato be'ilat zenut* does not apply to a woman: see *Ḥayyim shel Shalom* II number 81; Abel, "Morgenstern" 21.2.6.11.3. See also *ET* I, 559-60.

52 See R. Aqiva Eiger, as discussed by Berkovits, at Abel, "Conditional Marriage" IX.41.

53 See *Piṯḥei Teshuvah EH* 157:4, sub-para. 9.

54 See Abel, "Conditional Marriage" IX.40 (iii).

55 See Bleich 1977:153.

56 Berkovits, *TBU* 52-53.

57 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."

58 "Nevertheless, the marriage is fully valid until such time as the condition is breached": Broyde, "Error", above n.44: cf. 2003:50 and in private conversation. His basis for this is not made clear (unless he assumes an explicit term in the condition that the invalidity will not be retroactive).

59 Of course, no issue of *mamzerut* of any children of the marriage arises, though there may in some circles be a fear of social embarrassment.

60 In *Tzitz Eli'ezer* I 27 (written in 1936), Rabbi Waldenberg argues at length that if a condition annuls a marriage during the husband's lifetime retroactive promiscuity will always result [and though, if a couple wanted, in spite of this, to make a condition in *nissu'in*, the condition would be valid, it is forbidden to introduce such a condition as the norm]. On R. Berkovits' response to this argument, see Abel, "Conditional Marriage" IX.20-35. Abel, "Za'aqat" 2.3, notes that *Ḥatam Sofer* vol. IV (*'Even Ha-'Ezer* 2) number 68, speaks only of the condition of Mahari Bruna when he declares that even in the event of annulment there would be no retrospective *zenut*, though Berkovits (*TBU* 54-56) argues that *Ḥatam Sofer* would say the same to his condition also.

fear of such *zenut* that it may be assumed that the condition was waived. This is based on the maxim *'eyn 'adam 'oseh be'ilato be'ilat zenut* .[61]

2.8 Implied Terminative conditions

2.8.1 The *halakhah* also recognises the concept of unspoken conditions (*'ada'ta' dehakhi lo' qiddeshah 'atsmah*), which can be used in relation to marital defects arising after *nissu'in,* as where a husband[62] or even the levir himself[63] becomes a *mumar* in the course of the marriage.[64] Whether this could be extended to a recalcitrant husband deserves investigation. After all, the husband commits himself in the *qiddushin* formula to *qiddushin kedat mosheh veyisra'el*: why should his continuing commitment not create a *tenai*[65] (as, indeed, appears to be assumed by *kol hameqadesh ada'ata derabbanan mekadesh*). Of course, any use of terminative conditions to provide a global solution to the problem of recalcitrance must not rely on the contingency of either explicit conditions or the subjectivity of implied conditions; what is required is a standard condition implied by law. But, as in the past,[66] the case for *tenai'in bet din* gains weight from previous practice — or, indeed, from enactment (*taqqanah*) of the *qahal* to which the couple belong.[67]

3.0 Coercion

3.1 Overview

3.1.1 The use of (halakhically authorised and administered) coercion — the stick rather than the carrot[68] — has been a major element in the history of our problem. Its use is currently largely

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61 See Abel, "Conditional Marriage" IX.47, where Berkovits attributes to *Shiltey haGibborim* a novel understanding of this maxim; Abel rejects Berkovits's suggestion (n.57 there).

62 See Abel, "Morgenstern" 21.2.6.12.1, on *Responsa Mahari Qatsbi*, *siman* 10.

63 See *Responsa Maharam Mintz*, number 105, quoted in *Responsa Seridey 'Esh* III 25, p.71, arguing from Maharam (quoted in Mordekhai, *Yevamot*, *siman* 30): we can say that she did not accept the *qiddushin* on such an understanding and that therefore she is free to remarry without *ḥalitsah*. See further Abel, "Morgenstern" 21.2.11.

64 See also Abel, "Za'aqat" 2.2, discussing the argument of *Ḥiqrey Lev* that, were it not for *tav lemeitav,* we would have *presumed* that a woman who finds herself before a leprous brother-in-law would not have married her late husband had she known that she would find herself in such a situation and so she would be exempt from *yibbum* entirely. The whole legal argument of reasonable presumption, says the *Ḥiqrey Lev*, is built on the law of conditions.

65 A letter of Rabbi Herzog addressed to Rabbi Weinberg, printed at the beginning of *Resp. Seridey 'Esh* III:25 (= I:90), cites a statement of Rabbi Shelomoh Kluger (Maharshaq) in *Resp. Ḥiddushey 'Anshey Shem* that since the groom declares in his marriage formula that he is acting "in accordance with the Law of Moses and Israel" he is, in effect, making a condition that the *qiddushin* depend upon his adherence to the Jewish faith. Should he apostatise, therefore, there will be no marriage. Rabbi Herzog finds the suggestion "astonishing" (see further Abel, "Morgenstern" 21.2.6.7.4). We find the same suggestion in the responsa of Mahari Qatsbi, number 10, cited in *'Otsar HaPosqim* (on *'Even Ha'Ezer*) 39:32:26 (see further Abel, "Morgenstern" 21.2.6.12.1).

66 For the argument that the standard *ketubbah* conditions of *M. Ket.* 4:7-12 were themselves based on earlier notarial practice, see Jackson 2004a:220f.

67 In discussing a proposed *taqqanat haqahal* which would render void any marriage not conducted with the knowledge and in the presence of the communal officials, and in the presence of ten persons, *Ribash* (*Resp.* 399; see Elon, 1994:II.856-59) argues: "Under the law of the Torah, the townspeople may adopt enactments, regulations, and agreements, and may penalize violators ... Since the townspeople agree on them, it is as if each one of them took them upon himself and became obligated to carry them out."

68 The latter has always been preferred. Rabbenu Tam is not embarrassed to use the language of "bribery" in recommending it: "A case was once decided by me regarding someone who had betrothed the daughter of R. Samuel in Chappes. The one who had betrothed her was ordered to divorce her, and I arranged 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]." See *Sefer Hayashar leRabbenu Tam*, as quoted by Riskin 1989:98 (Heb.), 102 (Engl.).

dismissed, for a number of reasons: (a) the traditional means of coercion were physical, and this is normally not permitted by secular legal systems in the Diaspora; (b) even where that "external" problem does not exist — as in Israel, where imprisonment has been available since 1953 — there is the fear of a *get me'useh*; (c) even where both these ("external" and "internal") problems may be solved, there is no guarantee that coercion will actually work in every case;[69] (d) this practical limitation on the possibility of using coercion as a "global" solution is matched by a halakhic limitation: the halakhic availability of coercion is particularly problematic where the wife is a *moredet* claiming *me'is alay*.

3.1.2 There are, however, signs of movement on some of these issues. It is said that the rabbinical courts in Israel are becoming more willing to use the range of civil sanctions provided by Knesset legislation in 1995 — including withdrawal of passports and driving licenses —sanctions which have been seen as the modern counterpart of the *harḥaqot* of Rabbenu Tam. Of course, while "lesser" sanctions may diminish the risk of the *get* being regarded as *me'useh,* they also increase the risk of failure to produce the desired effect, so that they, too, fail in principle to advance the search for a "global" solution. Nevertheless, the very fact that the halakhic authorities are prepared to consider the validity of new forms of coercion is encouraging, and may open the door to debate on new types of coercion which may have a "global" effect.

3.1.3 In this context, it becomes relevant to revisit the history of the matter. The halakhic objections to the use of coercion as a global solution to the problem of recalcitrance may be summarised as follows:

(a) There is no explicit evidence for the use of coercion against the husband of a *moredet* claiming *me'is alay* in the Talmud.
(b) The Geonim practiced the traditional form of *kefiyah* (physical coercion) on the basis of an emergency situation.
(c) Rabbenu Tam explicitly denied that coercion was contemplated by the Talmud in such cases.
(d) Although the Geonim appear to have authorised coercion in such cases, they either lacked authority to do so (Rabbenu Tam), or, even if they did possess authority, we have no comparable authority today.
(e) While Rambam authorised coercion in such cases on grounds independent of the Geonim (logical inference from the Talmud),[70] his view was not followed other than by the Yemenite community.[71]
(f) The issue cannot be separated from that of the *grounds* for divorce, as is reflected in the traditional rabbinic "moral fear" (expressed already in the Mishnah) that accepted grounds for divorce may be misused by women who have an "ulterior motive": namely, that they have "cast their eyes on another man".

3.1.4 In this section, the following arguments will be advanced in response to the traditional objections:

(a) There is now explicit evidence, in a recently discovered talmudic manuscript, for the use of coercion against the husband of a *moredet* claiming *me'is alay* (§3.2).
(b) There are grounds to believe that the Geonim practiced a different form of *kefiyah,* more akin to annulment (§3.3), and that, while they recognised an emergency situation, they did not base their authority exclusively on that (§3.4).
(c) The text of the *Sefer Hayashar* is inconsistent: elsewhere, Rabbenu Tam accepts coercion in such cases, and objects to the geonic practice only insofar as it overrode the 12 month waiting period prescribed by the Talmud (§3.5).
(d) The claim (of Rabbenu Tam) that the Geonim lacked authority for coercion in such cases is based upon (i) the text of the Talmud available to him, and his interpretation of it; (ii)

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69 Witness the notorious case of the Yemenite who died in prison after 32 years of recalcitrance.

70 *Hilkhot Ishut* 14:8; see further Jackson, "Directions" 3.5.4.

71 On the latter, see Arusi 1981-83.

his general reluctance to accept halakhic modification on the basis of emergency powers;[72] (iii) his unawareness of the view that the geonic practice had been based in part upon a *tenai*.[73] Moreover, the assumption of a consensus amongst the Rishonim and later authorities in favour of Rabbenu Tam's view (resulting in the conclusion that even if the Geonim did possess the authority for their measures, we have no comparable authority today) is now being questioned by contemporary research (§3.5).

(e) Contemporary research also indicates that Rambam's view has been accepted as normative beyond the confines of the Yemenite community. Rather, it fits into a more general pattern of a division between (broadly) Ashkenazim and Sephardim, itself reflecting the different (Christian v. Muslim) cultural environments within which these traditions developed (§3.6.1).

(f) That latter division is itself reflected in approaches to the *grounds* for divorce, and the very different ways in which Ashkenazim and Sephardim before the *Shulḥan Arukh* sought to "equalise" the position of men and women in divorce: the Ashkenazim by restricting the husband's right to unilateral divorce (through the enactments of Rabbenu Gershom), the Sephardim by maintaining (in principle) the wife's right to unilateral divorce, and retaining the possibility of coercion in the case of the *moredet* (§3.6.2).

3.1.5 The above (largely historical) analysis of the issue needs to be supplemented by addressing a number of dogmatic, analytical and policy issues. Briefly:

(a) Is the authority of tradition 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 Geonim did not base themselves on talmudic authority (even a minority opinion in the Talmud[74]), 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?[75] Or do we take the view that, like an erroneous textual tradition, error may be validated by subsequent acceptance? Is Rema's justification of his exception to the principle of *hilkheta kebatra'ei,*[76] relevant here?: we need not follow later authorities when the latter were unaware of a previously unpublished geonic responsum since, had it been known, the later authorities may have decided the other way.

(b) Is it possible to envisage a form of coercion which does not require the participation at all of the husband in the *get* procedure (or, more generally, what precisely is the relationship

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72 For the view that Rabbenu Tam "never utilizes the argument that the conditions have changed since the days of the Talmud. He rather chooses to resolve the problem by presenting new interpretations to the statements of the Talmud ...", see S. Albeck 1954, quoted by Riskin 1989:108; Jackson, "Directions" n.125. But the matter is disputed. See further Ta-Shma 1999:76-92.

73 The view Me'iri attributes to his teachers: see 2.2.2, above.

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

75 Thus, Riskin 1989:86 argues: "If it was the Geonim who initially provided for a coerced divorce, then if the Geonic decrees are ever rejected, their provision for a coerced divorce must be rejected as well. If, however, it was the Rabbanan Sabborai — i.e., the Talmud itself — who provided for a coerced divorce, then even if we were to reject the Geonic decrees granting the wife monetary compensation, we would nevertheless be forced to uphold the provision for a coerced divorce. Such is the position of Alfasi." Rif, however, sees the geonic measures as based on *taqqanah,* not interpretation.

76 *Rema* to *Shulḥan Arukh Ḥoshen Mishpat* 25:2, quoted in n.21 above.

between coercion and annulment?)?

(c) Do not contemporary historical circumstances, in the form of the increasing unity of *klal yisra'el,* both politically in the State of Israel and through the worldwide use of modern media of communication, indicate the desirability of transcending the traditional Ashkenazi/Sephardi divisions on the grounds for divorce, in a way which would affirm the wife's unilateral right to divorce, subject to necessary safeguards, and justify (a globally effective means of) coercion in such circumstances?

3.2 The talmudic text

3.2.1 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:[77] broadly, cases of "major" physical defect, malodorous occupations inhibiting conjugal relations and abusive behaviour;[78] indeed, *Mishnah Ketubbot* 7:9 provides a list of cases where the husband is to be coerced: ואלו שכופין אותו להוציא. Later opinion is divided as to whether this list is now closed.[79]

3.2.2 The Mishnaic institution of coercion, however, is of limited value to the *agunah:* it applies to a list of situations where the Mishnah itself recognises that the wife that has a *right* to divorce. While the tannaitic sources already contemplate financial sanctions (in respect of the *ketubbah*) against the *moredet*[80] (*Mishnah Ketubbot* 5:7; *Tosefta Ketubbot* 5:7), it is only the Gemara which considers coercion against the husband. This was to become a major issue between the Geonim and the Rishonim.[81] Its importance for the *agunah* resides in the fact that any wife refused a *get* by her husband might well (and sincerely) declare herself a *moredet,* to whom her husband is "repulsive" (*me'is alay).* The issues which then arise are the following: (a) is such a wife entitled to a divorce? (b) is she entitled to a *coerced* divorce?; (c) what form might the coercion take?; (d) what if the husband resists the coercion?

3.2.3 In *Ketubbot* 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 כייפינן לה). Mar Zutra said: She is forced (כייפינן לה).

According to this, the traditional text, the issue between Amemar and Mar Zutra is whether the wife

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

78 *M. Ket.* 7:1, *M. Ned.* 11:12, *T. Ket.* 7:10-11, *Ket.* 77a (on infertility and refusal to maintain); *Shulḥan Arukh*, *Even Ha'Ezer* 154:1-2, 6-7; see further Haut 1983:25; Breitowitz 1993:42-45; Riskin 1989:9ff.; Schereschewsky, 1973b: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 Rabbaniyim* 15, pp.145-163; further, Jackson, "Directions" n.83.

79 For the view that the categories of permissible coercion are closed, see Chigier 1981:213, reprinted in Porter 1995:73-92, at 77, on *Shulḥan Arukh*, *Even Ha'ezer* 154 and earlier sources. See further Jackson, "Directions" n.84. A different view is taken by Villa 2000 who, while acknowledging that the *Ḥatam Sofer (Even Ha'ezer*, no. 116) wrote that a divorce can be compelled only when "it is clear to the one divorcing that the compelling is valid according to all", cites a response to this by S-Y Cohen 1990:200-201 (Heb.), which quotes, *inter alia,* the *Ḥazon Ish (Even Ha'ezer* 69, 23: "The *Ḥatam Sofer's* ruling cannot be upheld ...") and Rabbi Isaac Herzog (*Responsa Heikhal Yitzḥak*, *Even Ha'ezer*, part 1, no.1). For other Aḥaronim supporting the use of coercion, see Riskin 1989:139; *idem,* 2002:6f., citing *inter alia* R. Chaim Palaggi (19th cent. Izmir) and *Resp. HaḤayyim VeHashalom,* vol.2, no.112. But see Abel, "Za'aqat" 6.1, regarding the Ḥazon Ish.

80 In context, this must refer to refusing sexual relations. See further Jackson, "Directions" n.87.

81 See further Jackson 2001:117-122; see also Jackson 2002b:4.2.1.

is to be compelled back (into marital compliance). Mar Zutra takes the view that she is; 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.[82] However, recent work towards a critical edition of the Talmud text has revealed a significant variant.[83] MS Leningrad Firkovitch[84] (which almost certainly comes from the Genizah MSS purchased by Firkovitch) reads:[85]

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

Here, Amemar takes the view that it is the husband who is coerced,[86] 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,[87] 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 (מאים עלי)," contrary to the view of Mar Zutra, is not to be compelled back (into marital compliance) but rather is entitled to a divorce.[88]

3.2.4 The issue raised by the variant text of Amemar's opinion is of great importance for the later development of the *halakhah*. The Geonim accepted and developed the institution of compulsion against the husband of a *moredet* (§§3.3-3.4, below), but their view was ultimately rejected by Rabbenu Tam. For Rabbenu Tam, the Geonim 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 (§3.5, below). But Rabbenu Tam does not appear to have had access to this variant MS tradition.

3.2.5 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? Views on this have

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82 So *Maggid Mishneh*, *'Ishut*, 14:8. See also R. Yehoshua' Falk, *Peney Yehoshua'*, *Ketubbot* 63b, s.v. *Tosafot d"h 'Aval* for another explanation of the wording of the *Gemara'* there according to Rambam (cf. *Yabia' 'Omer* III *EH* 18:5). R. Falk, *loc. cit.*, shows that Rashi also agrees with Rambam in this matter. At 2002:5, Riskin takes Rambam and Rashbam to have understood Amemar's view to have entailed an immediate divorce, coerced if necessary.

83 A different variant in the text was known to some of the Rishonim: the view of Amemar is presented as לא כייפינין לה. That would most naturally be rendered: "he is not coerced". However, S. Friedman 1973:64-69 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.

84 The description of the Leningrad-Firkovitch MS of Ketubbot-Gittin, Preface to Masekhet Gittin (Jerusalem: Makhon HaTalmud HaYisraeli, 2000), p.33, reads: "In this MS we find in the talmudic text, especially in Masekhet Ketubbot, many additions apparently made by Rabbanan Sabora'i and also the Heads of the Yeshivot which appear as "interpretations", but there are also additions which do not appear to be "interpretations"." We have to decide into which category the present variant falls. If the former, it may be difficult to view it as providing (talmudic) support for the geonic view; rather, it may itself reflect post-talmudic innovations (such as the geonic view itself). However, the form of the variant is not here the addition of an interpretation, but rather the substitution of a different text by the deletion of the negation and the addition of a *yod* in לה.

85 *Dikdukei Soferim ha-Shalem* [*The Babylonian Talmud with Variant Readings ... Tractate Kethuboth*], ed. R. Mosheh Hershler (Jerusalem: Institute for the Complete Israeli Talmud: 1977), II.88. See Westreich, 1998-2000:126, 2001:209; Jackson 2001:110f.

86 Friedman's argument (n.83, above) cannot be applied to the variant in MS Leningrad Firkovitch, since to do so would eliminate any difference between the views of Amemar and Mar Zutra.

87 So Riskin 1989:44.

88 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.

differed. While the *Ḥazon 'Ish* was suspicious of new manuscripts and regarded them negatively,[89] this approach[90] was categorically rejected by R. Ovadya Yosef,[91] who argues that newly discovered opinions of *Rishonim* in manuscripts that had been unknown to Rabbi Karo may be employed as an argument that Rabbi Karo would have changed his ruling had these sources been available to him (thus applying Rema's qualification to *hilkheta kebatra'ei*[92]). Indeed, Rav Ovadya has contested a position of the Ḥazon Ish on *hilkhot sukkah*, which seemed correct in the light of the standard editions of Rambam's *Perush haMishnah*, on the basis, *inter alia*, of the reading in a critical edition (based on recently discovered manuscripts) which Rav Ovadyah consulted.[93] The use of recently discovered manuscripts was welcomed also by the *Ḥafets Ḥayyim*.[94] Rabbi Mosheh Bleich, while largely following the view of the *Ḥazon 'Ish,* notes that a more liberal view towards the admissibility of MSS evidence was taken before the period of "definitive codifications of Halakhah" (and particularly the *Shulḥan Arukh*), 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 himself.[95] Particularly relevant to our problem is the observation of P.S. Alexander, that "Gaonic commentators regularly solve problems in the Bavli through collation of old manuscripts and through conjectural emendation."[96]

3.3 What did the Geonim do?

3.3.1 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*,[97] Sherira sets out the history of the matter,[98] taking the view that it was the Babylonian Talmud which introduced coercion, after the twelve month waiting period:

> They then enacted that she should remain without a divorce for twelve months in the hope that

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89 *Ḥazon 'Ish*, *'Orlah* 17:1; *Qovets 'Iggrot Ḥazon 'Ish* (Beney Beraq n.d.) part 1, no. 32 and part 2, no. 23. His view is discussed by M. Bleich 1993:43-44, stressing divine providence in the transmission of the MSS tradition (but not, apparently, in the discovery of new MSS, *qal vaḥomer* the now-available forms of electronic searching of the talmudic text, which put the modern generation of talmudic interpreters at a significant advantage compared to earlier generations, notwithstanding the legendary recall and command of the text which some of the latter are reputed to have possessed). See also the references to articles dealing with the approach of *Ḥazon 'Ish* in this area in Shapiro, 1999:196 n.101.

90 Largely followed by M. Bleich, who gives (at 1993:42) the following account of the view of Rabbi S.Y. Zevin, the editor of the modern volume of *variae lectiones*: "... a variant talmudic text is significant only when it can be demonstrated that an early-day authority based his ruling upon that version of the text" (based on Yevin's introduction to the first volume of *Dikdukei Soferim ha-Shalem*: n.85, above).

91 *Responsa Yabia' 'Omer* X *HM* 1, where Rabbi Yosef permits a claim of *qim li* against the *Shulḥan 'Arukh*.

92 *Shulḥan Arukh Ḥoshen Mishpat* 25:2, quoted in n.21 above. Cf. Rabbi Z.Y. Lehrer 1992:68-73, where he argues that when manuscripts to which the Aḥaronim had no access are uncovered and reflect disagreement with the *halakhot* of the Aḥaronim, these manuscripts should be followed, since we presume that had the Aḥaronim had access to these manuscripts, they would have decided differently.

93 *Yeḥawweh Da'at* III no.46, 2nd footnote, middle of first para: "However, I examined the Rambam's Commentary on the Mishnah in the [original] Arabic (ed. Rabbi Y. Kafiḥ, Jerusalem 5624) and I saw that the words *weyaṭu la'aretz* were not there at all." This fact fortified Rabbi Yosef's stand against the *Ḥazon Ish*.

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

95 *Hilkhot Malveh ve-Loveh* 15:2, noted by M. Bleich 1993:23. 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.

96 Alexander 2000:180. On the history of rabbinic text criticism of the Babylonian Talmud, see also Goodblatt 1979:268-70.

97 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 *taqqanah* of the Rebellious Wife").

98 See further Jackson, "Directions" 3.4.1.

> she would become reconciled, and after twelve months they would compel her husband to grant her a divorce ...[99]

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

> ... After the time of the Savoraim, Jewish women attached themselves to non-Jews 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 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.

3.3.2 What exactly is meant by "we compel him to grant her a divorce forthwith" (וכופין אותו וכותב לה גט לאלתר)? *Kofin* normally refers to physical coercion: thus, the husband is coerced (beaten)[100] 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.[101] Yet there are hints of the use of a greater judicial power (including *ḥerem*[102]) in some geonic and later sources. According to the *Halakhot Gedolot* (ascribed to Rav Shimon Kiara, 9th cent.): "... we grant her a bill of divorce immediately (ויהבינן לה גיטא אלתר)".[103] 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 לה גט לאלתר), and do not [publicly] proclaim against her for four weeks.[104]

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99 כופין את הבעל וכותב לו גט: *Otsar HaGeonim*, 8, pp.191-92. Cf. Riskin 1989:59; Elon 1994:II.660 n.68, citing also Naḥmanides, *Ḥiddushei Ketubbot*, ad loc., for Sherira's view.

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

101 *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. One would not, however, wish to eliminate crime by decriminalising everything!

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

103 Riskin 1989:48f.

104 Riskin 1989:62f. Villa (in Goldberg and Villa 2006:274 n.570) notes that this ruling of Rabbi Shemuel ben Ali is

The use of the plural in these sources: נותנין, ויהבינן, 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 לה גט לאלתר).[105] Indeed, the Rosh, whose teacher, the Maharam of Rothenburg, cites the responsum of R. Shmuel b. Ali,[106] appears to have interpreted the geonic practice not as coercion but rather as annulment,[107] using the language of *hafqa'at qiddushin*:

> ... 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)[108]
>
> וסמכו על זה כל המקדש אדעתה דרבנן מקדש והסכימה דעתם להפקיע הקידושין כשתמרוד 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 find support for such a progression in a responsum of Rashba.[109]

3.3.3 Release without a (normal) *get* would seem to be implicit also in clauses from two Genizah *ketubbot*. One, dated 1023, reads:[110]

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

It is not entirely clear whether, according to such *ketubbot*, (a) a *get* was necessary at all (perhaps the condition was regarded as self-executing), or (b), if it was, whether the court would back up its permission with an order, *a fortiori* with coercion.[111] Certainly, the teachers of the teachers of Me'iri, who saw such clauses as forming the basis of the geonic coercion (§2.2.2, above), appear to have thought the latter.

3.4 By what authority did they do it?

3.4.1 By what authority did the Geonim proceed? The responsum of Rav Sherira Gaon uses the language of rabbinic *taqqanah,* and explains it on "emergency" grounds: "Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands" (*shebnot yisrael*

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quoted in the *responsa* of Maharam of Rothenburg (the teacher of the Rosh), no.443. In the Prague edition of this *responsum* the ruling is quoted in the name of R. Sherira Gaon.

105 Riskin 1989:52f.

106 See n.104, above.

107 On the wider relationship between coercion and annulment, and particularly the claim of Morgenstern that "Wherever you may coerce according to the *Halakhah*, since today it is impossible in practice to do so, you may annul instead", see Jackson, "Directions" 5.3.3; Abel, "Morgenstern" 10.

108 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 he himself endorsed, on one occasion, a traditional form of coercion (see *Resp*. 43:8, p.40b, Riskin 1989:126 (Heb.), 128 (Engl.); Jackson "Directions", 3.5.2) makes his account of the geonic practice all the more striking.

109 *Rashba Resp*. 1, 551: see further Jackson, "Directions" 4.3.3.

110 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). The second is TS 24.68, ll.5-7, quoted in n.8, above. See further Friedman 1981, 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.

111 Riskin 1989:80: "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 *taqqanat hamoredet*.

holkhot venitlot bagoyim liytol lahen gittin be'ones miba'aleyhen: §3.3.1, 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;[112] or he may refer simply to the use of gentile thugs, a practice attested in the responsa of Rashba.[113] The motivation of the *taqqanah* is, however, amplified somewhat in other sources. An anonymous 13th-cent. responsum[114] 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)".[115] Conversion was, indeed, recognised by Islamic law (as, indeed, in medieval English law[116]) as annulling the marriage of a spouse whose partner did not also convert.[117] More significantly, there is a strand of tradition within the *halakhah* which maintains that apostasy annuls an earlier Jewish marriage,[118] and we may view the references to apostasy in this context as implying such a view.[119]

3.4.2 Whatever the precise historical circumstances, the situation appears to have been construed by the Jewish authorities as amounting to an emergency: Rav Sherira speaks of its "disastrous results" (§3.3.1, above), and in what Riskin (1989:86f.) has identified as the earliest source to turn against the geonic practice, the *Sefer Ha-Maor* of Rabbenu Zeraḥyah Halevi written between 1171 and 1186, the geonic decree (*taqqanah*) 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] 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 Geonim "there was a temporary need in their day to go

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112 Libson in Hecht et al. 1996:237f. writes: "To my mind, the mere possibility that wives might appeal to Muslim courts was motive enough for the enactment of this *taqqanah*. 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 *taqqanah* of the rebellious wife." *Aliter,* Riskin 1989:74f.

113 I, 73: see Assis 1988:36.

114 Riskin 1989:52f.

115 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.

116 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 B. Berkovits 1990:127, discussing a case where the Jewish widow of a convert to Christianity failed to secure her dower.

117 See further Jackson, "Directions" n.119.

118 Rashi, according to *Minḥat Ḥinukh* 203: see Abel, "Morgenstern" 21.2.1, noting that "Rabbi Babad refers to the *'miqtsat ge'onim'* — a minority of the Babylonian Geonim — who maintained that an apostate is treated by Torah law as a gentile so that his marriage is void"; see also Abel, "Morgenstern" 19.2.1, and further 21.2.6. For sources which regard the marriage of a *mumar* as doubtful or rabbinic, see Abel, "Morgenstern" 21.2.6. For the view that treats an apostate as a gentile, who thus becomes, at the moment of apostasy, "another person", see Abel, "Morgenstern" 21.6.7.2 (penultimate paragraph) on Maharsham. See also *Ohel Mosheh* II 123, discussed by Abel, "Morgenstern" 21.6.1.3.

119 Some later views, however, deny that conversion to Islam is apostasy. See Abel, "Morgenstern" 21.2.6.3, on the view of *Ḥayyim shel Shalom* II 81, citing *YD* 124. Abel comments (at n.103): "I find this astonishing. True, Islam is not idolatrous but its embrace involves the denial of the Tenakh and the Talmud so that the convert is rejecting the truth of both the Written and Oral Law and the Talmud rules that heresy is worse than idolatry: see *Shabbat* 116a! See the discussion in *ET* XXII col. 70 at notes 191-196."

beyond the words of the Torah and to build a fence and a barrier":[120]

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.[121]

Naḥmanides, by contrast, maintains:

> ... but in truth they decreed for [all] generations. This decree did not move from their midst for five hundred years, and they practiced it into the days of our Rabbi, may his memory be a blessing, as is known from their responsa.[122]

3.4.3 There is reason, however, to believe that צורך שעה was not the sole halakhic basis for the geonic *taqqanah*. We cannot simply infer that the Firkovitch MS reading of Amemar's view in the Babli (§3.2.3, above) was known to the Geonim, but it does appear that they interpreted the final position of the Talmud as entailing coercion, albeit after a 12 month waiting period[123] (a view shared by some Rishonim[124]). Moreover, we have observed the view attributed to the teachers of Me'iri, that the geonic *kefiyah* was based on the *tenai* of R. Yoseh.[125] A combination of *taqqanah*, perhaps supported by talmudic interpretation, and *tenai*, involving the consent of the parties, would appear to provide a unique blend of institutional and voluntarist legitimation which prove a suitable model for the contemporary situation. It may be noted that several Rishonim discuss the authority of the geonic measures in terms of *minhag,*[126] though here they may be addressing the authority for the *persistence* in different communities of measures originally intended to have only local validity.

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

121 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 Rosh's generation. Riskin, however, argues at 129 that the geonic decrees may themselves have been directed against "brazen" women, since these are precisely the ones most likely to invoke Gentile help. Maxims like "Jewish women in this generation are vain" are not uncommon in rabbinic writings. In Piskei Din *Rabbaniyim*, part 4, pages 342-346, a woman is not trusted in her claim against her husband because the dayanim rule in accordance with the Mahari Weil 22, who quotes the Maharam (cited in the Mordechai), that "she is not believed in these generations since women are sexually immoral (*perutsot*) and we fear that she has cast her eyes upon another man."

122 *Milḥamot* on *Rif*, *Ketubbot* 27a, quoted by Riskin 1989:112.

123 R. Sherira Gaon, 3.3.1 above, at n.99; cf. Riskin 1989:81-83; *Mordekhai*, as discussed in *Tzitz Eliezer* 5, 26.

124 See *Tzitz Eliezer* 5, 26, as discussed by Abel, "Morgenstern" 12.2.12, on the *Mordekhai* and *Tosefot Rid*.

125 2.2.2, above. Friedman 1980:I.325-30 argues against the view of the teachers of the teachers 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). Similarly, Riskin 1989:81-83, 2002:32 n.9 argues that originally the Palestinian and Babylonian modes of rescuing women from impossible marriages were quite distinct. He rightly points out that the Jerusalem Talmud never included the case of a woman who claimed "He is repulsive to me" under the law of the *moredet*. But even if the *taqqanah* of the Geonim was not followed in Palestine and Egypt, the converse proposition does not follow: the Babylonian practice may have used R. Yoseh's condition, and the Geonim may have regarded it as contributing to the authority of their *taqqanah* (despite Riskin's claim that they were "apparently unaware" of it: see further Jackson, "Directions" n.113).

126 See Rabbenu Tam (who regards this as illegitimate), as quoted at Riskin 1989:98 (Heb.), 101 (Engl.); Rambam, *Hilkhot Ishut* 14:14; *Resp*. 43:8, p.40b (Riskin 1989:126 (Heb.), 128 (Engl.)). See further Jackson, "Directions" 3.5.2.

3.4.4 The Rishonim are themselves divided on what precisely the Geonim had done, and by what authority. Riskin comments that Naḥmanides 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 notes that while we have the texts of the original decrees of the Geonim, they were apparently not available to Naḥmanides.[127] This would appear to justify application of the discretion conferred by Rema's qualification of *hilkheta kebatra'ei*.[128]

3.5 Rabbenu Tam's position and its dogmatic status

3.5.1 While for the most part rejecting the continuing validity of the geonic decrees, the Rishonim were far from agreed on where this left the authoritative *halakhah*. Unilateral divorce for the wife who claimed *me'is alay* is still found in Raban,[129] Alfasi[130] and Rashbam.[131] 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.[132] However, there is a substantial doubt as to Rabbenu Tam's exact position: two passages from *Sefer Hayashar* appear to conflict[133] — a reflection, no doubt, of its collective, pseudepigraphical character.[134] On the one hand, we read:

> 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 ...[135]
> דבכל השמועה אינו מזכיר כפיית הבעל אלא כפיית האשה

and similarly:

> And we do not find in any [part of the laws of divorce] that the husband is forced to give a divorce without any [logical] difficulty at all [in the law's formulation]".[136]

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127 Riskin 1989:113; Rashba, on Riskin's account (1989:118f.), makes the same mistake, denying that the practice of the Geonim was based upon interpretation of the Talmud.

128 See further below, 5.3.

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

130 *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. 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 *taqqanot* of the Geonim, but rather because the enactment is recorded in Alfasi's code.

131 See Riskin 1989:93, commenting 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 geonic decree (although there were still those who maintained that the divorce was Talmudically based)."

132 Riskin 1995:187 maintains that, with only rare exceptions, this has been the accepted halakhic opinion to the present day. See, however, 3.5.2, below.

133 Cf. Abel, "Morgenstern" 12.2.4.

134 Ta-Shma 1973:781 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 Rabbenu Tam himself, who repeatedly emended and improved much of it.

135 Riskin 1989:94 (Heb.), 96 (Engl.), quoting *Sefer Hayashar leRabbenu Tam*, ed. E.Z. Margoliot (New York: Shai Publications, 1959), 39ff., based on *Sefer Hayashar leRabbenu Tam*, *Responsa*, ed. S.F. Rosenthal (Berlin: Itskovski, 1898), *Siman* 24, p.39.

ובלא שום פירכא בעולם כפייה לבעל לא אשכחן בכולא שמעתא

The Geonim, he argued, 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.

Elsewhere, however, he writes:

> 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].[137]
>
> 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[138] within the *Sefer Hayashar*). What he appears here to object to is compelling such a *get* within 12 months.[139] 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."[140]

3.5.2 Recent research, moreover, casts some doubt over the dominance of Rabbenu Tam's view, either (as Riskin maintains[141]) in his own generation or later. In geographical terms, we may note evidence that the geonic practice appears to have spread by the time of Rabbenu Tam (and on his

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136 Riskin 1989:98 (Heb.) 101 (Engl). Abel, "Za'aqat" 6.6 and at "Morgenstern" 12.2.12 n.57, notes that this more radical version of Rabbenu Tam's view accords with the report in *Tosafot*, *Ketubbot* 63b, s.v. *'aval 'amrah*.

137 *Sefer Hayashar le-Rabbenu Tam*, *Resp*., ed. Rosenthal, #24 (p.40), quoted by Riskin 1989:97 (Heb.), 98f. (Engl.); Elon 1994:II.661f. On a difficulty in this presentation of this view, see further Abel, "Morgenstern" 12.2.12 n.57.

138 However, even if he does understand the measure of Rabbanan Saborai as applicable to the "*moredet*" who claims "he is repulsive to me" (*me'is alay*), he denies the possibility of coercion: "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.); see further Riskin 1989:95, 103f. On this interpretation of the talmudic passages, see further Jackson, "Directions" n.143. Even so, the conflict remains in his criticism of what the Geonim did.

139 On whether, according to Rabbenu Tam, the court should even order the husband to issue a *get* before the twelve months have elapsed, see Jackson, "Directions" n.143.

140 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 immorality of the generation (מפני פריצות הדור)." As for the general question of authority, Riskin 1989:117 (Heb.), 119 (Engl.) quotes *Ḥiddushei HaRashba* (Jerusalem, 1963), pt.2, pp.97-98: "I rail against those who say that it is not fitting to follow the decrees but [rather to follow] the law of the Talmud". This is found word for word in Ramban in *Milhamot HaShem* to *Ketubbot* 63. It is not found in critical editions of Rashba. Riskin presumably found it in an older edition of Rashba, which appears to be faulty.

141 Riskin 1989:108, 176 n.25, in relation to Rabbenu Tam's denial of "authority to legislate other solutions beyond the Amoraic period of Ravina and Rav Ashi", in the context of the *moredet*.

own account) to Paris.[142] Rabbi Abel notes the argument of Rabbi Avraham Ibn Tawwa'ah,[143] on the basis of *responsa* of Rashbets,[144] that the latter in practice agrees entirely with the ruling of the Rosh that if any *bet din* — even in a place where it is not the custom to follow the Rambam regarding coerced divorce in the case of the *moredet* — relied on the Rambam and coerced a *get* in a case of *me'is 'alai*, though the *bet din* acted incorrectly, the woman may, on the basis of that *get*, remarry *ab initio*.[145] He notes, in this context, the tradition that had R. Karo seen the other volumes of *Tashbetz* subsequent to vol.1, and found in them some contradiction to his rulings in *Shulḥan 'Arukh*, he would have retracted his decision in favour of that of R. Duran, even if this would have meant adopting a lenient in place of a stringent ruling and even if the case were one of *gittin* and *qiddushin*.[146] Recent, unpublished research by Yuval Sinai indicates, moreover, that Rambam's endorsement of *kefiyah* to free the *moredet* survived in the traditions of North African and Oriental communities,[147] including responsa of the Aḥaronim written *after* the dissemination of the *Shulḥan Arukh*,[148] despite the rejection there of Rambam's position.[149] Indeed, Rabbi Herzog[150] and Dayan Waldenberg[151] have both argued for the reintroduction of coercion in the case of the *moredet*.

3.6 Ashkenazim and Sephardim

3.6.1 The differences amongst the Rishonim on *kefiyah* of a *moredet* claiming *me'is alay* — 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 Geonim 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.[152] 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,[153] and where, indeed, there was external moral pressure to restrict divorce itself.

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142 *Sefer Hayashar*, per Riskin 1989:98 (Heb.), 101f. (Engl.): "And regarding that which our Rabbis of Paris wrote: We hereby agree to whatever you will do to force [this] man — with whatever means of coercion lie at your disposal — until he says "I wish [to grant this divorce]" — this too is not proper in my eyes (perhaps it is an error on my part), for we do not find that we force him to divorce [his wife], as R. Hananel decided [as quoted] above, and since he states at the end of [his commentary] to Gittin: "[As to the case of an] Israelite's coerced divorce, [if it is arranged] according to law, it is valid; if not according to law, it is invalid and [prevents the woman's future offspring by another husband from marrying native-born Jews]." But Rav Yosef in *YO* III *EH* 18:8 does apparently quote Ḥananel as accepting *kefiyah*.

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

144 I:4, II:69 & 180. See further Abel, "Za'aqat" 6.7 n.39.

145 Abel, "Za'aqat" 6.7.

146 Abel, *ibid*., citing *Resp. Yabia' 'Omer*, X, *Ḥoshen Mishpat* 1, s.v. *Teshuvah*, and arguing that if Maran had seen *Tashbets* II:69 and II:180 and the arguments of Ibn Tawa'ah, he would have accepted the position of the Rosh — and the final position of Rashbets — as being that though a *get* must not be coerced in cases of *me'is 'alai* if it was coerced the woman may remarry *ab initio*.

147 Contesting the view of Westreich 2000: 149 ("Rambam's stature, and the fact that his ruling regarding the claim of *meis al'ai* was deeply entrenched in the North African communities, could not withstand the pressure of the two halakhic luminaries – Rivash and Tashbetz, who introduced the Spanish Christian tradition into this predominantly Muslim area"), Sinai cites, *inter alia,* the custom of Talmes (capital of Algiers) as attested by *Resp. Rivash* (end of s.104); *Resp. Tashbetz,* 2. 256; R. Abraham Tawwa'ah, *Tur HaShlishi ba-Ḥut Hameshulash* (printed as the fourth part of the *Tashbetz*, written by his grandfather), s.35; Rav Ovadiah Yosef, *Resp. Yabia Omer,* pt.3 *Even Ha-'Ezer* 19.18.

148 *Shulḥan Arukh, Even HaEzer,* 72.2.

149 Citing *Resp. Maharitaz,* end of sec. 154; R. Masuud Alfasi, *Mashka DeRevuta,* pt.1 *Even Ha-'Ezer*, 154; *Darkhei No'am Even Ha-'Ezer*, 15; *Resp. Mekor Baruch*, s.17; *Resp. Maaseh Ish, Even Ha-'Ezer*, 11.

150 *Responsa Heikhal Yitzḥak*, *Even Ha'ezer*, part 1, no.2.

151 See n.234, below.

152 3.4.1, above.

153 Cf. Riskin 1995:188: "It is easy to understand why the legal position of Rabbenu Tam was accepted without significant

3.6.2 This Christian cultural environment, Ze'ev Falk argued many years ago,[154] proved an important factor 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 unilaterally. The fact that the *ḥerem* of Rabbenu Gershom was accepted in Ashkenaz but not Sepharad may well also have been a factor in accentuating the divide over the *moredet*. For coercion where the wife claimed *me'is alay* went some way towards balancing the rights of husband and wife, by giving the wife a unilateral right of divorce of her husband, broadly corresponding to the unilateral right which he had to divorce her. In Ashkenaz, however, after the *ḥerem* of Rabbenu Gershom, the husband no longer had such a unilateral right:[155] 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*?

4.0 Grounds and Evidence for Divorce

4.1 Dayan Broyde has recently stressed the importance of considering the problem of the *agunah* within the broader issue of the grounds for divorce.[156] The argument in §3.6 above indicates the close historical connection between approaches to *kefiyah* and the Ashkenazi/Sephardi divide on the basic grounds for divorce. Further consideration of practice, taking particular account of issues of evidence, may point towards a possible resolution of the divide.

4.2 From the tannaitic period itself, issues of presumptions and evidence have significantly impinged on the operation of the recognised criteria for divorce. Most striking is the rabbinic "moral fear" expressed in *Mishnah Nedarim* 11:12,[157] which already records a tightening in the rules regarding

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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 (sic: permanance?) 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."

154 Falk 1966:ch.4.

155 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.

156 Broyde 2001. He notes the existence within the tradition of five different models of divorce (taken to reflect different conceptions of the very nature of marriage) which have been normative in different communities at different times (see ch.2, and cf. Berger 2001). He maintains that it is still possible, in principle, to opt in (by the use of appropriate conditions) to any of these models: "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" (2001:8). One such model he terms "Marital Abode as the Norm" (2001:23) and cites in support, *inter alia,* Rav Mosheh Feinstein, *Iggrot Mosheh*, *Yoreh Deah* 4:15. Here, the parties may agree that either has a right to divorce after a specified period of separation. Cf. *Resp. HaḤayyim 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*.

157 "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], (1) 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

the wife's entitlement (in defined circumstances) to demand a *get* against the will of her husband, on the grounds that "a woman must not be [so easily given the opportunity] to look at another man and destroy her relationship with her husband."[158] This, indeed, is cited 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", all the more so was the *me'is alay* grounds liable to abuse, so that coercion in such cases should not be contemplated.[159] Granting a woman a divorce in such circumstances, he argued, amounted to rewarding a sinner. The fear of *batei din* that the reasons offered by a woman claiming divorce (particularly, in cases where she claims repulsion) may not be sincere, and that her real motive may be that she has found a preferable husband, is a recurrent theme in halakhic literature, and survives into the jurisprudence of the rabbinical courts in Israel.[160]

4.3 *Batei din* naturally have to consider issues of sincerity and possible ulterior motive (which are particularly prominent in *gerut,* the other major practical concern of *batei din* in issues of personal status). In this context, we may note two particular aspects of their application in practice of the mishnaic "moral fear" argument (whatever view may be taken of its stereotypical characterisation of women's sexual attitudes and behaviour). First, the presumption may be rebutted by showing that the woman has an "objective" basis for her claim. Second, the argument is no longer applicable to women alone: it is now recognised that a man, too, may be insincere in the basis he claims for a divorce, in that he too may have the ulterior motive of "casting his eyes on another", given that the *ḥerem* of Rabbenu Gershom forbids him (at least, if he is Ashkenazi) from taking a second wife without divorcing the first.[161]

4.3.1 The means of rebutting the "moral fear" argument usually takes the form of requiring "*amatla*". But this concept requires further analysis. Sight must not be lost of the basic purpose of the requirement, which is simply to corroborate the woman's sincerity and rebut any presumption that she has an ulterior motive. This is sometimes put in terms of "objectivity". But we must ask: is the "objective" support required purely *evidentiary* (the *bet din* requires independent evidence that she does indeed find him repulsive) or *substantive* (she must prove further grounds for her finding him repulsive, whether domestic violence or something else)? Related to this question is that of the strength of the *amatla:* is it to be regarded as conclusive or does it merely provide the *bet din* with a discretion?[162]

4.3.2 The application of the "moral fear" argument to men, in the light of the *ḥerem* of Rabbenu Gershom, may at first sight be regarded as a striking internal measure of gender equalisation. But it highlights a more basic issue: the very fact that the *ḥerem* is cited as justifying the application of the "moral fear" argument to men implies that the Sephardi man retains a right of "unilateral" divorce (unless he has, as is sometimes the practice, taken an oath that he would not divorce his wife without her consent).

4.4 The introduction of a requirement of *amatla* in order to justify *kefiyah* of the husband of a *moredet* is

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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 and explanations of Riskin 1989:11, slightly adapted. 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.

158 On the possible historical context of this rabbinic reaction, see Jackson 2004:147f.

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

160 Its prominence is currently being documented by Shoshana Knol, a PhD student in the Agunah Research Unit, on whose work the next paragraph is based.

161 And he cannot do this, absent his first wife's consent, without proving "objective" grounds.

162 Logically, the two issues might be correlated: a substantive *amatla* might be regarded as conclusive, a merely evidentiary *amatla* discretionary.

not, of course, an invention of the Rabbinical Courts of Israel.[163] However, the link shown in the *piske din rabbaniyim* with the *ḥerem deRabbenu Gershom*[164] invites a more fundamental reconsideration of the grounds for divorce. Contemporary conditions make such a reconsideration particularly apposite. The Ashkenazi/Sephardi distinction is no longer justified in geographical terms, not only in the State of Israel but also in many parts of the Diaspora.

4.4.1 Such a reconsideration may well be based on the practical compromise in relation to *kefiyah* of the husband of a *moredet*: that a plea of *me'is alay* is an acceptable grounds for divorce, provided that it is shown to be sincere. There is no reason why the same grounds should not be open to a husband, so that either spouse may divorce on the basis of repulsion, provided that such repulsion is corroborated.

4.4.2 In effect, the *halakhah* applicable to Ashkenazim and Sephardim would thus be harmonised. Only its formulation would differ: for Ashkenazim, divorce must be by consent, other than in cases where there are recognised grounds for unilateral divorce by either husband and wife (and these recognised grounds now include *me'is alay,* objectively verified); for Sephardim, divorce may be unilateral, but where based on a claim of *me'is alay,* it must be objectively verified (of course, divorce by consent has always been accepted by Sephardim).

5.0 Annulment

5.1 The term "annulment" (as indeed the Hebrew "hafqa'at qiddushin" and its Aramaic equivalent) is used in a variety of situations to indicate release of the wife without a *get*.[165] It is far from clear that the (temporal) effects[166] of "annulment", including the status of the liaison in the light of the *hafqa'ah*,[167] are identical in all such cases, and this complicates the discussion of whether the authority to annul exists today, and if so in what circumstances it may be used. No full discussion of the matter is here attempted. The analysis which follows is designed to highlight issues which impinge upon the overall argument of this Report.

5.2 Both historically and analytically, the following situations may be distinguished:

(a) The *qiddushin* are tainted by the *incompetence* of one of the spouses, who, for example, is not Jewish[168] or is a *shoteh*.[169] Here, there never was a *qiddushin,* and any judgment

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163 See, e.g., Rosh, *Resp*. 43:8, noting that in this case the brother of the woman claiming *me'is alay* told him that she gave reasonable bases for her rebellion. Cf. Breitowitz 1993:48 n.129 and 1993:155.

164 The view is sometimes expressed that the *ḥerem* had a duration of 1000 years, and is thus due shortly to expire. This appears to be based on a misunderstanding: the "1000 years" refers to the millennium in which Rabbenu Gershom lived. Thus, Schereschewsky 1973a:987: "Many authorities were of the opinion that the validity of the *ḥerem* 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 *ḥerem* remained in force after 1240, since later generations accepted it as a binding *taqqanah*. Accordingly, the *ḥerem*, wherever it was accepted ..., now has the force of law for all time (*Resp*. *Rosh* 43:8; *Sh. Ar*., EH 1:10; *Arukh ha-Shulḥan*, EH 1:23; *Otsar ha-Posekim*, EH 1:76)."

165 Or, exceptionally, with a coerced *get*: see the discussion of the Rosh in 3.5.2, above.

166 See 5.2 below, esp. n.176.

167 Presumably, a *shoteh* has no competence for even *pilagshut,* and probably not for *zenut* either. No problem regarding the status of the *qiddushin* exists on the analysis of the "defective *get*" cases (5.2(e), below) in n.174, below. As for the other cases, there is disagreement, some denying that they must be retrospectively classified as either *pilagshut* or *zenut*. On *pilagshut* and the status of its prohibition, see Abel, "Za'aqat" 4.1 (on Radbaz, *Responsa* IV 225), 4.7 (on Rivash, later challenged by R. Emden). As for *zenut*, the very concept calls for further analysis. On the parallel question in relation to terminative conditions, see 2.7.2, above, esp. n.60.

168 For the view that treats an apostate as a gentile, see n.118 above.

169 *Mishnah Yevamot* 14:1.

of a *bet din* to that effect is purely declaratory.[170] Indeed, any such declaration is strictly unnecessary: a Rabbi satisfied of such facts would be entitled to conduct or authorise a marriage for the other "spouse" without further ado.

(b) The spouses were both competent, but the *qiddushin* are tainted by the *lack of consent* of one of them. These comprise some of the classical cases of the Talmud.[171]

(c) The spouses both consent, but that consent is not "informed", because a significant (halakhically recognised) "defect" exists at the time of the *qiddushin* that is not known to one of the spouses. This is the issue of *qiddushei ta'ut*.[172]

(d) The *qiddushin* are tainted by the absence of some further (rabbinic) requirement, such as the consent of parents, the simultaneous execution of a *ketubbah,* the presence of a *minyan*. Such additional requirements form the subject matter of a series of medieval *taqqanot haqahal*, and it is in this context, in particular, that the authority for such annulment has come to be viewed as problematic.[173]

(e) A *get* deemed invalid in Torah-law has been delivered to the wife (e.g. where the husband has withdrawn his consent for it, but the wife, in ignorance of the withdrawal, acts in good faith upon it).[174]

Of these, it is (e) which requires retroactive annulment in the strongest sense, for here there is no doubt that a constitutive decision of the *bet din* will be required: until any such *psak,* the original *qiddushin* remain valid. Despite the factual parallel here to the situation of *get*-recalcitrance — the husband (though he is entitled to do so by the *halakhah*) has here wrongly denied his wife a valid *get*[175] — the problems of authority of extending the talmudic case to the situation of *get*-recalcitrance appear to be substantial.[176]

5.3 Some current arguments designed to extend the scope of *qiddushei ta'ut* seek to infer from the evidence of post-marital conduct — specifically, the fact of recalcitrance — the pre-existence of a defect ("sadism") which would generate annulment on the basis of §5.2(c) above. The scientific basis of such an inference is, to put it mildly, contested.

5.4 Just as the authority for *kefiyah* in cases of *me'is alay* was viewed by some as based on a *combination* of institutional and voluntarist legitimation,[177] so too do we find that combination[178]

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170 Cf. Abel, "Morgenstern" 16.2.1, on *Torat Gittin* 121:5.

171 *Yev*. 110a, *B.B*. 48b. For reviews of all the talmudic cases, see Breitowitz 1993:63f.; Riskin 2002:9-11; Jachter, 2000:29f.

172 See further Jackson, "Directions" 4.4, written before HaCohen's *Tears of the Oppressed* appeared. On the latter, and the debate provoked by it, see the forthcoming review of Jackson and A. Westreich in *The Jewish Law Annual*.

173 See further Jackson, "Directions" 4.3.

174 *Ket*. 3a, *Gitt*. 33a, 77a. Jachter 2000:30 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." This appears to mean that that they threaten retroactively to dissolve the marriage if the husband does not agree to leave the *get* valid. In the internet version, Jacher notes that "Rashi in these three cases explains that "Hafkaat Qiddushin" works because of the presence of the Get (despite its defects)." See also Abel, "Za'aqat" 8.3, citing *Tosafot*, *Gittin* 32a s.v. *Mahu de-tema' 'iglai milta'*, quoted by Rabbi Aqiva Eiger in his gloss to *Mishnah Gittin* 4:2, no.39; and at "Morgenstern" 4.2.1, on Maharsham, *Resp*. I, 9.

175 Cf. Jackson, "Directions" 4.1.2.

176 See, however, the argument of Berkovits, discussed by Abel, "Za'aqat" 8.7-8.9, for authorising annulment even in such cases on the basis of a properly drafted *taqqanat haqahal*. It may also be argued that the principle: "He acted improperly, they, therefore, treated him also improperly" is applicable, despite the fact that it occurs in the Talmud in the context of a man who effected his *qiddushin* in an inappropriate manner. For sure, the problem of the *agunah* is different: the husband originally effected the *qiddushin* in a wholly valid manner. However, if there is a general principle that the court may deal "improperly" with a man who has himself behaved "improperly", we may argue that since he has acted improperly in relation to the *get*, so too here may the court act improperly towards him in relation to the *get*. But if this is viewed as a discretionary judgment, it does not contribute to a global solution.

177 3.4.3, above.

reflected in the commonly found justification of annulment on the basis of the maxim *kol hameqadesh ada'ata derabbanan mekadesh*.[179] This in itself may support the adoption of a strategy such as that suggested in §5.3, above.

6.0 Issues of Authority

6.1 The issues of authority arising from the problem of the *agunah*[180] are addressed systematically in Rabbi Dr. Abel's paper "Halakhah – Majority, Seniority, Finality and Consensus". This section seeks only to highlight some vital issues and summarise our provisional conclusions.

6.2 Primary and Secondary Rules

6.2.1 In modern jurisprudence, systemic rules about authority are commonly termed "secondary rules" (following Hart).[181] They include "rules of recognition" and "rules of change", which provide criteria for recognising the validity of existing rules on the one hand, changes in rules on the other. In some secular legal systems, they are defined in a Constitution. Not so in Jewish law. As Rabbi Abel's paper demonstrates, they are subject to substantial uncertainties. That in itself prompts the question whether they may be applied "reflexively". Do the secondary rules about *safeq* apply to *sefeikot* in the secondary rules themselves? There is little in the *halakhah* to indicate a negative answer to this question; indeed, some have questioned the very applicability of the distinction between "primary" and "secondary" rules to the *halakhah*.[182] If so, the question arises whether each of the rules about authority, considered in this section, are *de'orayta* or *derabbanan,* since this would determine whether we apply to them *safeq de-'Oraita' le-ḥumra* or *safeq de-Rabbanan le-qula*.[183]

6.3 *Hilkheta kebatra'ei* and historical error

6.3.1 One set of issues arising from our research relates to "rules of change" (diachronic issues), in the form of the principle *hilkheta kebatra'ei*, its qualification by Rema, and the applicability of the latter to issues of historical error.

6.3.2 There are uncertainties in the scope and meaning of the basic rule of *hilkhata kebatra'ei*, such as its applicability as between "halakhic epochs" (particularly relevant in relation to the rejection by the Rishonim of the geonic enactments[184]), the need for specific rejection by the *batra* of the ruling (and

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178 Cf. Riskin 2002:28: "We have seen that many Rishonim maintained that *hafqa'at qiddushin,* even when implemented many years after the marriage, is based on implied conditions attached to the betrothal ... Hence, there is reason to allow *hafqa'at qiddushin* many years after the betrothal even without a *get*."

179 On its incidence, see Jackson, "Directions" 4.1.2-3, 5.3.2. Indeed, communal enactments backed up by threat of annulment are sometimes taken as themselves establishing a consensual basis: the people are by such *taqqanot*, in effect, adoping new standard conditions (*tena'in*) in their own future marriages (see §D in Resp. Ribash 399, at Jackson, "Directions" 4.3.4). See also Abel, "Za'aqat" 8.2, on Ramban.

180 See Jackson, "Directions" 5.1-5.2.

181 See Jackson 2002b:24-26, 4.1.

182 Silber 1973:51 claims that Jewish law, being a system of religious law, "does not define norms for deciding the law, but norms of behaviour" — thus apparently reducing Jewish law (in Hartian terms) to a system of primary rules only.

183 See, e.g., Abel, "Morgenstern" 10.2.2, on *Devar 'Eliyahu* 48 (in relation to doubts regarding facts or (substantive) law).

184 Elon notes (1994:I.267f.) 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 Geonim and the Rishonim: "Similarly, the early authorities in the rabbinic period (the Rishonim) accorded special veneration to the *geonim* ..." But clearly, this has not operated in relation to coercion of the *moredet* (or, indeed, to the geonic use of *taqqanot*). Two points may be added. First, there is a divergence amongst the Rishonim as to whether a Rishon has the authority to dispute the opinion of a Gaon, Rambam saying yes and Ramban saying no (see Abel, "Consensus" III.20). Secondly, it is authoritatively argued that Rambam and Rabbenu Tam towered above their contemporaries and may be considered as the equal of the Geonim or even superior to them (see Abel, "Consensus" III.21).

reasoning?) of the *qamma,* and the conditions required for the application of Rema's qualification.[185]

6.3.3 A major issue relates to the applicability of Rema's qualification to (different forms of) historical error. In this context, we may distinguish the following situations:

(a) The discovery of new manuscripts of classical sources would appear to fall unproblematically within the qualification, and this appears to be recognised by Rav Ovadya Yosef.[186]

(b) The status of a traditional text which has not received a critical edition, and which we have reason to believe, from the circumstances of its compilation, does not represent the *ipsissima verba* of the author to whom it is attributed. Such is the situation of the *Sefer Hayashar*, resulting in a major doubt regarding Rabbenu Tam's view of whether (and where) *kefiyah* was approved by the Talmud in the case of the divorce of a *moredet*.

(c) Problems of interpretation, such as the meaning of the *tenai* of R. Yoseh, and the precise means used by the *geonim* to effect release of the *moredet*.

Of these, (a) falls within Rema's qualification to *hilkheta kebatra'ei*, while (b) and (c) may be viewed as raising a *safeq* which may contribute to an argument based of *sefeq sefeiqa* (§6.5 below). The matter should, perhaps, be reviewed further in the light of the limited argument put forward by R. Yitsḥaq Lampronti, *Paḥad Yitsḥaq*, *'erekh tsedah*, for changing the *Halakhah* in the light of new scientific knowledge.[187]

6.4 Majority, Consensus and Special *Ḥumrot*

6.4.1 A second set of issues relates to "rules of recognition"[188] (synchronic issues[189]), in the form of the principle of *rov* and apparent qualifications of it in (i) the demand for consensus and (ii) the claim that issues of *qiddushin* and *gittin* are subject to special (more severe) rules. A fundamental uncertainty here relates to whether the basic rule of *rov* — which Rambam implied would have justified retention of the geonic measures,[190] and which Maharam Alashkar saw as justifying the extension of annulment beyond the cases enumerated in the Talmud[191] — applies at all where there was no face-to-face meeting of those comprising the majority with those comprising the minority. If not, the matter remains one of *safeq* and any *ḥumrot* derived from application of *rov* must be regarded as a rabbinic stringency, according to the majority opinion that *safeq de'Oraita' leḥumra'*

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185 See n.21 above.

186 See 3.2.5 above.

187 Abel, "Za'aqat" 5.7, citing sources (for and against halakhic change) and discussion in M.M. Kasher, *Mefa'ne'aḥ Tsefunot*, Jerusalem 5736, 171-72.

188 See 6.2.1 above.

189 There are also issues of the relationship between these diachronic and synchronic principles. Thus, Elon argues at 1994:I.269 that 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. He quotes at n.105 the reply of *Pitḥei Teshuvah*, *Shulḥan Arukh Ḥoshen 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]." 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. See further Abel, "Consensus" III.5, note 30. The rule of *hilkheta kebatra'ei* is normative even against contrary indications from other talmudic rules such as "Whenever an individual disputes the opinion of a group of scholars, the *halakhah* is like the majority": *Rif, Qiddushin* ch.2. Cf. *ET* IX. col. 343 n.12.

190 *Hilkhot Ishut* 14:14. "And the Geonim said that in Babylonia they have other customs concerning the *moredet*, but these customs did not spread to the majority of the Jewish people, and many and great people disagree with them in the majority of places", *per* Riskin 1989:88 (Heb.), 90 (Engl.).

191 *Resp*. #48. See Breitowitz 1993:65 n.181.

is, as Rambam says, a rabbinic doctrine.[192]

6.4.2 It has become commonplace to hear that any proposed solution to the problem of *agunah* must command a consensus. If this is advanced simply as an application of some *general* claim that we require a consensus for (any) halakhic change, it is ill-founded. Consensus 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 — at best — as a new and additional condition upon the operation (in practice) of any established source of law (a "meta-source", perhaps).[193] If so, perhaps we might interpret the demand for consensus not as consensus on the substance of the law, but rather consensus as to which *gedolei hador* to follow.

6.4.3 Some have identified the origins of the doctrine of consensus in Maimonides.[194] A more likely explanation is that consensus emerged in the context of the increasing limitations imposed upon the authority of *taqqanot haqahal* (which Morrell dates back to the twelfth century and associates with Rabbenu Tam[195]), particularly in their use of the power of expropriation, viewed as threatening the inviolability of property rights and personal liberty (and thus requiring unanimous consent).[196] The demand of Ribash for the approbation of "all the halakhic authorities of the region" may be viewed in this light.[197] Later, however, even the "region" becomes too local a basis for the operation of consensus.[198] 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). We may note

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192 See further Abel, "Consensus" IV.11-12.

193 As, for example, where Rav Mosheh Bleich observes (1993:45) that "it is the consensus of contemporary authorities that inordinate weight not be given to newly published material."

194 See further see Jackson, "Directions" 5.1.2.

195 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), *Ḥatam Sofer, Ḥoshen 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"."

196 Kanarfogel 1992:87-97 relates it to the particular problem of *kinyan* in relation to *davar shelo ba le'olam.* At 103, he 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."

197 *Resp*. 339. Elon 1973:726f. argues: "Also, this phenomenon is largely attributed to the fact that the *taqqanot* 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 *taqqanah* — 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)."

198 Maharam Alashkar (end of the 15th, beginning of the 16th centuries) requires that "... the entire country and its Rabbis, with the concurrence of all or a majority of the communities", 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.

that this was in the context of an application of annulment to a marriage untainted by either incompetence or lack of informed consent.[199]

6.4.4 If claims that we require a consensus for halakhic change are ill-founded when put forward as general propositions, they have greater weight in the particular context of *gittin*.[200] This, indeed, is reflected in the debate regarding conditional marriage, where the view that even a condition repeated at *ḥuppah*, *yiḥud* and *biah* may be cancelled during the act of intercourse was asserted as normative, on the basis apparently of a single opinion.[201] Rabbi Abel argues, however, that this is a modern innovation,[202] and, moreover, that analysis of a *teshuvah* by Rav Mosheh Feinstein (*Iggrot Mosheh*, *EH* I, 79) leads to the conclusion that "he would certainly say that insubstantial minority halakhic opinions, even in matters of *'erwah*, need not be considered"[203] and that "there is no source in the Talmud for those who rule that we must take into account even insubstantial minority, or unique, stringent opinions in the area of *gittin* and *qiddushin*".[204] Indeed, Rav Ovadya Yosef,[205] in common with most *posqim*, indicates that even if this *ḥumra* applies in *gittin* and *qiddushin* generally, once a situation of *'iggun* has materialised we revert to the usual rule of *rov posqim* and the *Shulḥan 'Arukh*.

6.4.5 The same argument, that we may revert to the usual rule of *rov* once a situation of *'iggun* has materialised, would apply to the understanding of consensus which gave a veto to an "insignificant minority".[206] What, however, where the minority is a substantial one? Certainly, in *factual* matters, as in *mayim she'eyn lahem sof,* such a minority (or statistical likelihood) would have to be taken into account. Whether R. Feinstein would apply this to a substantial minority of halakhic opinions is unclear.[207] It is, however, argued[208] that the concern for minority views in *gittin* and *qiddushin* is only *ab initio* (*lekhatehilah*) but *post factum* (*bedi'avad*) we can leave the situation as it is.[209] Since the rule is that in times of urgency we may *ab initio* create a situation which is, in normal

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199 See 5.2(d), above.

200 E.g. Bleich 1989:332: "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." See further, in relation to the New York Get Law, Jackson, "Directions" n.250.

201 See Abel, "Consensus" V.3. See also Abel, "Za'aqat" 6.10, on opposition to the application of the modern Israeli version of the *harḥaqot* of Rabbenu Tam.

202 Abel, "Za'aqat" 7.8, noting that an oft-quoted source is Rabbi Yom-Tov Algazi (18th century), as indicated in *teshuvot* of R. Ovadya Yosef.

203 Abel, "Consensus" IV.32.

204 Abel, "Consensus" V.8.

205 Abel, "Za'aqat" 7.8, cites *Yabia' 'Omer*: I *YD* 3:12; IV *EH* 5:4 & 6:2; VI *YD* 15:5 end; VI *EH* 2:6, p.274a, beginning on the 17th line above the end of the column [in the large edition (Jerusalem 5746)].

206 Terminology of the *Tosafot* and other *Rishonim*; see also R. Mosheh Feinstein, *Iggrot Mosheh*, *EH* I, 79. See further Abel, "Consensus" IV.27; "Conditional Marriage" n.102.

207 Abel, "Consensus" IV.32.

208 Abel, "Consensus" IV.16.

209 For example, if a woman whose husband had disappeared at sea (the case of *mayim she'eyn lahem sof*) and was therefore not permitted to remarry (*Yevamot* 121a, *EH* 17:32) did in fact do so, she would be allowed to remain with her husband (*Yevamot* 121a and b, *EH* 17:34).

circumstances, considered legal only *post factum*,[210] it follows that in an emergency situation we may *ab initio* follow a majority, even against a substantial minority, even in matters of marriage and divorce. Accordingly, in a case of *'iggun* we revert here too to the normal halakhic process of *Shulḥan 'Arukh*/Rema and majority rule.[211]

6.4.6 Even if we argue that the *ḥumra'* that we need a consensus (and thus grant a veto even to a single dissenting opinion, *qal vahomer* an insubstantial minority) is unfounded (according to Rabbi Feinstein – see §6.4.4, above) the converse claim, that in matters of *iggun* we may rely on a sole opinion and (*qal vahomer*) an insubstantial minority,[212] can still stand. This is because we are relying on the view that every *maḥloket haPoskim* (even when not evenly balanced) remains a doubt and *safeq de'Oraita leḥumra* is a rabbininc rule. Hence, according to the first claim the Sages said that we *need not* take the (insubstantial) minority view into consideration even in cases of *gittin* and *qiddushin*; while according to the second claim the Sages also said that we *may* take it into consideration in cases of *iggun*. The greater the emergency — for example, the *agunah* is young, without children, desperate to remarry and facing the certainty of a ruined life — the more likely we are to rely on even a single lenient opinion. In each case, sensitivity to the circumstances dictates what we should do.[213]

6.5 Exploiting *sefeq sefeiqa*

6.5.1 The application of *sefeq sefeiqa* to our problem is complicated, and requires further study. The principles of *safeq de-'Oraita' le-ḥumra* and *safeq de-Rabbanan le-qula*[214] provide a useful starting-point: a double doubt is sufficient to permit a Torah prohibition; a single doubt is sufficient to permit a rabbinic prohibition.[215] Yet what constitutes a "doubt" (to be distinguished from mere lack of knowledge) may itself be contested, and there are additional issues to be addressed, such as the combining of factual and halakhic doubts[216] and the status of unique (but not excluded) opinion.[217]

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210 See the sources listed in *ET* VII col. 417, note 140. See also Abel, "Morgenstern" 21.2.7, on R. Volkin, and "Za'aqat" 6.7, on acceptance of a *get me'useh* in case of *me'is alay* in an urgent situation. Cf. Rabbi David Zvi Hoffman in *Eyn Tenai BeNissu'in,* 17, explaining the Mahari Bruna's condition regarding the *aḥ mumar*: see Abel, "Conditional Marriage" IX.65-66, and see further there at n.78. See also Hacohen 2004: 90-91, 92, 96-97.

211 R. Ovadyah Yosef, *Yeḥaweh Da'at* I *Killeley ha-Hora'ah* p. 32 ס.

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

213 See Abel, "Morgenstern" 15.3, discussing the argument of Rav Kook who, in the tenth chapter of the introduction to his work *Shabbat Ha-'Arets*, writes that the ruling that we can rely on even a single lenient opinion, even when dealing with *de'Oraita* law, is possible only according to those who maintain that every *maḥloket haPoskim*, even where there is an overwhelming majority on one side of the debate, remains, in Torah law, a doubt. Abel points out there that Rabbi Yosef has proved that the correct view is indeed that all debates amongst the Poskim are viewed in Torah law as doubts. See Abel further there in n.67: "Although this approach regards *maḥloqet ha-posqim* as one of doubt and, therefore, should the question be one of Torah law, we should not be allowed to rely on a lenient minority because *safeq de-'Oraita' le-ḥumra'*, Rabbi Yosef has shown that the view of the Rambam — that *safeq de-'Oraita' le-ḥumra'* is only a rabbinic regulation — is the dominant halakhic opinion." See also Abel, "Morgenstern" 15.2-3, on the view of "the *Taz* and his school who, in an emergency, allow reliance on even a single view even where the question is one of Torah law".

214 See Abel, "Morgenstern" 21.2.6.1.1 n.102.

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

216 For an example of such, see Jachter's comments on Rav Herzog's analysis of the lenient ruling in favour of annulment

It is within this context that we may seek to revisit several different types of issue (§§6.5.2-4).

6.5.2 What, for the purpose of *sefeq sefeiqa*, is the significance of historical error (of various types: §6.3.3) in the argumentation on which the halakhic rulings of earlier generations have been based? We have identified, in the course of this Report, the following possible examples:

(a) What was the original text of Amemar's ruling on the wife proclaiming *me'is alay* in the Talmud (§3.2.3)?

(b) Assuming the traditional text of Amemar's ruling, did it imply coercion of the husband or not (§3.2.3)?

(c) Did the ruling of Rabbanan Sabora'i, requiring the wife to wait 12 months for her *get,* imply (as the Geonim clearly understood) that after that period the court would compel him (§§3.2.3, 3.2.5, 3.4.3)?

(d) What did the Geonim mean (and practice) by compulsion? Were they willing, in the final resort, to override the husband's resistance, whether by having the court authorise the writing and delivery of the *get,* or by *hafqa'at qiddushin* (§3.3.2)?

(e) By what authority did the Geonim proceed: interpretation of the Talmud (or a different talmudic textual tradition), *taqqanah* (based on an emergency situation?), custom (§3.4.1-3)?

(f) If they were motivated by *tsorekh hasha'ah,* did they themselves conceive their measures to be temporary, and if so how temporary (§3.4.2)?

(g) Did the Rishonim have accurate information as to what the Geonim did and on what authority they based themselves (§3.4.4)?

(h) Do we have accurate information on Rabbenu Tam's view on *kefiyah* (§3.5.1)?

(i) What was the original meaning of R. Yoseh's condition (§§2.1.3-5)?

6.5.3 Do doubts in relation to "secondary rules"[218] of the system have any special status, or are they treated in the same way as any other doubts (factual or halakhic), both in terms of the methodology of seeking to resolve them (the "rules of recogition"[219]) and in terms of their significance for the purposes of the application of *sefeq sefeiqa*? For example:

(a) May we use a minority opinion as part of a double or triple doubt, and what, here, is the relevance of the "weight" of the doubt. For example, Rav Yosef discusses *sefeq sefeiqa'* at length (with regard to removing the blemish of *mamzerut*) concluding that so long as one doubt is *shaqul* (= evenly balanced, i.e. 50-50) the other need not be, so that a minority opinion can qualify as the second doubt in a *sefeq sefeiqa*.[220]

(b) Are the normal rules of *sefeq sefeiqa* applied where the issue is one of *iggun*?[221]

(c) Are the normal rules of *sefeq sefeiqa* applied where the situation is deemed one of emergency?[222]

6.5.4 In this context, we may consider the overall strategy adopted by R. Berkovits. Rabbi Abel observes: "Although he does not say so, it seems to me that the three approaches to the problem in *TBU* were meant not as alternatives but as a combined three-fold approach creating a "triple-doubt" effect. If, after all the arguments and proofs, there exists any residual doubt about the halakhic efficacy of the Berkovits – or some similar – condition, we can rely on a *get*, prepared from the time of the *qiddushin*. Should there be doubt about that too, we can rely on the operation of retroactive communal annulment which also has its supporters amongst the *Gedoley Ha-Posqim*."[223] More

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of the marriages of the "captured" wives of the Austrian *kohanim*, on the grounds of *sefeq sefeiqa:* (i) were they raped?; (ii) is annulment possible in the post-talmudic age? See Jackson, "Directions" 5.2.3.

217 See Abel, "Morgenstern" 21.2.6 n.99.

218 6.2.1, above. See esp. the examples in 6.3.3.

219 6.2.1, above.

220 *Yabia' 'Omer* VII *EH* 6. See Abel, "Morgenstern" 5.2.1.

221 See Abel, "Morgenstern" 8.2, on R. Ovadya Yosef's remarks on *Resp. Peney Yitsḥaq* II no. 12.

222 See Abel, "Morgenstern" 15.2-3, 21.2.1, 21.2.7 (penultimate para.).

223 "Conditional Marriage" XI.3; cf. Jackson, "Directions" 5.4.2 (end).

recently, Dayan Broyde has also outlined a theoretical tripartite solution composing condition, divorce arrangements and annulment.[224]

6.6 The Contemporary Situation

6.6.1 Other issues relate to our sense of our particular situation today, and in particular: (i) does the *agunah* situation present *she'at hadeḥaq* and (ii) who has authority to address our problem?

6.6.2 The determination of whether we live in *she'at hadehak* is important, since, if so, various relaxations of the rules of authority are permitted,[225] including permitting *lekhatḥila* what otherwise would be permitted only *bediavad*,[226] and following a minority opinion.[227] Thus, for example, Rabbi Abel argues: "Therefore, one must consider whether the situation regarding *get*-refusal today is one of compelling need (*she'at deḥaq*) so that we can apply the rule that whatever is normally permitted only *post-factum* is, in a *she'at deḥaq*, permitted even *ab initio*, so that in our situation the Rashbets — and *Maran* — would allow, in a case of *me'is 'alai*, coercion (and, obviously, remarriage), even *lekhatḥillah*!"[228]

6.6.3 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[229]] 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;[230] 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 R. Zeraḥyah 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.[231]

6.6.4 It is clear that only the highest halakhic authority has the competence to introduce a global solution to the problem of recalcitrance, even if the problem is conceived as one of *she'at hadeḥaq*. Historical analysis suggests that the optimal deployment of authority consists in a combination of institutional and voluntarist legitimation (§§3.4.3, 5.4, above). But what form of institutional legitimation is today available? Elon has documented both the rise and fall of *taqqanot haqahal* in medieval times and the rise and fall of *taqqanot* by the rabbinical authorities in Mandatory (the Chief

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224 See further Broyde, *Edah Journal*, Kislev 5765, p.13, at nn.51-54 and pp.21-22.

225 The *Halakhah* accepts that a *Bet Din* of *Gedoley HaDor* has the authority, even nowadays, to abrogate, in an emergency, even negative Torah commandments when the seriousness of the emergency warrants this. See Abel, "Morgenstern" 9.3.2-3.

226 See 6.4.5 above. Acording to the Rambam, a *get* coerced illegally by a *bet din* is valid, *bediavad*, in Torah law": *Yad, Hilkhot Gerushin* 2:20.

227 See further Abel, "Morgenstern" 15.3.2-3, "Consensus" V.6.

228 "Za'aqat" 6.7 (end).

229 In this paragraph, צורך שעה and הוראת שעה are used interchangeably, without addressing the history of the relationship (an issue between Riskin and Wieder 2002). Both concepts are used to refer to the geonic enactments in the sources reviewed in 3.3-4 above. On the ... יש בח לעקור principle, see Abel, "Morgenstern" 9.1-3.

230 Indeed, Ramban says in *Milḥemet haShem* (on Rif to *Ketubbot* 63) that R. Zeraḥyah knew very well that the Geonim had intended their enactment for all time and his claim that it was meant only for the geonic period is just a nice way of saying that he does not agree with them and is ruling against them!

231 See further Jackson, "Directions" 5.2.4; Abel, "Za'aqat" 8.13; Abel, "Morgenstern" 9.3.2, 9.5.1.

Rabbinate Council) and State times.[232] It is ironic that the establishment of the State has seen such a decline.[233] Perhaps, now, an appreciation of the greater geographical, cultural and halakhic integration of Ashkenazim and Sephardim (§§3.6, 4.4, above) may remove the logjam.

6.6.5 Elon (1994:II.876) quotes R. Shalom Moses Ḥai Gagin as attacking Abulafia for his use of *hafqa'at qiddushin* with the words: "It cannot possibly be contended that the world's great scholars ever gathered together and agreed to rule contrary to the saintly Caro even in a single particular." This would appear to imply that a convention of the world's great scholars is indeed capable of making such a ruling.[234] Indeed, this appears to have been accepted by Rav Lubetsky in *Eyn Tenai BeNissu'in:* "Therefore, choose some of the *Gedoley ha-Dor* and if they agree with you who will dare to challenge it?"[235] Berkovits quotes Maharam Al Ashqar: "Therefore, if all that country and its rabbis, with the agreement of all the communities or most of them, took a vote and decided to rely upon these great trees [= authorities] to raise a barrier against, and to impose a fine upon, anyone who betroths in violation of their agreement and their enactment, and to annul the betrothal and requisition it [= the betrothal ring] for ever or until any time they choose, I too will support them."[236]

7.0 Towards a Solution

7.1 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 hameqadesh,* i.e. through conditions imposed by rabbinic (or communal) authority.[237] Indeed, we have seen that this latter institution sometimes explicitly evokes a consensual basis: the people are by such *taqqanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages. The issue is thus whether standard terms can be imposed upon the parties to a marriage. While *kol hameqadesh,* in its traditional form, might suggest a positive answer,[238] the implications of 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"[239] are less clear: the customs of the town might be taken to represent the (antecedent) consent

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232 Elon 1973:727f., 1994:II:678-879; see Jackson, "Directions" 4.5.1.

233 As when Chief Rabbi Herzog sought to introduce changes in inheritance, also by a combination of *taqqanah* and *tenai:* see Greenberger 1991.

234 Dayan Waldenburg adopts a somewhat different institutional route, in advocating the use of coercion "through a general agreement of all the rabbinic courts": *Tzitz Eliezer* 5, 26. See further Abel, "Morgenstern" 12.2.12.

235 Abel, "Conditional Marriage" VII.9.

236 See further Abel, "Za'aqat" 8.9.

237 For Rishonim who explicitly base *hafqa'at qiddushin* on a condition, see Riskin 2002:15, esp. Maharam of Rothenberg, in *Mordekhai*, *Qiddushin* 3:522: "At the time of betrothal he did nothing wrong, and we judge him according to that time, and say that he betrothed her on condition that if he later violates a rabbinic regulation ... his betrothal will not be valid."

238 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 qiddushin 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."

239 See §I in Resp. Ribash 399, at Jackson, "Directions" 4.3.4.

of the parties to the marriage. However this may be, the history of *taqqanot haqahal* 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 *taqqanah* itself.[240] This requirement may be applied not only to a *taqqanah* 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.

7.2 The relationship between Annulment and Coercion[241] has given rise to a number of different formulations. Traditionally, we encounter a hierarchy of remedies. 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). 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 (*Yev.* 110a), where annulment was used.[242] 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.[243] This, for him, is not merely a conceptual equation (the equivalence, at least functionally, of coercion and annulment); he adopts also a procedural equivalence by using a *get zikui* in the process of annulment.[244] Though there is some mild historical support for Morgenstern's view,[245] his exaggerated dogmatic claim is not supported by the sources he cites.[246]

7.3 The analysis in this Preliminary Report leads to the following tentative proposals on the substantive issues:

(a) A *taqqanah* should be adopted, by an appropriate body with the *haskamah* of the *gedoley*

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240 As in Ribash, *Resp.* 399. 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 *taqqanot* complying with these conditions, and explicitly empowering the court to annul on the basis of *hefker bet din hefker*, were increasingly discouraged (e.g. by Karo, *Bet Yosef* to *Tur*, *Even Ha'ezer* ch. 28 (end); *Rema* to *Shulḥan Arukh Even Ha'ezer* 28:21; see 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.

241 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]."

242 "... 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.).

243 "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*", in Morgenstern (internet version):ch.I (emphasis supplied).

244 See 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 *mekaḥ 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, *Dvarim 'Aḥadim* 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).

245 For the rules established by the court of R. Eliyahu Hazan, Chief Rabbi of Alexandria, in 1901, see Freimann 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 *ḥerem* was available to them.

246 Abel, "Morgenstern" 10.

hador, requiring every marriage to be subject to the following conditions:

(i) The parties agree that the marriage will terminate on refusal to comply with the order (or even recommendation?) of a *bet din* to grant a *get,* such refusal being certified by the *bet din.*

(ii) This termination may operate either (a) automatically, without a *get* (whether prospectively or retrospectively), or (b) by the delivery of a *get* by the *bet din* (as a form of *kefiyah*) or (c) as a form of *hafqa'ah*, according to the decision of the *bet din.*

(iii) 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.

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

(c) *The taqqanah* should recite the authority on which it is based (§7.4, below), and the powers to be exercised by the *bet din,* including a declaration that the condition has been broken, and the effects of such breach.

7.4 How might the authority for such measures be justified? The *taqqanah* might include a series of recitals such as the following:

a The Palestinian tradition of *tena'in* classifies conditions terminating marriage (so interpreting *Jerusalem Talmud, Ketubbot* 5:9 (30b)) as *mamona* rather than *issura*, and in other respects too showed particular concern for the needs of the wife.

b The return to Palestine and the establishment there of new halakhic institutions justifies a revival of the tradition of *taqqanot haqahal*, of invocation of "Jephthah in his generation is like Samuel in his generation", and of exercise of the powers of בני העיר.

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.

d Such an emergency situation justifies approving *lekhatḥila* of measures which otherwise would be valid only *bediavad.*

e Insofar as this *taqqanah* might be regarded as an indirect form of coercion, the latter is justified in the light of doubts concerning the halakhic rejection of coercion of the husband of a *moredet.*

f The doubts encountered in establishing the normative *halakhah* in this context justify a *taqqanah* which will remove any need to provide a *get* simply "for the avoidance of doubt".

g Insofar as this *taqqanah* might be regarded as an indirect form of annulment, the latter is based on the parties' consent to its use, under the principle of *kol hameqadesh.*

h The adoption of a *taqqanah* removes from the court any problem of lone responsibility (the "chip of the beam").

i The *ḥerem* of Rabbenu Tam against casting a slur on the validity of a divorce after it had been delivered in a Jewish Court[247] may now be applied to the decisions of *batei din* acting under the authority of the present *taqqanah.*

7.5 The strategy implicit in the above suggestion is designed to meet a number of alternative analyses of the present problem (cf. §6.5.4 above). 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*taqqanah*; or

(ii) Annulment remains available to post-talmudic authorities in the circumstances of the

247 See Finkelstein 1924:44-46, 105-106 (accepting the possibility that Rabbenu Tam may have admitted nevertheless the need for a new divorce in such cases). Morgenstern (internet version) notes that the *ḥerem* was reiterated by Rav Mosheh Feinstein in *lgrot Mosheh Even Hoezer* 1:137.

contemporary *agunah*, at least if backed by an appropriate *taqqanah*; or

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

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