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Agunah and the Problem of Authority

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Co-Director, Centre for Jewish Studies, University of Manchester
and Director, Agunah Research Unit
e-mail: bernard.jackson@man.ac.uk

'It is not your duty to complete the work, but neither are you free to desist from it'
(*Pirkei Avot* 2:20)

1.0 Introductory

1.1 History and Authority

Not infrequently, the problem of *agunah* is approached by appeals to history, whether by simple reference to an earlier stage in the development of the *halakhah*, or to the dynamic processes of Jewish law: major historical changes, it is argued, have been made in Jewish law (not least, in the areas of marriage and divorce) in the past; why, then, can we not make the necessary changes to meet the problem of *agunah* today? Against this, a halakhist might reply: it is not a question of history, but rather of authority. The mere fact that changes were made in the past does not in itself entail the view that we have authority to make such changes today. At this point, however, the history of the matter re-enters the debate. The question of authority itself sometimes depends upon historical claims. If the Talmud ranks as the highest authority, we need to establish the text of the Talmud. One talmudic text vital to our question has, as we shall see, a problematic text. Is the establishment of the text itself to be determined by historical scholarship or by recourse to authority? Again, the questions "what did the *Gaonim* actually do, and on the basis of what authority did they do it?" are historical questions, but the normative value of *Rabbenu Tam*'s rejection of the Gaonic approach may be premised upon the answers given to them. Authority systems, moreover, themselves have a history. If we are not entitled to argue: "just because changes have been effected in the past, the authority must exist to make further changes today", it must follow that we cannot argue either: "just because changes have been not been effected in the past, the authority cannot exist to make changes today."

1.2 A New Problem?

In discussing this problem, the impression is often given that the *agunah* problem is a relatively recent one — a product of the era of Emancipation, when (i) both marital breakdown and abuse by the husband of his rights in relation to a *get* are more common and (ii) the halakhic authorities

themselves (deprived by both internal and external factors of some of their traditional powers) have suffered a loss of nerve and have become more reluctant than their predecessors both to innovate and even to exercise powers which the *halakhah* gives them. In fact, these features of the "modern" period are already well attested from an early stage in the halakhic tradition. Mishnah Nedarim 11:12 already records a tightening in the rules regarding the wife's entitlement (in defined circumstances) to demand a *get* against the will of her husband, the motivation being stated explicitly as "a woman must not be [so easily given the opportunity] to look at another man and destroy her relationship with her husband." Indeed, even the strategy of rabbinic encouragement to the family of the *agunah* to "pay off" the husband in order to achieve a "voluntary" *get* is attested at least as early as the twelfth century (e.g. a responsum of *Raban*, §4.2, below). Other than the parallel existence of civil marriage and divorce, I believe that there is little in our present difficulties which is inherently modern or new. Contrary to some contemporary voices, the present difficulties already existed long before the introduction of civil marriage and divorce. Nor can we blame our present predicament on inhibitions against beating the husband deriving from secular criminal law: the halakhic problem of when *kefiyah* is permissible is quite independent of such external constraints.

1.3 Criteria

I shall review some aspects of the history of three of the principal strategies which have been used to try to alleviate the problem of the *agunah*, in order to highlight the problems of authority which, respectively, afflict them. The *agunah* problem is, I believe, primarily a problem of authority. If we were able to resolve the various authority issues which arise, we would rapidly achieve a solution to the *agunah* problem (and much else, besides). Of course, we have to define what we mean by a "solution". I do not demean the sincere efforts of those who have sought to provide case-by-case alleviation, or limited solutions, halakhic or secular (such as the inherently "parochial" measures involving inhibitions on divorce in secular law or the range of civil disabilities now available as sanctions in Israel). But the problem will continue to plague us — as one of morality, of reputation (*hillul hashem*) and of social/gender values — until and unless we find a universal solution, either one which prevents the situation of *agunah* from arising at all [I refer throughout to the victim of a recalcitrant husband, not the wife whose husband has disappeared] or provides a universal remedy when it does arise. So let me proceed to the three principal strategies: conditions, coercion and annulment.

2.0 Conditions

2.1 Conditions contrary to *halakhah: mamona* and *issura*

Tosefta Kiddushin 3:7-8 states:

> [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. [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.

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" (*devar shehu shel mamon*). The distinction in Tosefta Kiddushin 3:7-8 might make that appear unlikely. However, divorce does involve financial consequences (regarding the *ketubah*), and this appears to have influenced R. Yose, in the Jerusalem Talmud, Ketubot 5:9 (30b), to take the view that a clause allowing the wife a unilateral right of divorce (for "hatred") was indeed to be classified as "monetary":

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

Rav Shlomo Riskin attaches great significance to this Palestinian tradition. There is nothing in the Babylonian Talmud which explicitly negates it. Nevertheless, many later authorities proceed as if conditions of this kind are self-evidently excluded, applying the principle of "when anyone stipulates out of a Law contained in the Torah, the condition is void." What, then, is the weight of an explicit ruling in the Jerusalem Talmud, against what is merely implicit in the Babylonian tradition? Jerusalem Talmud Gittin 4:2 is also sometimes cited (e.g. Gilat, "Gittin", *Enc. Jud.* VII.594): "Sages have the power to uproot Torah Law by annulling marriages." Though this is not required for the argument based on classification of the *tenai,* it does support the distinctiveness of the Palestinian tradition, which, I shall argue, may be particularly relevant in contemporary circumstances.

2.2 The French Proposal

In modern times, a fresh attempt has been made to use conditions specifically to prevent women divorced in civil law to remain "chained" according to *halakhah.* The French Orthodox Rabbinate in 1907 urged that all *ketubot* include a clause providing that a civil divorce decree would *annul* the marriage. This proposal, however, met with widespread opposition, on two principal grounds. The first was violation of the principle "when anyone stipulates out of a Law contained in the Torah, the condition is void" (despite a precedent in *Rema,* which, it was argued, was also wrong for the same reason). Secondly, any such conditions regarding *Nissuin* (if not the *Kiddushin*) would be invalidated by the subsequent marital relations between the couple, applying the presumption (*chazakah*) that marital relations are intended as such, and not as acts of promiscuity. The status of sexual relations between the spouses, on this argument, cannot be conditional — they cannot be marital if not invalidated by subsequent acts bringing the condition into effect, non-marital if those conditions are fulfilled. The first of these objections seems to have overlooked the Palestinian tradition represented by the Jerusalem Talmud, noted above. To the second, a possible answer is provided by the distinction between:

2.3 Conditions Precedent and Conditions Subsequent

In the United States, Rabbi Michael Broyde, a strong opponent of the Rackman-Morgenstern court, has himself expressed the view that this may offer a way forward. Distinguishing the operation of conditions from mistake-induced invalidity (§4.4, below), he writes:

> ... 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.
>
> ... All agree that a *tenai* can be kept in effect if, for example, the couple repeated the condition to a bet din each time before they engage in a sexual relationship.

The practical problem (which has generated a "custom and practice" of not using such conditions) is thus that of maintaining the conditions intact at the same time as the marital relations. One may observe that this an example of a rule devised originally for the *benefit* of the woman now being turned against her. But this problem is based simply upon a presumption (*chazakah*) that relations between husband and wife are intended as marital, and not as acts of promiscuity. Perhaps we can devise ways of rebutting that presumption, and thus maintaining the *tenai* intact, without requiring the couple either to go to the *bet din* before each time they wish to engage in relations, or (as has been suggested) have witnesses stand within earshot to hear their oral declaration (maintaining the *tenai*) before each such marital act.

2.4 Incorporation of a Condition in the PNA?

The PNA in use since 1996 in the United Synagogue makes no attempt to make the validity of the marriage conditional upon observance of its terms, as might have been achieved, for example, by expanding the final clause to read:

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

It was reported at the time that some such condition had been considered but rejected. We have not been told why. Interestingly, this approach is, in principle, favoured by Dayan Berkovits.

3.0 Coercion and the *moredet*

3.1 The Talmudic text

The principle of coercion was accepted already by the Mishnah in cases where the law recognised that the woman had a *right* to divorce: this came to cover cases of "major" physical defect, malodorous occupations inhibiting conjugal relations, infidelity and abusive behaviour; indeed, *Mishnah Ketubot* 7:9 provides a list of cases where the husband is to be coerced: *ve'ilu shekofin oto lehotsi*. We find already in *Mishnah Arakhin* 5:6 the seemingly paradoxical statement: "so also regarding a divorce we force him until he says 'I want to'."

Already in the Gemara the issue is raised as to whether coercion applies also to the case of the *moredet*, the wife who refuses conjugal relations to her husband without having one of the grounds listed by the Mishnah. This was to become a major issue between the *Gaonim* and the *Rishonim*. Its importance for the *agunah* resides in the fact that any wife refused a *get* by her husband might well declare herself a *moredet*, to whom her husband is "repulsive" (*ma'is alay).* In *Ketubot* 63b, we encounter a dispute between two Amoraim regarding both the definition and treatment of the

moredet. The definitional problem need not concern us. What is important is the substance. The essential issue is as follows:

> ... if she says, however, "He is repulsive to me (*ma'is alay*)," [Amemar said] she is not forced (*lo kayfinin lah*). Mar Zutra said: She is forced (*kayfinin lah*).

According to this, the issue between Amemar and Mar Zutra is whether the wife is to be compelled back (into marital compliance). Mar Zutra takes the view that she is; Amemar takes the view that she is not. Are we to take Amemar to imply that she is entitled to a divorce, even a coerced divorce? The text is not explicit, and later authorities have differed. However, recent work towards a critical edition of the Talmud text has revealed a significant variant. MS Leningrad Phirkovitch reads:

> ... if she says, however, "He is repulsive to me (*ma'is alay*)," [Amemar said] he is forced (*kayfinin leyh*). Mar Zutra said: She is forced (*kayfinin lah*).

Here, Amemar takes the view that it is the husband who is coerced, which can hardly mean anything other than that he is coerced to give her a *get.*

The issue raised by the variant text of Amemar's opinion is of great importance for the later development of the *halakhah.* The *Gaonim* accepted and developed compulsion against the husband of a *moredet,* but their view was ultimately rejected by *Rabbenu Tam* (France, 1100-1171). For *Rabbenu Tam,* the *Gaonim* had no authority to go beyond the Talmud, and the Talmud referred to coercion, in the case of the *moredet,* only in respect of the wife, not in respect of the husband. But *Rabbenu Tam* did not have access to the variant MS tradition. Suppose that scholarship ultimately concludes that the variant represents the original text, so that the Talmud does contemplate coercion of the husband? Would such an historical discovery be taken into account by halakhic authority? A recent study of this problem by Rabbi Moshe Bleich [*Tradition* 27/2 (1993), 22-55] cites the view of Rabbi S.Y. Zevin, the editor of the modern volume of *variae lectiones,* that:

> ... a variant talmudic text is significant only when it can be demonstrated that an early-day authority based his ruling upon that version of the text.

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

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

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

3.2 The *Gaonim* and *Rishonim*

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

According to R. Sherira Gaon, "we compel him to grant her a divorce forthwith" . What exactly is meant by this? *Kofin* normally refers to physical coercion: thus, the husband is coerced (beaten) 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 much of his life in an Israeli jail, and die there, rather than release his wife, is often cited. Yet there are hints of the use of a greater judicial power in some Gaonic and later sources. According to the *Halakhot Gedolot* (ascribed to Rav Shimon Kiara, 9th cent.): "... we grant her a bill of divorce immediately". 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, and do not [publicly] proclaim against her for four weeks.

The use of the plural in these sources (*notnin, heviynin*), 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 (quoted by Riskin, *Women and Jewish Divorce,* 52f.), which uses the expression: "they wrote her an immediate bill of divorce". Such a view would seem to be implicit also in the following clause of a *ketubah* from the Genizah, in the collection of Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study*, I.56:

> 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 (*al pum bet dinah*) and with the consent of our masters, the sages.

Indeed, the *Rosh* (R. Asher b. Yehiel (Asheri), Germany, 1250-1328), who followed *Rabbenu Tam* on the general issue, appears to have interpreted the Gaonic practice not as coercion but rather as annulment (*hafka'at kiddushin*):

> ... For they relied on this dictum: "Everyone who marries, marries in accordance with the will of the Rabbis" [bKet 3a], and they agreed to annul the marriage when a woman rebels against her husband (*Resp*. 43:8, p.40b; Riskin, *Women and Jewish Divorce*, 126f.)

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.

By what authority did the *Gaonim* proceed? There is debate also as to whether the *Gaonim* claimed a talmudic basis for the *takkanah* (might they have had access to the tradition represented by the Leningrad MS?). Riskin comments that Nahmanides appears to believe that the Geonic decree introduced the coerced bill of divorce, whereas in fact the Geonim themselves believed this was

already legislated in the Talmud. He observes that we have the texts of the original decrees of the Geonim, which apparently were not available to Nahmanides.

The responsum of Rav Sherira Gaon (which sets out his view of the history of the matter) uses the language of rabbinic *takkanah*, and explains it on the grounds that "Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands." The motivation is amplified somewhat in other sources. The anonymous 13th-cent. responsum quoted by Riskin (above) suggests that the twelve month delay required by the Talmud prompted women to resort to "bad ends, either prostitution or apostasy" (*ben biznut ben bishmad*). In what Riskin (*Women*, 86f.) has identified as the earliest source to turn against the Gaonic practice, the *Sefer Ha-Maor* of Rabbenu Zerahyah Halevi, written between 1171 and 1186, the Gaonic decree (*takkanah*) is attributed to *hora'at sha'ah* *Rosh* similarly explicitly construes these circumstances as amounting to "emergency measures, *tsorekh sha'ah*, to go beyond the words of the Torah and to build a fence and a barrier". But there is dispute amongst the *Rishonim* on whether such measures were intended as temporary "for that generation [only]" (*Rosh*) or "for [all] generations. This decree did not move from their midst for five hundred years" (Nahmanides). *Rabbenu Tam*, on the other hand, pays no attention at all to the argument from *tsorekh sha'ah*. He appears to have regarded it as a *minhag* on a matter of *issura*, contrary to *halakhah*. In his view, the *Gaonim* had had no authority to go beyond the Talmud in this matter of coercion, and should not be followed. The (notoriously problematic) text of the *Sefer Hayashar*, however, leaves us with a doubt as to whether *Rabbenu Tam* himself considered that coercion of the husband was not contemplated at all in the Talmud, or whether it was contemplated after the 12 month waiting period instituted by Rabbanan Sabora'i (and which the *Gaonim* certainly overrode).

As for the issue of authority more generally, *Rabbenu Tam* argued that in matters regarding *issura* we have to wait for the coming of the Messiah before changes can be made from the position stated in the Talmud. In rejecting the Gaonic *takkanah*, he was rapidly followed by the Ashkenazi authorities. Nevertheless, even the *Rosh* (Germany, 1250-1328), who followed *Rabbenu Tam* in this, advised in a particular case:

> If [her husband's] intent is to "chain" her (*da'to le'ignah*), it is proper that you rely on your custom at this time to force him to give an immediate divorce. (*Resp*. 43:8, p.40b)

3.3 Historical queries

We are, in fact, faced by a series of doubts on historical issues which are presupposed by the arguments from authority in this area:

(a) What was the original text of Amemar's ruling on the wife proclaiming *ma'is alay* in the Talmud?
(b) Assuming the traditional text of Amemar's ruling, did it imply coercion of the husband or not?
(c) Did the ruling of Rabbanan Sabora'i, requiring the wife to wait 12 months for her *get*, imply (as the *Gaonim* clearly understood) that after that period the court would compel him?
(d) What did the *Gaonim* mean (and practice) by compulsion? Were they willing, in the final resort, to override the husband's resistance, whether by having the court authorise the writing and delivery of the *get*, or by *hafka'at kiddushin*?

(e) By what authority did the *Gaonim* proceed: interpretation of the Talmud (or a different talmudic textual tradition), *takkanah,* custom?
(f) If they were motivated by *tsorekh hasha'ah,* did they themselves conceive their measures to be temporary, and if so how temporary?
(g) Did the *Rishonim* have accurate information as to what the *Gaonim* did and on what authority they based themselves?
(h) Do we have accurate information on the reasoning of *Rabbenu Tam*?

On all these questions, we may ask whether the authority of the tradition is affected by what may turn out to have been historical errors concerning its prior development. For example, if *Rabbenu Tam* did take the view that coercion of the husband is never mentioned in the Talmud and that the *Gaonim* did not base themselves on talmudic authority (even a minority opinion in the Talmud), 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? Or do we take the view that, like an erroneous textual tradition, error may be validated by subsequent acceptance? Not necessarily. In discussing *hilkheta kebatra'i,* Elon (*Jewish Law,* I.271) quotes *Rema*:

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

3.4 Value of a Solution based on Coercion

There is, however, a further problem if we look to coercion as potentially providing a universal solution to the problem of the *agunah.* For this purpose, not only must coercion be universally available to a wife refused a *get;* there must also be means of ensuring that the coercion is universally effective. If the husband (as in the notorious Israeli case) remains recalcitrant despite the coercion, a universal solution must find a way of dispensing with his participation altogether. We are thus led to consider the halakhic issues relating to annulment.

4.0 Annulment

4.1 The Talmudic cases

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

We may take the incident at Naresh (*Yev*. 110a) as exemplifying the first type: a man "snatched

away" a woman who had been betrothed as a minor to someone else. Despite the fact that the abductor might have "acquired" the woman by either money or intercourse, the Rabbis did not require her to obtain a letter of divorce from him. R. Ashi explained: "He acted improperly, they, therefore, treated him also improperly, and deprived him of the right of valid betrothal."

Elsewhere, too, R. Ashi was willing to annul a marriage, using the same formula in a case where a woman consented to betroth herself under pressure of physical violence (*B.B.* 48b). The Talmud discusses the issue of authority in relation to the form which the betrothal effected by the abductor might have take: if the *kiddushin* was by *kesef* (conventionally, with a ring), the Rabbis invoke a power of (retrospective) confiscation, *hefker bet din hefker*, which has a biblical basis in the powers granted to Ezra (10:8). But even if the betrothal was by *biyah*, the view is taken that a procedural defect can be found: the intercourse will be regarded (conclusively) as motivated not by the intention to constitute *kiddushin*, but rather by *zenut.* In short, immoral behaviour on the part of the groom here justifies the Rabbis in constructing a procedural defect in the *kiddushin*, such as to render it void. No valid *kiddushin* having taken place, no *get* is required.

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

4.2 Post-talmudic retrenchment

Yet when we reach the *Rishonim* of Ashkenaz, we find (here as in the issue of coercion for the benefit of a *moredet*), the beginnings of a tradition of rabbinic reticence regarding the use of annulment. A responsum of *Raban* (R. Eliezer b. Nathan of Mainz, 12th cent.) is particularly interesting, given the similarity of the case which prompted it to the Naresh incident in the Talmud. An incident occurred in Cologne in which a young man was negotiating with the parents of a young woman for her marriage when a new suitor, this time a man of wealth, appeared on the scene and arranged to marry her. The father instructed his daughter to marry the man of wealth. However, the young man's relatives deceitfully got to her first and he married her by reciting *harey at ...* and giving her a ring in the presence of witnesses prepared in advance. When the woman's parents realized what was happening, they told her, "Throw away the ring." She did so and married the man of wealth. The local scholars were prepared to annul the marriage to the young man, following the precedent of Naresh. *Raban*, however, disagreed. While offering a possible distinction between this case and Naresh — perhaps, here, the girl agreed to the marriage — he argued that, in any event:

> ... even if the Rabbis [i.e., the Talmudic Sages] had the power to annul a marriage, we do not

have such a power of annulment, and it stands to reason that we do not have such power ...

What was the outcome?

> We advised her relatives to pay the young man some money to free her, and this is what happened. The first man gave her a divorce and the second one betrothed and married her and the matter was accomplished legally. I record this to teach future generations. (*Resp. Raban,* E.H. III, 47b; Elon, *Jewish Law,* II.848f.)

Elon (*Jewish Law,* II.850) notes that this denial of the power of *hafka'at kiddushin* was also the view of *Rabbenu Tam,* who denied that even the Geonim had possessed authority to annul such marriages.

4.3 Annulment in *takkanot hakahal*

The issue in the case presented to *Raban* was whether there existed an *inherent* power of annulment, to deal with abuses of the *kiddushin* procedure. But the power of annulment might be based either on rabbinic or communal enactments (*takkanat hakahal*). Thus, *Rashba* (R. Solomon b. Abraham Adret, Spain, 1235-1310) was asked:

> Does a community (*kahal*) have the power to adopt an enactment that provides, in order to punish scoundrels, that a marriage effected in the absence of ten persons is void? (*Rashba Resp.* 1, 1206; Elon, *Jewish Law,* II.853f.)

He replied that the authority to make such an enactment exists if the people of the town agree, but subject to a veto by any halakhic scholar within the locality. Indeed, he attributes to the communal authority both the power to apply here the principle "He acted improperly, they, therefore, treated him also improperly" (§4.1, above) and that of *hefker "bet din" hefker.* The community is here equated with the *bet din,* the only difference being the additional invocation of the powers conferred by the Talmud on *bnei ha'ir*. There is, however, a sting in the tail of the responsum. It is framed between an opening reference to the "strict law" (*shurat hadin*), and a concluding note of hesitation: "Nevertheless, the matter requires further consideration", which seems to suggest that powers may exist but the authorities may be reluctant to use them.

In a responsum by *Ribash* (R. Isaac b. Sheshet Perfet, 14th cent.), such reserve generates a doctrine of consensus. *Ribash* was asked about the validity of a communal enactment (*Resp.* #399):

> ... providing that no one may marry any woman except with the knowledge and in the presence of the communal officials, and in the presence of ten persons; and that if anyone should violate the law and marry contrary to these requirements, the marriage is void (*nifka'in*). At the time a marriage is contracted [in violation of the enactment], the community expropriates the money or other property given to effect the marriage, and the property is considered to be ownerless and of no value. The marriage is annulled, and the woman may marry without any divorce and is not even required to obtain a divorce to remove any possible doubt.

Ribash seeks to reassure the questioner: there is an (independent) power conferred by the Talmud on *bnei ha'ir* (*B.B.* 8b); moreover, he buttresses this with a "consensual" argument: the communal

institutions represent the people, so that the people are by such *takkanot*, in effect, adopting new standard conditions (*tena'in*) in their own future marriages. He adds, moreover, that even if it were necessary to rely upon the principle of *kol hamekadesh* in cases such as this, the questioner need not hesitate in attributing that power to the *kahal* as well as to the Rabbis: indeed, once the people of a town agree to such conditions by enacting the *takkanah*, those conditions will serve as implied terms (binding even on one who *mekadesh stam*). *Ribash* thus concludes unequivocally that the community has the power to adopt the proposed *takkanah*. That being so, the final paragraph comes as a surprise:

> This is my opinion on this matter in theory. However, as to its practical application I tend to view the matter strictly; and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred, so that only a "chip of the beam" [cf. *Sanh*. 7b] should reach me [i e., so that I do not take upon myself the full responsibility, but only part of it].

Ribash is not willing to bear the responsibility for this decision alone; he requires the concurrence of "all the halakhic authorities of the region" — despite the fact that he had earlier pronounced the approval of the local scholar as desirable but not essential. We are thus left with a paradoxical situation: such a power of communal enactment may itself be halakhically exercised without a consensus of rabbinic authorities, but a consensus is required for a formal *haskamah* for such exercise, since the individual authority consulted is reluctant to take sole responsibility for giving such an *haskamah*. Elon observes (*Jewish Law*, II.856) that this reflects a desire "to divide the responsibility for the decision among as many authorities as possible"; perhaps we should say, rather, that it reflects a desire to divide the responsibility for *authorisation* of the decision among as many authorities as possible.

4.4 *Kiddushei Ta'ut* and the Rackman-Morgenstern Court(s)

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

It is against this background that a number of annulments granted by Rav Moshe Feinstein have

been discussed: in one, the husband is reported to have been incurably impotent before the marriage (*Iggrot Moshe E.H.* 1:79); in another, a man concealed that he was institutionalized prior to the marriage (*E.H.* 1:80); in a third, he concealed that he was a practicing homosexual prior to the marriage (*E.H.* 4:113); in a fourth (the facts of which are more disputed), he concealed that he converted to another religion (*E.H.* 4:83). These decisions have themselves been described as "extraordinary" (Jachter: though he does not take them to be erroneous or invalid), and the criteria for *Kiddushei Ta'ut* have generated discussion: Rabbi Michael Broyde, for example, indicates that the remedy is based on mistake, not fraud, notwithstanding the fact that the cases decided by Rav Moshe Feinstein do appear to have involved knowing concealment on the part of the husband. More important: the defect must have been present in the husband at the time of the marriage, and the woman must discontinue marital relations with her husband either immediately or very soon after the discovery of the defect.

Rav Moshe Morgenstern has been severely criticised for going beyond these criteria. Thus, he applies the principle of *Kiddushe ta'ut* (amongst other arguments) to the very circumstances of denial of a *get:* a woman would not consent to enter into a marriage had she known at the time that the husband could or would arbitrarily refuse her a *get.* Such a refusal "may very well be a sign of sadism that existed before the marriage." In such cases, he argues, there is a presumption that his later-manifested psychological condition existed prior to the marriage, and thus it is the husband who has the burden of proving that the defect did not exist before the marriage.

We need not enter into the merits of this interpretation. What is significant for present purposes is (i) the fact that the *Aharonim* have developed what is a new area of application for the annulment remedy, despite the widespread view that annulment is not available to post-talmudic authorities; (ii) the authority attached (on all sides) to the decisions of Rav Moshe Feinstein. Rabbi Jachter observes:

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

It would thus appear that even today it is possible for a "great Rabbi" to follow such decisions of Rav Moshe Feinstein, even without a consensus on the halakhic issue in question.

4.5 *Takkanot* in Israel

Professor Elon ("Takkanot", *Enc. Jud.* XV. 727f.) argues that the reluctance to adopt post-Geonic legislation in areas of marriage and divorce reflects the fear that different communities might adopt different rules. However, he maintains, the situation has changed with the establishment of the State of Israel, and the authority accorded to its halakhic institutions. In the 30's and 40's they were prepared (in general) to adopt *takkanot*. For example:

> ... the introduction of adoption as a legal institution represented an innovation in Jewish law ... In 1944 the following three matters were enacted in different *takkanot*: the minimal amount of the *ketubbah* was increased "having regard to the standard of living in the *yishuv* and economic considerations"; the levir refusing to grant the widow of his deceased brother *halizah* was rendered obliged to maintain her until releasing her; the legal duty was imposed

> on the father to maintain his children until reaching the age of 15 — not merely until the age of six years as prescribed by talmudic law. Included in the matters laid down by *takkanah* in 1950 was the prohibition against the marriage of a girl below the age of 16. The introductory remarks to the *takkanot* of 1944 emphasize the twofold basis of their enactment, halakhic authority and the assent of the communities of the *yishuv* and their representatives.

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

> Solutions to these problems are capable of being found through the enactment of *takkanot* leading to an annulment of marriage in special cases, in the manner and by virtue of the talmudic principle described above in some detail. The already mentioned threat of a proliferation of laws and lack of uniformity on a matter of great halakhic sensitivity, which inhibited past generations from acting on the stated principle, has much abated in modern times in the light of the central spiritual standing which may be allocated to the halakhic authority in Israel in its relations with other centers of Jewry in the Diaspora.

Yet even he puts this in terms of "special cases": he does not, seemingly, present it as a universal solution to the problem.

5.0 Consensus issues

5.1 Is Consensus a "Source" of Jewish law?

It has become commonplace to hear that any proposed solution to the problem of *agunah* must command a consensus. It is a matter of both academic and practical importance to identify the nature of the operation of consensus in Jewish law. It is *not* listed as a source by Elon in his four-volume *magnum opus*; indeed, "consensus" does not even appear in his subject index! It would appear that "consensus" is not regarded as an independent source of law, but rather as a new and additional condition upon the operation of any established source of law (a "meta-source", perhaps). Thus, for example, Elon does indicate that arguments based on *hilketa kebatra'i* "must be acceptable to the contemporaries of the one propounding it". How did this come about? The traditional position, after all, is that we follow *majority* decisions; indeed, the very reason for the preservation of minority decisions is to serve as a potential resource for later decision-making. So there are historical questions to answer regarding the role of "consensus" in Jewish law.

5.2 On the Origins of Consensus

Some have identified the origins of the doctrine of consensus in Maimonides. In the Introduction to *Mishneh Torah,* Rambam justifies the binding character of "all matters stated in the Babylonian Talmud" on the grounds that "with respect to all matters stated in the Talmud there is universal agreement [*hiskimu aleyhem kol yisrael*] among all Israel." This prompted Salo Baron (*A Social and Religious History of the Jews*, VI.100) to see here a reflection of the Islamic doctrine of *ijma* (which certainly plays a more central role in the doctrine of Islamic law — as one of the four

"roots" of the system — than it does in Jewish law). However, in the very context of coercion of the *moredet,* Maimonides applied the talmudic principle of majority decision (here applied to a majority of communities, rather than scholars), when he rejected the view of the *Gaonim* (*Hilkhot Ishut* 14:14). A more likely explanation, in my view, is that consensus emerges in the context of the increasing limitations imposed upon the authority of *takkanot hakahal* to impose conditions (such as the presence of a *minyan*) upon the constitution of marriage (breach of which would justify annulment based on *kol hamekadesh...*). Clearly, the autonomy of the individual *kahal* here threatened the unity of Jewish law. Elon sees this as underlying the demand, for example, by *Ribash* for the approbation of "all the halakhic authorities of the region" (Resp. #399, §4.3, *supra*). If so, it is 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."

What, then, is the normative significance of the demise of *takkanot hakahal* in this area? Does consensus operate in a negative fashion, as desuetude, so that the cessation of a practice, or the cessation of the exercise of a power, becomes normative just because it is supported by a consensus? At what point does it become *ma'aseh*: not merely a practice, but a normative practice? In particular, if we know that the reason for the cessation of the exercise of the power was not any question regarding the validity of the power itself, but rather a fear of taking individual responsibility for providing a *haskamah* for the exercise of the power, then if we can find ways of lifting the burden of this individual responsibility, perhaps the exercise of the power may be revived? *Ribash* may not have been in a position to take an opinion poll of contemporary halakhic authorities. In the world of modern communications, the halakhic authorities are in a very different position. Elon, *Jewish Law*, II.876, quotes R. Shalom Moses Hai Gagin as attacking Abulafia for his use of *hafka'at kiddushin* with the words: "It cannot possibly be contended that the world's great scholars ever gathered together and agreed to rule contrary to the saintly Caro even in a single particular." But this would appear to imply that a convention of the world's great scholars is indeed capable of making such a ruling.

5.3 Consensus and the *gadol hador*

I am struck sometimes by the paradox of the demand on the one hand for consensus, on the other for a *gadol hador.* The name of Rav Moshe Feinstein is often mentioned in this context; little surprise, therefore, at the intensity of the exchanges regarding the cases in which Rav Moshe Feinstein is said to have annulled on the grounds of *kiddushei ta'ut* (§4.4), or the invocation of his authority by Rav Moshe Morgenstern for the proposition even that: "All doubts with respect to law and facts are resolved in favor of Agunot and even minority opinion of Gedolim in favor of annulment are relied upon (Rav Feinstein's view)." The paradox, of course, is readily resolved if we interpret the demand for consensus not as consensus on the substance of the law, but rather consensus as to which authority to follow. Recall the observation of *Rabbenu Tam*: "But as for permitting an invalid bill of divorce, we have not had the power to do so from the days of Rav Ashi [nor will we] until the days of the Messiah" (*Sefer Hayashar,* quoted by Riskin, *Women and Jewish Divorce*, 98f.). It is in this context that we may seek to understand the "dry-up" of *takkanot* in Israel since 1944: is it perhaps attributable to a fear that such activity might be misinterpreted in messianic terms? But can we be sure that *Rabbenu Tam* would not have interpreted the foundation of the State as *reshit degaluta*? Is there not theological reason, today, to "begin" at least to redeem the *agunah* ? Or is the current gridlock to be regarded as a providential "plague", a punishment for our sins, a new form of vicarious punishment? In order to overcome the "chip of the beam"

argument, perhaps we have to address more directly its theological roots.

6.0 Towards a Solution

The responsum of *Ribash* (§4.3, above) suggests very strongly that the problem exists on two levels, that of *halakhah* and that of *ma'aseh.* The former may be termed substantive: is there a solution which can survive the various objections?; the latter is systemic: can the strands of halakhic authority be weaved together in such a way as to generate a consensus which would grant a *haskamah* for a solution, and thus meet the "chip of the beam" argument (and any theological assumptions it may carry)? I stress that much further work is required to answer these questions; I am considering the establishment of an Agunah Research Unit within the Centre for Jewish Studies at Manchester, if funding can be found. For the moment, I conclude by indicating some possible directions for further work, which I think are indicated by the foregoing analysis (and, on a few points not covered by the foregoing analysis, by the expanded version).

6.1 Historical Precedents for Combining the Strategies

Of the three strategies whose history I have summarised, coercion and annulment raise problems of authority very directly; the issues relating to conditions are more technical: the classification of particular conditions, and the relationship between conditions and the presumptions regarding the intent accompanying marital relations. Yet there is much in the *halakhah* which recognises that the problem is more complex that this: the paths do interact, and this may turn out to provide opportunities, rather than simply compound our problems.

For example, the history of *takkanot hakahal* shows a growing concern that any terms so imposed, and any powers assumed in order to enforce such terms (such as the power of confiscation of the *kesef*), should be made explicit in the *takkanah* itself. This may be viewed (merely) as a necessary rather than a sufficient condition, but it is a principle which can be applied not only to a *takkanah* imposing conditions on a marriage, but also to the marriage contract itself: the latter might well recite not only the conditions of the marriage but also (acceptance of) the authority by which such conditions are to be enforced. We may note that the use of a *takkanah* in conjunction with explicit terms in the *ketubah* adopting the provisions of the *takkanah* was the strategy advocated by Rav Isaac Herzog in his attempt to provide equal succession rights for women. By contrast, the PNA in use in the United Synagogue in England, and similar agreements elsewhere, do not seek a foundation in any *takkanah,* but only in the will of the parties themselves to adopt the conditions it contains.

In *Resp.* 35:2, the *Rosh* indicates that he will not grant annulment, even in a case which he concedes is similar to that at Naresh in the Talmud (§4.1, above), where annulment was used. In the absence of annulment, however, he is prepared to coerce (at least if an attempt to "appease [the husband] with money" fails):

> ... [As to the question of fraudulent marriage] It may appear to you, being close to the matter, that the man is not worthy or fit to be married to a woman of good family and that he misled her through schemes and trickery, so that the matter is quite similar to the incident at Naresh described in Tractate Yevamot, chapter *Bet Shammai*, where a marriage was annulled because a man acted improperly. If so, although we will not annul the marriage in our case,

> yet we may rely on the opinion of some of the Rabbis who ruled that a divorce may be compelled in a case involving a *moredet* (wife who refuses to cohabit with her husband). Nevertheless, the attempt should be made to appease him with money; if he is not willing, I will support you in compelling him to divorce her. (Elon, *Jewish Law*, II.850f.)

Rav Moshe Morgenstern now wishes to reverse the argument: he argues that it is precisely because coercion is no longer available (being denied to the Rabbis by secular law, at least in the Diaspora) that annulment now becomes available:

> The power was not limited to Kiddushei Ta'ut but virtually exercised when ever the marriage was deemed dead because of situations created by the husband and for situations intolerable to the wife, *or for the inability of the Bet Din to coerce the husband to give the Get*. (emphasis supplied)

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

6.2 The substantive issue

A combination of elements drawn from the traditional strategies might be the following:

(a) *Takkanot* should be adopted, first in Israel and then in all *kehilot,* requiring the inclusion in a PNA, perhaps reiterated in the *ketubah*, of an appropriate condition (d-g, below).
(b) *The takkanah* should also state that such a condition shall be implied where it is not explicit.
(c) *The takkanah* should recite the authority on which it is based (§6.3, below), and the powers to be exercised by the *bet din,* including the power to confiscate either the *kesef* by which the *kiddushin* is effected (thus rendering the marriage retrospectively annulled) or the full value of the *ketubah* (thus rendering the marriage non-retrospectively void).
(d) The condition should provide for automatic termination, without a *get,* of the marriage on refusal of the order of a *bet din* to grant a *get,* this refusal being certified by the *bet din.*
(e) This termination may operate either retrospectively or non-retrospectively, according to the decision of the *bet din.*
(f) The condition shall recite the fact that husband and wife agree that until any breach of the condition, every act of intercourse between them shall be assumed, without further evidence but in the absence of evidence to the contrary, to have been accompanied by a declaration that they reiterate their intention that the *tenai* shall remain in force, despite the marital intercourse.
(g) The parties further declare that they enter into the marriage in accordance with the conditions laid down in the *takkanah* and elsewhere in rabbinic law, and that any annulment declared by the *bet din* shall be regarded as a legitimate form of coercion, based upon (i) the wife's regarding the husband as "repulsive" as a result of breach of the condition, (ii) the inability of the wife to meet any special terms for delivery of a *get* demanded by the husband, and (iii) considerations of *pikuah nefesh.*

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

(i) Conditions providing for termination of a marriage without a *get* are halakhically permissible, at least if backed by an appropriate *takkanah;* or
(ii) Annulment remains available to post-talmudic authorities in the circumstances of the contemporary *agunah;* or
(iii) Coercion remains possible in the case of a *moredet* in contemporary conditions.

6.3 The issue of authority

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

(A) The Palestinian tradition of *Tena'in* classifies conditions terminating marriage as *mamona* rather than *issura*.
(B) The return to Palestine and the establishment there of new halakhic institutions justifies a revival of the tradition of *takkanot hakahal*, of invocation of "Jephthah in his generation is like Samuel in his generation", and of exercise of the powers of *bnei ha'ir*.
(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) In many cases the *agunah* problem creates a situation of *pikuah nefesh*, such that it may not be possible to await a court determination as to whether such a situation actually exists in the individual case.
(E) There are historical doubts concerning coercion of the *moredet* as regards the positions of (i) the Talmud, (ii) the *Gaonim*, (iii) the *Rishonim*.
(F) The situation of the *agunah* presents such a combination of halakhic and factual doubts as to justify leniency on the principle of *safek sefeikah*.
(G) Use of the principle of *kol hamekadesh* remains particularly appropriate in relation to behaviour after entry into the marriage, even if the consequence of such misbehaviour is a sanction other than annulment.
(H) The adoption of a communal enactment may serve to remove any need to provide a *get* simply "for the avoidance of doubt" (*Ribash*, *Resp.* #399).
(I) The adoption of a communal enactment, approved by the halakhic authorities, removes any problem of lone responsibility (the "chip of the beam"). Accordingly, the *herem* of *Rabbenu Tam* against questioning the *get* of a qualified Rabbi may now be applied to the decisions of *batei din* acting under the authority of the present *takkanah.*

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