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Halakhah – Majority, Seniority, Finality and Consensus

In this paper I set out briefly the methodology of halakhic decision making and point to important consequences in the area of marriage and divorce.

In the final section I investigate the (apparently recent) practice of taking into consideration even unique stringent opinions in the area of *gittin* and *qiddushin* and try to discover what it is that brought about this requirement of consensus that so hamstrung progress in the search for solutions for the problem of *'iggun*.

I Majority

I.1. The majority rule (*rov*) is the guiding principle in deciding between divergent halakhic opinions. The Talmud deduces from biblical sources that *rov* operates in (i) cases of doubtful facts, (ii) differences of informed opinion (*maḥloqet ha-Posqim*) and even in (iii) cases of indefinite numbers.[1] It is accepted without question that *rov* is biblical law (*de'Oraita'* / *min ha-Torah*).

I.2. Some authorities maintain that *rov* is *min ha-Torah* only when the argument was amongst contemporaries debating face to face but in the case of divergent opinions amongst authorities who never met together in debate, whether due to historical or geographical constraints, there is doubt if the majority rule applies by Torah Law.[2] Thus when someone today searches the codes and *responsa* to issue a ruling on the basis of the majority of the rabbinic decisors (*rov posqim*), the majority decision rendered is considered normative only by rabbinic decree but from the perspective of Torah Law the matter is still considered a doubt (*safeq*). Nevertheless, such a ruling would be considered valid even if the question was one of Torah, rather than rabbinic, law.[3]

I.3. However, others maintain that **in all cases** the majority rule is valid by Torah law.[4]

I.4. Those who do not apply the biblical law of *rov* to *maḥleqot ha-Posqim* give as their rationale the fact that we can never know for sure whether members of the majority camp would not have been persuaded, had they had the opportunity to discuss the matter with the opposition, by members of the minority, to adopt the position of their disputants and turn the minority into the majority. That is why, in certain areas of the *Halakhah*, we do not rely on a majority of the *Posqim*.[5] For an important consequence of this debate touching upon matrimonial law see my paper "Rabbi Morgenstern's Agunah Solution" §§15.3.1-15.3.4, where I discuss the argument of the *Taz* and the *Shakh* regarding the possibility of relying on a single lenient opinion in cases of *'iggun* **even when the question is one of Torah Law**. I conclude there that if we accept the arguments of Rabbi Yosef who maintains, on the one hand, that in any *maḥloqet* where the disputants are *in absentia* of each other, the majority rule is not applicable in Torah law and the situation remains one of doubt and, on the other, that the consensus of scholarly opinion follows the Rambam that a doubt in Torah Law being resolved strictly (*safeq de-'Oraita le-ḥumra'*) is only rabbinic

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1 The rule is derived from *'aḥarey rabbim lehatot* (Exodus 23:2) which is taken to refer to both a majority of opinions and a majority of situations – see *Sanhedrin* 3b and *Ḥullin* 11a. For the operation of the majority rule even in the case of indefinite numbers (*ruba' de-leteh qaman*) see *Ḥullin* loc. cit.

2 Maharam Ibn Ḥabib, *Get Pashut, Kelalim, kelal* ח; Rabbi Z. H. Hayes, *Mishpat haHora'ah*, ch. 4&5. See further in *Encyclopedia Talmudit* (*ET*) IX col. 257 n. 236.

3 See further below, at n. 97.

4 *Shakh*, *Yoreh De'ah* (*YD*) end of siman 242, *Hanhagat Hora'at 'Issur weHeter*. Cf. *ET* IX col. 256 n. 234.

5 Cf., *inter alia*, the references in R. Ovadyah Yosef, *Responsa Yeḥawweh Da'at* I *Kileley Ha-Hora'ah*, p. 10, no. 16 and n. 17.

in nature,[6] it would seem that we could adopt the view of the *Taz* and rely, in an emergency, on a single lenient authority even in a case of Torah law including, as the *Taz* says, *'iggun*.

II Seniority

II.1. This rule, first formulated by the *Ge'onim*, states: "The law is not like a pupil in the presence of the teacher (*'en halakhah ke-talmid bimqom ha-rav*)".[7] Some limit this rule to divergences between teacher and pupil in face to face confrontation, arguing that when the two opinions are presented otherwise in the Talmud, on the contrary, the law accords with the pupil, in consonance with the rule of Finality (*batra'ey*, see below, p.3).[8] Others extend the rule to include all cases where the pupil disputed the view of the teacher during the latter's lifetime even if there is no record of their having discussed the question between themselves, but they agree that if the pupil expressed his conflicting view only after his master's demise the rule of *batra'ey* is effective and the *Halakhah* accords with the pupil.[9]

II.2. There is a view that narrows down this rule to include only the pupil's prominent teacher (*rabbo muvhaq*)[10] and an opposing view that extends it to include any disagreement between the pupil and any earlier teachers of the generation of his master or before.[11] Obviously, this latter view of Seniority will perforce apply Finality only after Abbai and Rava (see next paragraph).

II.3. Seniority rules only until the generation of Abbai and Rava but in subsequent generations the rule of *batra'ey* becomes operative even in a dispute between pupil and teacher even where the dispute was face to face and even if the teacher was *rabbo muvhaq*.[12] The rationale behind this is that the later Amoraim were more concerned than the earlier generations to bring the somewhat unwieldy halakhic debate to a practical conclusion and therefore scrutinized the material all the more carefully.[13] Furthermore, before Abbai and Rava, the students concentrated their studies upon the traditions each received from his teacher[14] but after that time they studied all traditions and sometimes discovered that their teacher was following a tradition that was not normative.[15] Besides, they were aware of the arguments of all the preceding authorities, as well as of their own.[16]

II.4. As regards cases in which Abbai and Rava argued with their teachers there are two views amongst the Early *Posqim* (the *Rishonim*) some applying *'en halakhah ke-talmid bimqom ha-rav*, others maintaining that the law accords with *batra'ey*.[17] The same two views are to be found when Abbai and Rava dispute with their pupils.[18]

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6 See below, note 111, that the Rambam maintains this lenient position even where the doubt is due to an argument amongst the *posqim*.

7 Rav Shemuel *haNagid, Mevo' haTalmud*, end; Rabbenu Ḥanan'el, *Sanhedrin*, 22a. Cf. *ET* I col. 619 n.1.

8 *Maggid Mishneh*, *Shabbat* 2:16. Cf. *ET* I col. 619 n. 2.

9 Ran, *Sukkah*, ch. 1. Cf. *ET* I col. 619 n. 3.

10 *Yad Malakhi* ס *kelal* 38. Cf. *ET* I col. 619 n. 4. A prominent teacher is one from whom the pupil received the majority of his knowledge. It is possible to have more than one prominent teacher: one in Bible another in Mishnah and yet another in Talmud – see *Shakh*, *Yoreh De'ah*, 242:4, sub.-para. 12 towards the end.

11 Rabbenu Ḥanan'el, *Sanhedrin* 22a. *Cf.ET* I col. 619 n. 5.

12 *Tosafot Qiddushin* 45b s.v. *hawwah 'uvda'*. Cf. *ET* I col. 620 n. 6.

13 *Tosafot Qiddushi*n ibid. Cf. *ET* I col. 620 n. 7 (= *ET* IX col. 342 at n.2).

14 The tradition maintains that this was also the case from the days of the Men of the Great Assembly until the time of *Rabbenu Ha-Qadosh*, redactor of the Mishnah. See S. Y. Rappoport, *'Erekh Millin*, cols. 116-17. Cf. *ET* II p. 38 col. 1 n.6. In these circumstances it is unlikely that the pupil would be better informed than his teacher.

15 Mahariq, *shoresh* 84. Cf. *ET* I col. 620 n. 8 (= *ET* IX col. 343 n. 8).

16 Rosh *Sanhedrin* 4:6. Cf. *ET* IX col. 341 n. 3. (The 'dwarf on giant's shoulders' argument.)

17 Rosh *'Eruvin* 2:4. Cf. *ET* I col. 620 n. 9.

18 Rashba *Ḥiddushey Shabbat* 141a.Cf. *ET* I col. 620 n. 10.

II.5. When a single teacher argues with two or more pupils Ramban and Rashba say that the law still accords with the teacher[19] but the Rosh says the law follows the majority.[20]

III Finality – The Law is like the Later Authorities (*Halakhah ke-Vatra'ey*).

Outline of the rule:

III.1. The rule of Finality is first mentioned in the writings of the early *Ge'onim*.[21] It functions only if there is no explicit ruling in the Talmud that in the case under discussion the *halakhah* is in accordance with the earlier authority.[22] The rationale behind it has been explained above at notes 12, 14 and 15.

III.2. Finality does not operate until the period of the Amoraim.[23]

III.3. Some say that it applies to all the Amoraim[24] except when the dispute was between teacher[25] and pupil face to face when, on the contrary, we follow the teacher i.e. the earlier authority (*qamma'*).[26] Others limit it to the generation of Abbai and Rava and onwards and say that before Abbai and Rava even when the teacher-pupil dispute was not face to face the rule of Seniority applies.[27] Yet others say that before Abbai and Rava, Seniority rules only when the teacher/pupil dispute was face to face but after Abbai and Rava even when the dispute was face to face we follow the *batra'*.[28]

Regarding the post-talmudic *Posqim*, see below.

III.4. Some *Rishonim* state that *Halakhah ke-Vatra'ey* lies behind the normative acceptance of the *Bavli* over the *Yerushalmi*.[29]

III.5. The Finality rule is normative even against contrary indications from other talmudic rules such as "[Whenever] A and B [argue, the] *halakhah* is like A",[30] "[Whenever] an individual [disputes the opinion of] a group [of scholars], the *halakhah* is like the majority".[31] The law follows the latest scholar even if

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19 Rashba *Responsa* no. 464. Cf. *ET* I col. 620 n. 12.

20 Rosh *Responsa* no. 2:14. Cf. *ET* I col. 620 n. 13.

21 Rif *'Eruvin*, end. Cf. *ET* IX col. 342 n. 1.

22 Rabbi Yosef 'Aqnin, *Mevo' haTalmud* 4. Cf. *ET* IX col. 343 n. 11.

23 Rif *'Eruvin*, end. Cf. *ET* IX col. 342 n. 1.

24 *Tosafot Rosh haShanah* 34b s.v. *Ledidi*. Cf. *ET* IX col. 342 n. 4.

25 For varying definitions of 'teacher' see above at notes 9 and 10.

26 *Maggid Mishneh Shabbat* 2:16. Cf. *ET* IX col. 342 n. 5.

27 *Tosafot Berakhot* 39b s.v. *Mevarekh*. Cf. *ET* IX col. 342 n. 6.

28 See *ET* IX col. 342 n. 7 where this opinion is cited on the name of the *Yad Malakhi* (who so understood the Rashba, the Ran etc.) and of Rabbi Yair Bachrach, *Responsa Hawwot Ya'ir* no. 94. The *Divrey Soferim* (I col. 78) argues that this is not correct. Those who distinguish between direct and indirect teacher/pupil disputes, he maintains, do not distinguish between before and after Abbai and Rava while those who do distinguish between before and after Abbai and Rava do not distinguish between direct and indirect teacher/pupil disputes – cf. *ET* ibid.

29 Rif, end of *'Eruvin*. Cf. *ET* IX col. 343 n. 10.

30 Rabbi Yosef 'Aqnin, *Mevo' haTalmud* 4. Cf. *ET* IX col. 343 n. 11. How is this possible? Surely if the Talmud has ruled explicitly like one of a pair (say like A in his disputes with B) and A is not the *batra'* the rule of *batra'ey* does not apply (as above at note 21). Possibly, the meaning is that although **as a rule** the *halakhah* would not accord with B if, regarding one or some, of the AB disputes, an Amora who lived at a late period **subsequent to the fixing of the rule** (eg. Mar bar Rav Ashi), decided like B, the rule of *batra'ey* would say that we follow Mar bar Rav Ashi and, consequently B and disregard the earlier general rule to follow A.

31 Rif *Qiddushin* Chapter 2 (ruling like Ravina against Rav, Shemuel, Abbai and Rava). Cf. *ET* IX col. 343 n. 12.

this would negate the principle that "the *halakhah* accords with the compromiser",[32] even if the plain meaning of the Mishnah is against the final opinion,[33] even if the final opinion contradicts the rule that "the *halakhah* follows whomever is lenient in divergences concerning the laws of *'eruv*"[34] and even if the later Amora is arguing against authorities of much earlier periods such as Rava against Rabbi Yoḥanan or Abbai against Shemuel.[35]

III.6. The rule operates only if the *batra'* argues on the basis of his own logic but not if he is merely quoting someone else.[36]

III.7. One opinion argues that *Halakhah keVatra'ey* means that a later authority is empowered to decide in an earlier debate between two contemporary sides (be they two groups, two individuals or a group opposed to an individual) but it does not mean that a later authority can challenge an earlier authority as the Sages say: "[If] Mosheh did not say it, from where [would] El'azar [know it]?" and "[If] Rabbi did not teach it, from where [would] Rabbi Ḥiyya [know it]?" However, this seems to be a singular opinion **opposed by all the other *Rishonim***.[37]

III.8. R. Yosef Qaro[38] maintains that the Rif and Rosh argued as to whether *Halakhah ke-Vatraey* enables a later Amora to overrule an earlier Amora who was a major talmudic protagonist and far greater than his later disputant. The talmudic debate[39] referred to in *Bet Yosef* was between Rabbi Yoḥanan (d. 4039 = 279 c.e.) and Rav Shisha *breh de*-Rav Idi, a fifth generation (350-375 c.e.) Baylonian Amora, the *Tosafot* and the Rosh deciding like Rav Shisha who was the later authority and the Rif and Rambam accepting the view of Rabbi Yoḥanan due to his being a talmudic protagonist to a degree far in excess of Rav Shisha.

III.9. The *halakhah* follows the later authority even if that authority is ruling leniently in Torah law.[40]

III.10. The Rosh[41] 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.

III.11. When the Talmud records the view of the later Amora first and only then that of the earlier, the

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32 Rif *Berakhot* chapter 6. Cf. *ET* IX col. 343 n. 14.

33 Rif *Gittin* 75b. Cf. *ET* IX col. 343 n. 15.

34 Rashba *'Eruvin* 73b. Cf. *ET* IX col. 343 n. 16.

35 *Yad Malakhi kelal* 168. Cf. *ET* IX col. 343 n. 17.

36 Rosh *Bava' Metsi'a'* 3:10. Cf. *ET* IX col. 343 n. 24.

37 This opinion is quoted in *ET* (IX col. 343 n. 19) from [Rabbi Ḥayyim Yosef David Azulai = Hida], *Ya'ir 'Ozen* [= *'Eyn Zokher*], *ma'arekhet* 5, *kelal* 51 where it is quoted from a manuscript edition of *Sefer Kelalim lehaRambam* also known as *Seder 'Olam*. S. A. Wosner in *Hilkheta' keVatra'ey – 'Iyun Meḥudash*, *Shenaton haMishpat ha'Ivri*, II (5755-57), 164 n. 25, quotes this same source. (Wosner's article has some interesting criticisms of Y. Ta-Shema's "*Hilkheta' keVatra'ey – Beḥinot Historiyot shel Kelal Mispati*", *Shenaton ha-Mishpat ha'Ivri*, 6-7 (5739-40), 405-423.)

Ḥida adds that where we find, for example, an Amora disputing the opinion of a Tanna it means that the Amora was aware – though he does not declare it - of some other Tanna who equalled or surpassed the Tanna with whom he is disagreeing. Were it not so the argument could not have taken place. See, however, note 77.

38 *Bet Yosef* to *Tur 'Orah Hayyim* 70 s.v. *We'im ratsah*. Cf. *ET* IX col. 343 n. 20.

39 See *Berakhot* 17b.

40 R. Ḥizqiyah da Silva (the '*Peri Hadash'), Mayyim Hayyim,'Avodah Zarah,* chapter 2, *halakhah* 12. Cf. *ET* IX col. 344, n. 21.

41 *Mo'ed Qatan* 3:20 (also cited in *Yavin Shemu'ah*, rule 277). Cf. *ET* IX col. 344 n. 22. Note that the Rosh there in *Mo'ed Qatan* is in conflict with the Ra'avad who had decided in accordance with a stringent ruling of Rav Ami as opposed to a lenient ruling of Rav because Rav Ami was the *batra'*. The Rosh disagreed, firstly because he maintains, unlike the Ra'avad, that the *batra'ey* rule applies only after Abbai and secondly because, even according to the Ra'avad who applies *batra'ey* to the earlier Amora'im also, since the dispute between Rav and Rav Ami was in rabbinic law it should therefore be resolved leniently – even if this goes against the rule of *batra'ey*.

halakhah is fixed like the earlier authority because that is why the Talmud placed him later in the text – to demonstrate that the *halakhah* accords with his view.[42]

III.12. Where the earlier Amora speaks with certitude and the later expresses doubt Rav Shemuel *Ha-Nagid* says that the *halakhah* is fixed like the earlier authority whereas Rif maintains that we should follow the later opinion and treat the matter as a doubt.[43]

III.13. Rav Hai Ga'on, as understood by the Rosh, points out that if the later authority merely discusses the opinion of the earlier sage and raises possible objections such as "Perhaps one could say otherwise…" more like a pupil questioning his teacher rather than like a colleague in dispute, the rule of *batra'ey* does not apply.[44]

III.14. Regarding the post-Talmudic authorities there is debate amongst the *Posqim* as to whether the Finality rule applies at all. Maharam Alashqar (*Responsa*, no. 53) argues that the *Ge'onim* intended *Halakhah ke-Vatra'ey* only for the generations preceding them (i.e. for the period of the Amoraim). *Inter alia*, he says:

> "Would that I might know until what time we can continue saying that "the law is like the later authority". If you limit the time to a particular generation you have **[**thereby**]** 'given your words to measures' **[**= you have set up arbitrary limitations**]**. Furthermore, what possible reason can there be that it **[**the application of the rule**]** should be until that generation and not until some other **[**time**]**? If **[**on the other hand, you say it applies**]** until the end of the world – such a thing it is forbidden **[**even**]** to consider in one's mind because it is as a derision and a laughing-stock (= ludicrous and risible) because those generations have no relationship to the earlier ones, not even on a par with the relationship of a monkey to a human. Indeed, would that these generations could understand the least of the words of the earlier **[**sages**]**, how much more so **[**can this be said of**]** the future generations **[***vis-à-vis* the earlier ones**]** because people's minds are gradually diminishing."[45]

On the other hand Mahariq (*shoresh* 84 & 94), Rema (*HM* 25:2) and others maintain that the rule applies to the post-talmudic sages also, provided that the words of the earlier authorities had been published and were well known and may therefore be presumed to have been known to the later sages. If, however, the opinions of the earlier scholars were unknown to the later sages who rendered decisions contradictory to their predecessors, the presumption is that had they been aware of the view of the earlier authorities they would have withdrawn their own opinion.[46] There seems to be no reason why this should not apply equally to recently discovered manuscripts and these were indeed welcomed by Rabbi Y. M. Poupco (the *Ḥafets Ḥayyim*)[47] and Rabbi O. Yosef[48] but not by Rabbi A. I. Karelitz (the *Ḥazon 'Ish*) who was

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42 I.e. he is viewed as the *batra'*. *Tosafot 'Avodah Zarah* 22a s.v. *'En*. Cf. *ET* IX col. 344 n. 23.

43 Ramban *Milḥamot Bava' Qamma'* end of ch. 2. Cf. *ET* IX col. 344 n. 25 & 26.

44 Rosh *Gittin* 6:7. Cf. *ET* IX col. 344 n. 27.

45 Cited in *ET* IX col. 345 at n. 30. See there that the *Shakh* said that one should take the stricter view in this matter. Presumably this means that one should not apply the *batar'ey* rule to the *Posqim* where this would lead to a lenient ruling. See III.18, 10(ii) below.

46 Cf. *ET* IX col. 344 n. 28 & 29.

47 Cf. *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*).

48 *Responsa Yabia' 'Omer* X *HM* 1. Rabbi Yosef there permits a claim of *qim li* against the *Shulḥan 'Arukh*. The newly discovered opinions of *Rishonim* in manuscripts that had been unknown to Rabbi Qaro, says Rabbi Yosef, may be employed as an argument that Rabbi Qaro would have changed his ruling had these sources been available to him. See also *Yeḥawweh Da'at* (Jerusalem 5740) III 46, second footnote, p. 140, lines 2-3 where R. Yosef informs us that a

suspicious of them and regarded them negatively.[49]

III.15. For an important example of the help that could be rendered by a newly discovered reading in the Talmud in the search for solutions to *'agunah* problems see my paper "Rabbi Morgenstern's Agunah Solution" §12.2.8, note 56. I point there to a reading in the *Gemara'* (*Ketubbot* 63b) preserved in the Firkovitch Leningrad manuscript which records, in place of "we do not force her" (the rebellious wife, into marital compliance), "we force him" (to divorce her).[50] According to this, the view of the *Sabora'im*, *Ge'onim*, Rif and Rambam's school that a woman who declares that she can no longer abide her husband is entitled to a divorce, coerced if necessary, is based upon an explicit ruling in the Talmud. It can then be argued that the opposition to Rambam's ruling by Rabbenu Tam and many other *Rishonim*, who forbid the application of force in such a case and whose view was accepted as normative in the *Shuḥan 'Arukh* (*EH* 77:2), would have been withdrawn had they been aware that Rambam's opinion was supported by a version of the talmudic text.

III.16. The summary wording of the *Talmudic Encyclopaedia*[51] states that the *batra'ey* are to be followed against the *qamma'ey*:

> "in those cases where the opinions of the *qamma'ey* are **written in a book and are well known**. However, in cases of statements or *responsa* of the *qamma'e*y which **have not been printed**, **it is not necessary** to rule like the *batra'ey* because **it is possible** that **had they known** the opinions of the *qamma'ey* they would have rescinded their ruling".

III.17. From this summary we can draw 10 inferences which touch upon the following 3 areas:

A The *batra'*s awareness of the opinion of the *qamma'*

B How the opinion of the *batra'* is viewed in cases where he may not have known the opinion of the *qamma'*.

C The application of *batra'ey* beyond the Amoraic period.

A

1. The opinion of the *qamma'* must have been **written in a book** or **printed** and also be **well known** for us to make the assumption that the *batra'* knew of it.
2. It would not be necessary for the *batra'* to actually quote the opinion of the *qamma'*.
3. There is no mention of the *batra'* needing to be aware of the **reasoning** behind the opinion of the *qamma'* and, consequently, no call for the *batra'* to justify his rejection of the opinion of the *qamma'*.

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consultation of the Arabic original of Rambam's Commentary on the Mishnah yielded a different halakhic ruling from that implied by the standard Hebrew versions of the Commentary (which latter support the variant ruling of the *Ḥazon 'Ish*). See also *Yabia' 'Omer* VII,*'Oraḥ Ḥayyim*, 44:6, where R. Yosef discusses the view of R. Aḥai Gaon in the *She'iltot* that *ḥamets* on Pesaḥ is annulled in 60. In the course of the discussion R. Yosef shows that many *Rishonim* agree with R. Aḥai and they maintain that the word *bemashehu* **was added to the text of the Talmud by the Geonim** and is therefore not halakhically binding. See further Abel, A Critique of *Za'aqat Dalot*, 6.6 s.v. It is possible.

49 *Ḥazon 'Ish*,*'Orlah* 17:1; *Qovets 'Igrot Ḥazon 'Ish* (Beney Beraq n.d.) part 1, no. 32 and part 2, no. 23. See the references to articles dealing with the approach of *Ḥazon 'Ish* in this area in Marc B. Shapiro, *Between the Yeshivah World and Modern Orthodoxy*, 196 n. 101. **See also Rabbi Yosef, *Yabia' 'Omer ibid.*, where this approach of the *Ḥazon 'Ish* is categorically rejected.**

50 Cf. *Diqduqey Soferim ha-Shalem*, Jerusalem 1977, II 88; quoted in B. S. Jackson, *Agunah and the Problem of Authority: Directions for Future Research*, Agunah Research Unit, Centre for Jewish Studies, University of Manchester, 20 at note 94.

51 IX cols. 344-45 at n. 29.

B

4. If the opinion of the *qamma'* was not well known, there is a **possibility** that the *batra'* did not know the opinion of the *qamma'*.
5. It is not **assumed** that he did not know it.
6. This possibility/assumption of the *batra'*s ignorance of the ruling of the *qamma'* leads us to the **possibility** that the *batra'*, had he been informed of the facts, would have recanted.
7. There is, thus, no **presumption** that the *batra'* would have recanted.
8. This leads us to the conclusion that we **need not** follow the *batra'* in such a case which means that a competent contemporary halakhic authority would have to use his discretion to decide between the *qamma'* and the *batra'*.[52]
9. We are, thus, not **forced** to accept the opinion of the *qamma'*.

C

10. We apply the *batra'ey* rule to the post-talmudic authorities just as we apply it to the Amoraim.

III.18. Enumeration of sources[53] in support of, or in conflict with, the above 10 points:

A

1. Sources which require that the *qamma'*s opinion be found in a **written** or **printed book** and that it be **well known** but who do not (explicitly or implicitly) require its being quoted by the *batra'*:

(i) Mahariq, 94[54] - "…**printed** in a **well known work**…" "…**written** in a **well known book**…"
(ii) Rema, *HM* 25:2 – "…**written in a book** and are **well known**…"
(iii) Rabbi Mosheh Sofer, *Responsa Ḥatam Sofer*, IV (= *'Even Ha-'Ezer* II) 71[55] - "…the Rema in *Ḥoshen Mishpat*…..writes that if the words of a Gaon are discovered but they have **never been mentioned in a book**…"[56]
(iv) Rabbi Yitsḥaq Hai Tayyeb, *'Erekh Ha-Shulhan, Even Ha-'Ezer* 90:3[57], first two paragraphs:

> "Following is the statement of the Mahariq, *shoresh* 84…It seems clear [from here] that even if the [*batra'ey*] **did not mention** the words of the *qamma'* , they probably did know [of them] but were not concerned [about them]. This is what he (Mahariq) says in *shoresh* 94:
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> 'When the words of the former Geonim are found **written in a well**

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52 He may, for example, decide that one presents more logical arguments than the other or that the talmudic discourse is more supportive of one than the other.

53 Almost all these sources are cited either in *ET* IX cols. 344-45 at n. 29 or in *Responsa Yabia' 'Omer* X *HM* 1.

54 As the *responsa* of Mahariq are not divided into paragraphs and this is a very long *responsum* it is difficult to find the relevant section. In the Jerusalem 5733 edition the section begins on p. 103, column 1, line 3.

55 Final paragraph of the *responsum*.

56 Although *Ḥatam Sofer* does not mention the *qamma'*s view being 'well known' he certainly does not mean to exclude its requirement as he is here simply quoting the words of the Rema. The reason for this lacuna in his accuracy is that his entire purpose in this final paragraph of his *responsum* is to demonstrate that where the *batra'* may not have known of the *qamma'*s ruling we do not have to follow the *batra'*. He is not at all concerned here with the definition of the circumstances that entitle us to presume the *batra'*s awareness of the *qamma'*s position so that we can accept the *batra'*s ruling against that of the *qamma'*. Hence he did not present an accurate description of those circumstances.

57 Ed. Jerusalem 5763 , 182b – 183b.

> **known book** and the later *posqim* decide against them…one must follow the later authorities…..this [applies] only where the words of the earlier [scholars] are **written in a well known book**…'

> If so, [in the case of] a renowned *poseq*, **even if the later one did not mention him**, he presumably knew [of his opinion] but was not concerned about it."

(v) Maharit, *Responsa*, II, *Ḥoshen Mishpat* 53, (beginning) – accepts the view of Mahariq (above, (i))[58]
(vi) *Kenesset Gedolah*[59] in *Responsa Ba'ey Ḥayyey*, *Ḥoshen Mishpat* 73, s.v. *We-'en lomar*. "…and you cannot say in this case that the *Halakhah* accords with the later sages for we say that only when the words of the *Rishonim zal* **appear in a well known work**. In our case, it is clear that the *responsa* of Mahari Caro and Maharam of Trani, *zal*, were unknown in the days of Harashdam and Mahara' Ḥason *zal*.
(vii) Mahari7 al-Gazi in *Responsa Simḥat Yom Tov*, 17 (end), s.v. *we-'od***:** "Furthermore, even if…someone of the *Aḥaronim* argues with Maharimat *zal*, you cannot say we rule in accordance with his view [as a *batra'*] because the Ritba and his master [support the Maharimat]. Although we apply *halakhah kevatra'ey* to the *Posqim* also, that is when the later sage **saw the words of the earlier scholars** and did not retract in favour of the them but if he did not see them.…"[60]
(viii) Rabbi Yitsḥaq (Ḥai) Tayyeb, *'Erekh Ha-Shulhan 'Even Ha-'Ezer* 90:3[61] disputes the ruling (of Radbaz and Maharashdam) that the *batra'* must mention the opinion of the *qamma'* (see below) and cites Mahariq *shoresh* 18 to show that such mention of the *qamma'*s opinion is not necessary.

2. From all the above sources it is clear that the *qamma'* need not be mentioned by the *batra'*. There are, however, a number of sources which insist that *Hilkheta' keVatra'ey* operates only when the *batra'* **mentions** the *qamma'*, as follows.

(i) Radbaz, *Responsa*, IV 1369 (297) – "If the Rashba *zal* had **mentioned** the argument of the Rosh…there would have been a possibility of relying on him (the Rashba)…"
(ii) Maharam al-Shekh, *Responsa*, 39 – "Now it seems that Mahariq forgot the ruling of *Tosafot* because **he did not mention it**."
(iii) Rabbi Shabbetai haKohen (*Shakh*), *Hagehot 'Issur weHeter*, in *YD* end of chapter 242, paragraph 8 – "Nevertheless, if the later sage **quotes the words** of the earlier scholar and disputes with him…"
(iv) Maharashdam, *Responsa*, 111. Rabbi Yitshaq (Hai) Tayyeb, *'Erekh haShulhan 'Even ha'Ezer* 90:3[62] writes:

> "The Maharashdam [*Responsa*] sec. 111 wrote that the Maharam (of Rothenburg) disagrees with the Rosh and we follow Maharam because the law does not accord with the pupil against the teacher, see there. I think Maharashdam follows *Responsa Radbaz*, III number 564:
>
> > '…even according to those who say that we also apply the rule [of *batra'ey*] to the *Posqim*, that is only when the *batra'* **quoted** the

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58 A seriously ill woman who had two daughters had stated that she leaves all her belongings to one of them and the question was whether 'leaving' is an acceptable expression for 'the gift of the seriously ill' (*matenat shekhiv mera'*). Maharit answered that Mahariq (*shoresh* 94) had already dealt with such a question stating that according to the Rosh it is effective but accordiung to *responsa* of Rabbenu Gershom and other early authorities it is not and accordingly Mahariq invalidated the woman's will arguing that although the Rosh was the *batra'*, **presumably the words of these earlier authorities did not reach him and had he been aware of them he would not have argued against them**. I could not find such wording in my edition of Mahariq where it seems only that where the opinion of the *qamma'* has not appeared in a well known work **it is possible** that the *batra'* did not know of it and had he known of it he would have changed his mind.

59 Rabbi Hayyim Benveniste

60 There is no mention here of the later authority having to mention the earlier authority, only of our being able to reasonably presume that the *batra'* was aware of the words of the *qamma'*.

61 Ed. Jerusalem 5763 , 182b – 183b.

62 See previous note.

> words of the *qamma'* and presented arguments (*heshiv*) against them.[63] However, **if he did not quote** the words of the *qamma'* this implies **that he did not see them**, and therefore, according to everyone, the law is like the *qamma'ey* because if [*the batra'*] had seen [the *qamma'*s] words he would have retracted.'
>
> Thus [according to Maharashdam and Radbaz], the *Halakhah* is not like the later *poseq* unless he **mentioned** the words of the earlier sage".

3. Sources which explicitly mention that, to be accepted, the *batra'* must have been aware of the **reasoning** of the *qamma'*:

(i) Radbaz – "…if the later [sages] had seen the words of the former [sages] **and their reasons** and rejected (*daḥu*) them…"
(ii) Maharam al-Shekh – "…but if he (the *batra'*) did not see h[is words] or **hear his reasoning**…"
(iii) Maharit al-Gazi – "…but if he did not hear [the ruling of the *qamma'*] and **did not hear his argument**…"
The Radbaz (see n. 62) applies the rule only if the *batra'* quotes the opinion of the earlier authority and his reasoning and proceeds **to demonstrate with proofs based on the Talmud** that he (the *batra'*) is right.[64]

B

4. Sources which regard only as **a possibility** the *batra'*s ignorance where the *qamma'*s view was not well known:

(i) Mahariq – "…**it is possible** to say that **perhaps** that later authority had not heard of it…"
(ii) Rema – "…**it is possible** that they did not know the words of the Gaon…"
(iii) Shakh – "…**it is possible** that they did not know the words of the Gaon…"
(iv) *Ḥatam Sofer* - "…**it is possible** that they were unaware [when handing down a ruling] of the words of the earlier sages…"
(v) Rabbi Yitsḥaq Ḥai Tayyeb – Rabbi Tayyeb here quotes favourably the Mahariq: "…**it is possible** to say that **perhaps** that later authority had not heard of it…" (See above, (i).)
(vi) Maharashdam, *Responsa*, *Ḥoshen Mishpat*, 1 – Maharashdam also quotes favourably the Mahariq: "…**it is possible** to say that perhaps that later authority had not heard of it…"
(vii) *Kenesset Gedolah*: "However, when something written in a *responsum* of a Gaon *zal* has not been mentioned in a known work, even if there be a later *poseq* who rules the opposite of the Gaon preceding him **it is possible** to say that perhaps the later *poseq* had not heard his words…"

5. Sources which **assume** the *batra'*s ignorance where the *qamma'*s view was not well known:

(i) Radbaz – "…but since **he** (the Rashba) **had not heard it** (the Rosh's argument)…"[65]
(ii) Maharam al-Shekh – "…but **if he did not see** hi[s words] or hear his reasoning…Now **it seems** that Mahariq forgot the ruling of *Tosafot*…"
(iii) Mahari7 – He rules that according to the Rosh it[66] is effective but that Mahariq in *shoresh* 94 quotes *responsa* of Rabbenu Gershom and other early authorities who rule that it is not effective. "As a result of this," writes Mahari7, "Mahariq invalidated the…will, [arguing] that although the Rosh was the *batra'*, **presumably** the words of these earlier authorities did not reach him…." [67] [68]

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63 The Radbaz adds here "and supported his arguments with the words of the Talmud".

64 See note 62.

65 The Radbaz maintains that we follow the *batra'* only if he quoted the *qamma'*. As the Rashba did not quote the Rosh, Radbaz writes: 'but since he (the Rashba) had not heard it (the Rosh's argument)' and not 'but since **it is possible** that he (the Rashba) had not heard it (the Rosh's argument)'.

66 A certain wording used in a gift document of the dangerously ill.

67 See above, n 57.

6. Sources which declare it **possible** that, when the *batra'* did not know/might not have known the opinion of the *qamma'*, that the *batra'* would have recanted were he to have been made aware of the *qamma'*s position:

(i) Mahariq - "…**it is possible** to say that **perhaps** that later authority had not heard of it and had he heard it **he would have changed his mind**."[69]

(ii) Rema – "…**it is possible** that they did not know the words of the Gaon and had they heard them **they would have withdrawn their opinion**."

(iii) Radbaz – "However, if the later [scholars] had not seen their (the formers') reasons….**perhaps they would have agreed with them**."

(iv) Maharam al-Shekh – "…but if he (the *batra'*) did not see hi[s (the *qamma'*s) words] or hear his reasoning**….perhaps**, if the latter had seen the words of the former, **he would have rescinded** his ruling.

(v) Shakh – "…**it is possible** that they did not know the words of the Gaon and had they heard [them] **they would have retracted**."

(vi) *Ḥatam Sofer* – "…**it is possible** that they were unaware of the words of the earlier sages and had they heard of them **they would have retracted**…"

(vii) Rabbi Yitsḥaq Ḥai Tayyeb (quoting Mahariq) - "…but [if] something [is] found written in a *responsum* of a Gaon which has not been mentioned in a known work, if there be found a later sage who rules the opposite of the Gaon who preceded him, **it is possible** to say that perhaps that later authority had not heard of it (the Gaon's ruling) [and had he heard it **he would have changed his mind**.]'

(viii) Maharashdam (quoting Mahariq) - "…[but [if] something [is] found written in a *responsum* of a Gaon which has not been mentioned in a known work, [and] there be found a later sage who rules the opposite of the Gaon who preceded him], **it is possible** to say that **perhaps** that later authority had not heard of [the Gaon's ruling] and had he heard it he would have changed his mind…"

(ix) *Kenesset Gedolah* - **"…**if there be a later *poseq* who rules the opposite of the Gaon preceding him **it is possible** to say that perhaps the later *poseq* had not heard his words and had he heard them.... "

(x) Maharit al-Gazi – "…because **perhaps**, if the later sage had seen the words of the earlier sage, he would have retracted."

7. Sources which speak of a **presumption** that, when the *batra'* did not know/might not have known the opinion of the *qamma'*, he would have recanted:

(i) Maharit – "….**presumably** the words of these earlier authorities did not reach him and had he been aware of them he would not have argued against them."[70]

8. Sources which rule that, in cases 6/7, we may choose between the *qamma'* and the *batra'* (by applying a competent contemporary judgement):

(i) Rema – "However, if there be occasionally found a *responsum* of a Gaon that has not been mentioned in a book and others are found disagreeing with him **we do not have to decide in accordance with the opinion of the later sages**…"

(ii) *Shakh* - If the rabbi rendering the [present] decision has it in his prowess to decide [between the earlier

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68 Maharit al-Gazi in *Responsa Simḥat Yom Tov*, 17 (end), s.v. *we-'od* writes: "Although we apply *Halakhah keVatra'ey* to the *Posqim* also, that is when the later sage saw the words of the earlier scholars and did not retract in favour of the them but if he did not see it [= the ruling of the *qamma'*] and did not hear his argument…" Rabbi al-Gazi limits his remarks to where the *batra'* **knew** or **did not know** of the opinion of the *qamma'*. It is impossible to deduce from his wording whether he would **assume** the *batra'*s ignorance where the *qamma'*s view was not well known or regard it only as **a possibility**.

69 The introductory term 'it is possible' seems to refer to the final clause also. Otherwise it would have been necessary to make the matter clear, for example by starting a new sentence after "heard of it" stating: "If the *batra'* **was** unaware of the position of the *qamma'*, he would presumably have recanted on being informed thereof."

70 See above, n. 57.

and later authority] **he can rule like whichever he agrees with**."[71]
(iii) *Ḥatam Sofer* - "In fact, the Rema…writes that if the words of a Gaon are discovered but they have never been mentioned in a book, **if his opinion and the logic behind it appear correct to us we can assume that if the later authorities had known his argument they would have ruled like him**[72] – 'If they had heard it, they would have withdrawn'.

9. Sources which rule that, in cases 6/7, we must follow the *qamma'*:
(i) Radbaz – "However, if the later [scholars] had not seen their (the formers') reasons **the law is like the earlier [scholars]** because if the later [scholars] had seen their (the formers') reasons perhaps they would have agreed with them."
(ii) Maharam al-Shekh – "…but if he did not see hi[s words] or hear his reasoning, on the contrary, **we say that the *Halakhah* accords with the former** because perhaps, if the latter had seen the words of the former, he would have rescinded his ruling.
(iii) Maharit al-Gazi – "…but if he did not see it [= the ruling of the *qamma'*] and did not hear his argument, on the contrary, **we say that the *Halakhah* accords with the *qamma'ey*** because perhaps if the later sage had seen the words of the earlier sage, he would have retracted."[73] [74]

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10. Sources which dismiss, or limit, the application of the *batra'ey* rule to the post-talmudic authorities:
(i) Maharam Alashqar (*Responsa*, no. 53) argues that the *Ge'onim* intended *Halakhah keVatra'ey* only for the generations preceding them (i.e. for the period of the Amoraim).[75]
(ii) The *Shakh* applies the rule only if the later authority quotes the earlier sage and is definitely competent to dispute with him and even then the present rabbi **cannot automatically decide like the *batra'*** but must use his reasoning to **choose between the *qamma'* and the *batra'***. Thus, according to the *Shakh*, the *Halakhah* is never automatically fixed like the *batra'ey* amongst the *Posqim*.

III.19. Conclusion to **III.18**

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71 The *Shakh* first says that one can rely on the later opinion (i.e. even if it is the more lenient of the two), provided that the later authority actually quotes the former scholar and is well suited for the intellectual task of disputation with such an authority that he has taken upon himself. Even so, the *Shakh* expresses a degree of unease – "but the matter needs further contemplation".

Subsequently, he rules – without registering the need for further contemplation – that in the previous case, if the present rabbi searching for a halakhic ruling is sufficiently capable, he can **decide between** the two opinions before him. I have therefore listed the Shakh with those who opt for a contemporary choice between *qamma'* and *batra'*.

72 And we must then follow the *qamma'*. Otherwise, we follow the *batra'*. This means that a contemporary *poseq* must decide between the *qamma'* and the *batra'*.

73 Having closely examined the wording of the *Responsa* of Mahariq, Maharashdam, and *Ba'ey Ḥayyey* (quoting *Kenesset HaGedolah*) mentioned above, I found it impossible to infer whether they opt for the *qamma'* or for a choice between *qamma'* and *batra'*. The wording in Maharit "**presumably** the words of these earlier authorities did not reach him and had he been aware of them he would not have argued against them" strongly suggests that we would have to follow the *qamma'* since it is being **presumed** that the *batra'* himself would have agreed to his predecessor. However, I have already noted that the wording of Maharit is based upon that of Mahariq and Mahariq does not employ the vocabulary of presumption only that of possibility – see above, n. 68.

74 It seems strange that the Radbaz, the al-Shekh and the al-Gazi, while maintaining only a **possibility** that the *batra'* would have realigned himself with the *qamma'*, do not grant the contemporary sage the choice of following the *batra'* but insist that the *halakhah* must follow the *qamma'*. This can be explained on the basis of the talmudic principles *bari' we-shema' – (lav) bari 'adif* = a certain claim wins (to an extent) against a doubtful claim (see *Ketubbot* 12b-13a, *Bava' Qamma'* 46a & 118a and cf. *ET* IV cols. 199-208) and *'en safeq motsi' midey waddai* (see *Yevamot* 19b & 38a, *Hullin* 10a and cf. *ET* I cols. 681-685). The *qamma'*s view is certain whereas the *batra'*s, though also expressed with certainty, is regarded by us as only doubtful because we do not know if the *batra'* would have maintained his opinion had he been aware of the ruling of the *qamma'*.

75 See III.14 above.

From the above survey it can be seen that paragraphs 2, 3, 9 and 10[76] display views contrary to *ET*'s summary. *ET* still represents the majority of the *Posqim* but in any halakhic discourse it would be important to be aware of the dissident views cited above which may, for example, contribute towards a 'double doubt' argument (*sefeq sefeqa'*).

III.20. Limitations of the *batra'ey* rule

The *batra'ey* rule was limited to, and functioned within, certain historical parameters. Just as it was agreed in the Talmud that the Amoraim would not contest the opinions of the Tannaim save where the Amora found a Tannaitic support for his view,[77] so was it later agreed that, though the interpretations and rulings of the *Saboraim* were accepted into the Talmudic text and regarded as valid halakhic prescriptions,[78] the *Ge'onim* and *Rishonim* would not challenge the views expressed in the Talmud unless they could discover support for their opinion somewhere in the Talmud itself (i.e. the Amoraic/Saboraic literature).[79] A later agreement created a final chronological dichotomy disallowing the *Aḥaronim* from contesting the opinions of the *Rishonim*.[80] There exists a divergence amongst the *Rishonim* as to whether a halakhic line was drawn also between the Geonim and the *Rishonim*. Ramban and others said that such a division did exist, Rambam and others that it did not.[81]

III.21. Exceptions to these limitations

In a small number of cases it was recognized that the scholarship of an individual towered above that of his generation and of many preceding generations. Such an individual would be considered within his rights were he to contravene the "agreement" of the *posqim* and contest the opinions of scholars belonging to an earlier halakhic epoch. Hence we find in the *Bavli* that **Rav** is occasionally referred to as a Tanna and granted the right to argue against a tannaic ruling.[82] There is mention of the same recognition being accorded **Shemuel**[83]. The Rivash records a tradition that **Rabbenu Tam** was, in his talmudic expertise, as great as, or even greater than, Rashi, Rabbenu Ḥanan'el and the *Ba'al Halakhot Gedolot*[84] and that "all the present sages of Israel combined are like the skin of a garlic and like a sesame seed compared to any one of the least of his pupils".[85] **Rabbi Eliyahu**, the Gaon of Wilna, was considered as a *Rishon* and is so referred to by Rabbi A. Y. Karelitz[86] and Rabbi Ovadiah Yosef,[87] amongst others. Similarly, in the

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76 Paragraphs 5 and 7 are not of any practical significance.

77 *Tosafot Yoma'* 3b, *Yad Malakhi siman* 40. Cf. *ET* II p. 38 at notes 7-9. However, see the array of opinions in *HaMaḥaloqet baHalakhah* (edd. Ḥanina Ben-Menaḥem, Natan Hecht, Shai Wosner), Vol. I, *Sha'ar Sheni*, 5 (= paras. 216-241).

78 See *ET* IX col. 334 n. 342-4.

79 See the sources and discussion in R. Ovadiah Yosef, *Yabia' 'Omer*, II *EH* no. 7:3 (227b – 228a).

80 R. Ovadiah Yosef, *Responsa Yehawweh Da'at* I, *Kileley ha-Hora'ah*, *Kileley ha-Posqim ha-'Aḥaronim*, no. 1. See the sources in idem., introduction to *Responsa* of Rambam, *Pe'er ha-Dor* (ed. Rabbi D. Yosef), Jerusalem 5744, 7 – 11.

81 Rambam, Introduction to the *Yad*; Ramban, *Milḥamot*, end of *Rosh haShanah*. Cf. *ET* IX cols. 334-5 n. 345–56. See also Rabbi A. Y. Karelitz, *'Igrot Hazon 'Ish*, part 2 no. 24, where it is stated that these "agreements" were not simply in the interest of the avoidance of halakhic chaos nor were they bestowed as an "honour" by the later upon the earlier authorities. They came about, he argues, due to the realisation by the later sages that they no longer comprehended the profundity of the scholars of earlier generations and thus could no longer dispute with them.

82 In 6 places – cf. '*Eruvin* 50b.

83 Cf. *Yad Malakhi*, *Kileley Ha-Resh*, sec. 552 who quotes Rashba's *novellae* to *Shabbat* (פ"ג דף י"ד ד): וכן שמואל תנא הוא. The *Yad Malakhi* comments that there is no source for this in all the Talmud and that it is contradicted by Rav Sherira *Gaon*. See, however, *HaMaḥaloqet baHalakhah* ibid., para. 237, citing R. Yitsḥaq Lampronti, *Paḥad Yitsḥaq*, s.v. *Amora'*, citing *Horayot* 12b, where Shemuel argues against Rabbi Yehudah in a *Baraita'*.

83 Authorship uncertain – variously attributed to Sherira Gaon, Hai Gaon, Yeudai Gaon and Rabbi Shim'on Kayara.

84 See Rabbi H.Y.D Azulai, *Shem Ha-Gedolim*, *Ma'arekhet Gedolim*, letter *yod*, no. 241 col.1 (Jerusalem 5730, p. 94 col 1).

86 *Ḥazon 'Ish*, *'Oraḥ Ḥayyim*, *Hilkhot Qeri'at Shema'*, sec. 13, letter 2; *Qovets 'Igrot Ḥazon 'Ish* part 1, no. 32.

87 *Responsa*: *Yehawweh Da'at* 5:3 footnote; *Yabia' 'Omer* I *'Oraḥ Ḥayyim* 3:21.

Mishnah Berurah also, the Wilna Gaon is given a unique status amongst the *Aḥaronim*.

IV Consensus

IV.1. The possible scenarios *vis-à-vis* majority/minority questions are:

(i) Consensus (*kol hade'ot* = 100-0)
(ii) Equally balanced doubt (*safeq hashaqul* = 50-50)
(iii) Substantial minority (*mi'ut hamatsuy* = eg. 25-75)
(iv) Insubstantial minority (*mi'ut she'eno matsuy* = eg. 1-99)
(v) Lone opinion (*da'at yeḥida'ah* = <1->99)

IV.2. As a rule, in the absence of any special regulation for determining the *Halakhah* (such as Seniority, Finality etc. etc.), the Law follows the majority opinion or, if the doubt is in the facts of the case, the majority likelihood.[88] Thus in (iii), (iv) and (v) above, one would follow the 75%, 99% or >99%. In (ii) the rule would be that in a case of biblical law one would follow the stricter opinion, in a case of rabbinic law one would follow the lenient opinion and in a case where there was a doubt as to whether the law concerned was biblical or rabbinic one would also follow the lenient opinion.

IV.3. However, there are areas in which this is not the case and a minority view, even a lone opinion, in law or a highly insubstantial likelihood in facts, may be taken into consideration when this would result in a stricter conclusion.

IV.4. The two areas where this tendency to strictness operates are *ḥamets* on *Pesaḥ* and marriage and divorce. In the former, the tendency is limited, on the whole, to the Ashkenazim but in the latter, it has been accepted by the Sefaradim also (though not by theYemenites).

The rest of **IV** is divided up as follows.

(i) The stringency (*ḥumra'*) of *ḥamets*
(ii) The *ḥumra'* of *gittin* and *qiddushin*
(iii) The requirement of consensus among the *Posqim* and within the contemporary rabbinate
(iv) The theory of the *Halakhah* standing behind it
(v) The attitude of the *Posqim* in emergency and *post factum* situations
(vi) Possible causes for the adoption of this incredibly strict policy
(vii) Objectors to its adoption
(viii) The approach adopted in practice
(ix) The position of Rabbi Mosheh Feinstein
(x) Translating Rabbi Feinstein's ruling from facts to law
(xi) A final analysis of the debate
(xii) A possible rationale behind the stringency of the Talmud itself

(i) *Ḥamets*

IV.5. The severity of the biblical law of *ḥamets* on *Pesaḥ*[89] lead to a corresponding severity in the Talmud.[90] This is then reflected in the *Shulhan 'Arukh*[91] and even more so in the glosses of the Rema'

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88 See note 1.

89 During *Pesaḥ*, it is forbidden by Torah law to eat *ḥamets*, to derive benefit from it or to possess it and its (intentional) consumption carries a penalty of *karet*. These points, together with the fact that the permissibility of *ḥamets* throughout the year makes it more likely that one might forget, during the festival, that it is prohibited, led the Sages also to apply stricter regulations to it. (Cf. *ET* III col. 65, n. 176.) No other prohibition displays all these stringencies.

90 For example, the Talmud states that *ḥamets* on *Pesaḥ* does not become nullified – by rabbinic decree - when it is mixed in a (permitted) substance no matter how small the ratio is of prohibited to permitted substance. (Cf. Ibid., n. 170.)

where a number of rulings can be found which follow the stricter view of a minority of the *Posqim*.[92] Some Sefaradi authorities have attempted to import all the *ḥamets* stringencies of the Rema' into the Sefaradi communities declaring that "On *Pesaḥ* we are all Ashkenazim".[93] However, Rabbi Ovadyah Yosef has ruled definitively in accordance with the numerous Sefaradi scholars who oppose this.[94]

IV.6. Some try to conduct themselves in accordance with **all** the stringencies of **all** the *Posqim* regarding *ḥamets* on *Pesaḥ*. This seems to have come about because of the declaration of Rabbi Yitsḥaq Luria that anyone who is careful to avoid even an inadvertent consumption of even an infinitesimal amount of *ḥamets* on *Pesaḥ* will not be confronted by any sin for the entire year.[95]

IV.7. The above is a matter of personal, family or community custom only. A rabbi is obliged to respond to a **halakhic** inquiry according to the Rambam (for the Temanim), the *Shulhan 'Arukh* (for the Sefaradim) and the Rema (for the Ashkenazim) and it is strictly forbidden for him *min ha-Torah* to impose any stringency upon the questioner.[96]

(ii) *The ḥumra'* of *gittin* and *qiddushin*

IV.8. However, in the area of *gittin* and *qiddushin* it is the accepted practice (though not agreed to by all authorities) to take into account **all** opinions (where these advocate stringency) even if they are opposed to the lenient rulings of the *Shulhan 'Arukh*, the Rema and the vast majority of the *Posqim*. Even a single stringent opinion would have to be taken into account. An oft-quoted source for this stringency of approach is Rabbi Yom-Tov Algazi (18th century)[97] who applies this "accepted practice" to *yibbum* and *halitsah* also.[98]

IV.9. In Torah law there is no difference whatsoever, as regards halakhic decision making, between *gittin* and *qiddushin* (or, for that matter, *ḥamets* on *Pesaḥ*) on the one hand and all other areas of the *Halakhah* on the other; taking into account all opinions in the area of *gittin* and *qiddushin* is purely custom or, at most, of rabbinic origin.[99]

(iii) *The requirement of consensus*

IV.10. Parallel to this extremely strict process we find a certain nervousness affecting decision-making in questions of *gittin* and *qiddushin*. In a *responsum* of the Rivash concerning annulment of marriage we find a reluctance to match practice to theory without a consensus of all the local halakhists.[100] A similar tendency can already be detected in the *responsa* of Rashba[101] who was reluctant to rely in practice on his (theoretical) decision in this area. This nervousness seems to have been translated down the generations. The desire to share the burden of a practical ruling and the distinction between theoretical and practical

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91 *OḤ* 447:1 et al.

92 *OḤ* 447:10, 462:4 et.al.

93 As reported by R. Ovadyah Yosef, *Ḥazon 'Ovadyah*, 63b.

94 *Yabia' 'Omer* I *YD* 3:11&12; *Ḥazon 'Ovadyah* ibid and pp. 295-6 (addenda to p. 63); *Yalqut Yosef*, *Mo'adim*, 354 para. 9.

95 *Shulhan 'Arukh* of the Geraz, section of *responsa*, no. 6.

96 Cf. *Shakh*, [*Qitsur*] *Hanhagat 'Issur weHeter*, para. 9; Rabbi Eli'ezer Fleckels, *Responsa Teshuvah me-'Ahavah* I end of no. 181; Rabbi Ovadyah Yosef, *Ḥazon 'Ovadyah* p. 296.

97 The matter is extensively examined in *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) & 6:2. Rabbi Yosef quotes in these *responsa* a number of sources in which Rabbi Algazi's ruling is found – eg. *Responsa Qedushat Yom-Tov* no. 9, 15d & *Simḥat Yom-Tov* no. 11, 44c.

98 *Responsa Simḥat Yom-Tov* ibid. (See *Yabia' 'Omer* VI *EH* 6:2, p. 296, col. 1, 11th line from base of column.)

99 See below.

100 *Responsa* Rivash no. 399 at the end.

101 I no. 1206 at the end.

Halakhah can both be found in the Talmud[102] but it has become a dominant feature only in the area of marriage and divorce.

(iv) *The Halakhic theory - Majority rule and rabbinic enactment*

IV.11. It seems to me that if the majority rule applies by Torah law even to the *posqim* who never met in debate[103] then the concern for minority views in the area of *gittin* and *qiddushin* must be a rabbinic stringency. This is stated explicitly in Rabbi Refa'el Asher Qubo's words:[104] "In a case of *'ervah* (adultery, incest) although [in any given circumstances] the majority of the *Posqim*[105] rule leniently and **according to the law of the Torah we follow their lenient position**, nevertheless **by rabbinic enactment** we concern ourselves with the stricter opinion of the minority of the *Posqim* as Maharibal[106] wrote in [his *responsa*] volume IV (no. 19). A root and base for this is that which we find explicitly stated in the Talmud that in a case of *'erwah* the [talmudic] Sages took into account a "substantial minority"[107] where this would lead to a stringent ruling (as *Tosafot* wrote in *Yevamot* 36b,[108] *Bekhorot* 20b;[109] cf. also *Tosafot*, *Qiddushin* 50b[110])."

IV.12. If the majority rule does not apply by Torah law to those *posqim* who never debated their disagreements face to face, so that *min ha-Torah* the matter remains in doubt and it is only by rabbinic authority that we accept the majority (albeit even in cases of Torah law), the concern for minority views in *gittin* and *qiddushin* is more easily understood because now we do not need to postulate a new rabbinic enactment towards stringency in cases of *mahloqet ha-Posqim* touching *gittin* and *qiddushin*; on the contrary, since there is no pentateuchal majority in such cases, we should automatically take the stricter view in all cases of Torah law (as we do in *gittin* and *qiddushin*) because *safeq de'Oraita le-humra'* and a rabbinic enactment is required so that we **can** rely on the majority in other cases involving Torah law. This rabbinic leniency is more easily understood according to Rambam and Ra'avad etc. who maintain that *safeq de-'Oraita' lehumra'* itself is *mide-rabbanan* – only a rabbinic stringency and, indeed, Rabbi Ovadiah Yosef concludes that the Rambam's view in this matter (as opposed to the Rashba's) is the halakhically correct one.[111]

IV.13. Evidence for the uncertainty of the majority rule in divergences of the *Posqim* has been gathered by Rabbi Ovadyah Yosef.[112] He appeals to such commonly accepted guidelines as (i) *safeq berakhot lehaqel* according to which, in any case of divergence amongst the *Posqim* as to whether a blessing should be said, even if the majority rule that it should be said, we do not say it due to the minority opinion ruling

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102 In fact, Rivash, in the above-mentioned *responsum*, quotes the relevant talmudic expression for sharing the burden of halakhic rulings: **בי היכי דלמטיין שיבא מכשורא**; see *Sanhedrin* 7b where Rav Huna uses it with reference to deciding a case in court and Rav Ashey with reference to giving a ruling on a *terefah*. The differentiation between theory and practice is found in *Bava' Batra'* 130b.

103 See I.3 above.

104 See in *Yabia' 'Omer* VI *EH* 6:3.

105 Including the *Shulhan 'Arukh* and the Rema.

106 Rabbi Yosef ibn Lev 1505-1580.

107 Of course, this would only justify taking a substantial minority of the *Posqim* into account in matters of marriage and divorce but it would not explain the practice of accepting the opinions of insubstantial minorities and even of unique opinions. On this, see below.

108 S.v. *Ha'*. See also *Tosafot* ibid. 121a, s.v.*Ve-lo'*.

109 S.v. *Ḥalav poter*.

110 S.v. *Hakhey garsenan* (interpretation of Rabbenu Tam). The Tosafists in these places describe the possibility of someone lost at sea having survived as being a substantial minority possibility.

111 *Responsa Yehawweh Da'at* I *Kileley Ha-Hora'ah, Kileley Safeq De'Oraita'*, no 1. Note that there is disagreement as to whether the Rambam's ruling that *safeq de'oraita' lequla'* in Biblical Law applies even to a doubt born of dissent amongst the *posqim*. R. Mosheh Tsevi Landau, *Sefeqot Melakhim* chapter 7, concludes that it does.

112 For this and the next three paragraphs see *Yabia' 'Omer* II, *'Oraḥ Ḥayyim* 12:3 (p. 39a).

otherwise, according to whom it would be a violation of the law prohibiting the pronouncement of a *berakhah le-vattalah* (a blessing in vain). Clearly, then, the majority in favour of pronouncing the blessing is not considered as providing certainty for if it were so, the minority would be considered as halakhically non-existent and there could be no possible objection to saying the blessing as there would be no *safeq*. If, however, a minority view in a divergence of the *Posqim* is considered as creating a doubt then it stands to reason that any minority view against the saying of a blessing will create a situation of *safeq berakhah* and the ruling will be that the blessing should not be said

IV.14. Further evidence for the correctness of the latter view of the majority rule is the fact that (ii) minority views, even if categorically rejected from *Halakhah*, are regularly used to create a *sefeq sefeqa'* (one 50-50 doubt plus one minority opinion) which would be impossible if the majority were considered definitely correct and the minority legally non-existent.

IV.15. Finally, evidence may be adduced from (iii) such rulings as "the *Halakhah* follows whomever is lenient in divergences concerning the laws of *'eruv*/mourning" even if the lenient view is expressed by an individual and the stricter view by a plurality. This makes good sense if the divergence of opinion is considered a doubt even though there is a clear majority on one side of the argument. Like any doubt in matters of purely rabbinic law (such as *'eruv* and *mourning*) we accept the lenient opinion - *safeq de-Rabbanan le-qula'*. According to the view that maintains that all types of halakhic argument is governed by the Torah law of *'aḥarey rabbim lehatot*, one would expect that even in matters of rabbinic law the majority view would have to be followed as the correct one and the minority view would be considered as non-existent.[113]

(v) ***Emergency and post factum situations***

IV.16. Our 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.[114] Since the rule is that in times of urgency we may *ab initio* create a situation which is, in normal circumstances, considered legal only *post factum*,[115] it follows that in an emergency situation we may *ab initio* follow a majority, even against a substantial minority, even in maters of marriage and divorce. Accordingly, in a case of *'iggun* we revert to the normal halakhic process of *Shulhan 'Arukh*/Rema and majority rule.[116]

IV.17. Even where the Talmud, because of minority considerations, does not free an *'agunah ab initio* such as in the case of *mayim she-'eyn lahem sof*,[117] if some additional emergency features in her situation – such as if she were a young woman – Rabbi Ya'aqov Reischer (c. 1670 – 1733) rules that we may

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113 However, it seems to me that (so long as we are dealing with rabbinic law) those maintaining that the majority rule applies by Torah law even to the *posqim* who never met in debate could still agree to the above halakhic principles on the basis of הם אמרו והם אמרו and, indeed, all 3 of R. Yosef's proofs involve rabbinic law only. This is because (working backwards) (iii) the laws of *'eruv* and mourning are all rabbinic (ii) once you have 1 equally balanced doubt, even if you are dealing with Torah law, the 50-50 doubt creates a *safeq de'Oraita'* which is only an *'issur derabannan* (according to Rambam and *rov Posqim*, **and so rules Rabbi Yosef**). As regards (i), it is irrelevant whether *berakhah le-vattalah* is a rabbinic or biblical prohibition (Rambam and Maran rule that it is biblical, most of the *Rishonim* regard it as rabbinic and some argue that the Rambam, too, holds this view - see the discussion in *ET* IV col. 280; *Yabia' 'Omer* V *OH* 43:4; *Yehawweh Da'at* III 60, second and third paragraphs) because the rabbis are promulgating **a stringency** so no justification is required.

114 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).

115 *Responsa Shevut Ya'aqov* III *EH* no. 110 (where the point is made that it is easier to permit ***ab initio*** in an emergency that which is permitted only ***post factum*** in a normal situation). See other sources in *ET* VII col. 417, note 140.

116 R. Ovadyah Yosef *Yehaweh Da'at* I *Killeley ha-Hora'ah* p. 32.

117 See note 113.

disregard the stringency based upon minority considerations and allow her to remarry even *ab initio*.[118]

(vi) *Possible causes for the adoption of this incredibly strict policy*

IV.18. What is it that brought about the requirement of consensus – at least for an *ab initio* ruling - (that so hamstrung progress in the search for solutions for the problem of *'iggun*) peculiarly in cases of *gittin* and *qiddushin*?

IV.19. It cannot be the severity of the prohibition of adultery as this is exceeded by many other commandments – such as *Shabbat* - where no such tendency towards the extreme strictness requiring a 100% consensus can be detected amongst the *Posqim* (even *ab initio*). It may be the horror of creating the irredeemable state of *mamzerut* which was perhaps viewed as a sort of death sentence and akin, therefore, to murder where, indeed, we do not rely on majorities[119] and indeed, in some cases, concern ourselves with the smallest minorities,[120] but such an explanation would surely be invalidated by the consideration that a doubtful case of *mamzer* does not exist in Torah law which recognizes only definite *mamzerim* as such; the prohibition of doubtful cases of *mamzer* is only rabbinic even according to those (Rashba *et al*) who maintain that the rule that every doubt of Torah law must be resolved towards stringency is itself Torah law. (As to why the Torah needs to write a special permit for a *safeq mamzer* according to the Rambam *et al* who regard *safeq* in every area of Torah law as permitted by the Torah – so that a *safeq mamzer* is anyhow permitted by Torah Law - see Rabbi A. L. Guenzberg, *Shev Shema'tata*, *Shema'ta' 'alef*, chapter 1, s.v. *We-hiqshu*.) Surely, if the Torah takes a lenient view of *mamzerut* that cannot be a reason for rabbinic stringency![121]

IV.20. The sources in the Talmud for a strict approach in this area refer only to cases where there is a substantial – albeit minority – possibility of adultery, as *Tosafot* describe the prohibitive ruling in the case of *mayim she-'eyn lahem sof* – when a women whose husband was lost at sea cannot remarry where there is a possibility that he has survived (*Yevamot* 121a). The *Tosafot* in *Yevamot* 36b s.v. *ha'* describe the percentage of survivors in cases of this nature as *mi'ut ha-matsuy* – a common or frequent minority. This would explain Maharibal's (and others') insistence on taking into account a substantial minority of stringent opinions but it can hardly be considered a satisfactory source for requiring a 100% consensus as required by Rabbi AlGazi and as accepted in contemporary practice.[122]

(vii) *Objectors to the tendency towards strictness*

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118 See *Responsa Shevut Ya'aqov* III, *EH* 110 who permits a young woman whose husband had disappeared in the ocean but whose death had not been definitely attested, to remarry since this type of *'agunah* is forbidden remarriage only *lekhatehilah*. As she was a young lady her situation was *she'at ha-dehaq* also and in her case the *lekhatehilah* prohibition could be overridden. On this amazing leniency it was remarked by Dayyan Y. Abramsky of the London *Bet Din* that "his words could not be believed were they merely heard but only if they be read in the written text" – see R. Meir Feuerwerger (Meiri), *'Ezrat Nashim* I:240 col. 2. (It is worth noting that Rabbi Reischer's willingness to criticize *Rishonim* and earlier *'Aharonim* earned him the censure of others, particularly the Sefaradi rabbis of Jerusalem. As a rule, however, he made a point of defending both the *Rishonim* and the *Shulhan 'Arukh* against their critics. He came to be regarded as a final authority even during his lifetime.)

119 *Ketubbot* 15b.

120 See, for example, *'Orah Hayyim* 329:2&3.

121 See IV.5 above, where it is demonstrated, on the contrary, that **stringency** in the Torah begets stringency in the Talmud.

122 For Maharibal see above IV.11; for Rabbi Al Gazi see above IV.8. See also below, the arguments of *Rabbi Mosheh Feinstein* (IV:24-32). For varying opinions on the definition of '*matsuy*', see Rabbi M. Vaye, *Bediqat haMazon kaHalakhah*, Jerusalem, 5758, p.118, second and third paragraphs.[123] 1741-1820. Rabbi Yosef Refa'el was rabbi of Smyrna. In 1811 he moved to Ḥevron and 2 years later to Jerusalem where he was appointed *Rishon leTsiyon* (Chief Rabbi of the Holy Land). His monumental work *Ḥiqrey Lev*, *responsa* according to the order of the *Shulhan 'Arukh*, was published in 7 volumes between 1787 and 1832. Rabbi Hayyim Pallagi was his grandson.

IV.21. Indeed, a number of *'Aḥaronim* objected to the entire affair of seeking 100% consensus for *gittin* and *qiddushin* and maintained that they should be subject to the usual rule of *Shulḥan 'Arukh* and *rov posqim*. Rabbi Yosef Ḥazzan[123] goes further arguing that even in matters of *'erwah* the lenient rulings of the *Shulhan 'Arukh* should be followed (by the Sefaradim) **even when these are against the majority of the *Posqim***. He writes in his classic *Ḥiqrey Lev*:

> "…from all the writings of the *'Aḥaronim* it seems that also in a case of *'erwah* (adultery and incest) we (the Sefaradim) have accepted his (Rabbi Yosef Qaro's) rulings even when these are the more lenient position. See what I have written in *Ḥiqrey Lev* to *'Oraḥ Ḥayyim* 95 & 96….I explained there that in case of an *'erwah* prohibition, although we have accepted the rulings of *Maran*, it is within the rights of the rabbi issuing a ruling (in a specific case) to rule stringently **if he sees that a majority of the *Posqim*….take a strict line** (against *Maran*'s lenient view). In all other matters of the *Halakhah* however, the rabbi issuing a ruling is **not permitted** to give a strict decision against the view of the Rambam and Maran".[124]

IV.22. It is clear from here that the *Ḥiqrey Lev* would go no further than **allowing** (though not ordering) a stringent decision (in *gittin* and *qiddushin*) against the *SA* if a majority of the *Posqim* are opposed to the *SA*'s lenient ruling. He would not abide by the Maharibal's acceptance of the substantial minority consideration and certainly not Rabbi Algazi's concern for every single opinion. For other *'Aḥaronim* who take a similar line to Rabbi Ḥazan see *Yabia' 'Omer*: IV *EH* 5:4; VI *EH* 6:2,3; VI *YD* 15:1.

(viii) *Current practice*

IV.23. In his summary of halakhic guidelines, Rabbi Yosef concludes:
"We customarily take a strict line in the laws of the grave matter of *'erwah* even against the opinion of Maran and the majority of *posqim*….but in a case of *'iggun*[125] we are lenient [and follow *Shulḥan 'Arukh* and *rov Posqim*]".[126] This seems to be the position of today's Ashkenazi authorities also.[127] Regarding the Yemenite communities, some argue that there existed a dispute amongst their *posqim* as to whether the Rambam's rulings were accepted as final even in the matter of *kefiyat get* when she claims *me'is 'alai*. Rabbi Ovadiah Yosef maintains that no such dispute existed – the Rambam's rulings were, he maintains, accepted on this point too.[128]

(ix) *The position of Rabbi Mosheh Feinstein*

IV.24. I subsequently came across the following reference in *'Igrot Mosheh*,[129] which may shed light on using *mayim she'eyn lahem sof* as a source for stringency in halakhic decisions in the area of *gittin* and *qiddushin*.

The question dealt with in this *responsum* was of a woman who discovered directly after her wedding that her husband was impotent and it is not possible for her to acquire a *get* from him. Rabbi Feinstein argues

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124 *Ḥiqrey Lev, Mahadura' Batra'* II (*EH* & *ḤM*), *HM siman* 4 on *Hilkhot Halwa'ah, siman* 60, p. 180d.

125 I presume that this includes cases where, in spite of a ruling of *bet din*, a *get* cannot be obtained.

126 *Responsa Yehawweh Da'at* I, *Kileley ha-Hora'ah*, p. 32, no. 9.

127 It is known, for example, that this is the position taken by Rabbi Y. S. Elyashiv – see *Pisqey Din Rabbaniyim*, vol. IV, col. 166, where Rabbis Hadayah, Elyashiv and Zolti wrote that as a general rule of coercion, according to the *Halakhah* we must rule like the majority and not concern ourselves with minority opinions as we find in the laws of *gittin*. "In a grave situation of *'iggun* when there is no hope of her returning to live with him and especially in a case like ours where the woman has sat chained for 8 years" we must hand down a **[**lenient**]** ruling even if it is not in accordance with all opinions."

128 *Responsa Yabia' 'Omer* III *EH* 19:21 col. 2.

129 *Responsa 'Igrot Mosheh, EH* I, 79.

that a woman would not have agreed to marry such a man had she known the truth about him and on the basis of this he declares the marriage a *miqaḥ ta'ut* and releases her without a *get*. At some point in the debate he quotes a *responsum* of the *'Eyn Yitsḥaq*[130] who argued that one must take into account the possibility that this woman belongs to the tiny minority who would settle even for such a marriage just as the Talmud concerns itself with the tiny minority[131] who are lost at sea and survive.

IV.25. At this juncture, Rabbi Feinstein points to an apparent contradiction in the writings of *Tosafot* and the Rosh who in some places describe the possibility of the husband's surviving in a case of *mayim she'eyn lahem sof* as being "a substantial minority" possibility (מעוט המצוי) whereas in other places they refer to it as a "highly insubstantial minority": (כלל) מעוט שאינו המצוי.[132] The question on *Tosafot* is not so serious, he says, because in *Yevamot* it is the Ri speaking and in *Bekhorot* it is Rabbenu Tam. In the case of the Rosh, however, it is very serious.

IV.26. As to the answer suggested to this in *Yashresh Ya'aqov*[133] at the end of *Yevamot* - that the Rosh simply follows *Tosafot* (even if this leads him into contradictions) – Rabbi Feinstein comments: "Heaven forfend that we should suggest such a thing especially as the Rosh wrote his entire work as practical *Halakhah* so how could he not have been aware that he was contradicting himself? Besides, the Rosh writes his opinion at the beginning of the final chapter of *Yevamot* and in *Ḥullin* 11 like the *Tosafot* in *Bekhorot* (that the possibility of survival is insubstantial) although there is no mention of this in *Tosafot* in *Yevamot* or in *Ḥullin*.[134] It is furthermore far-fetched to say that there is an argument here about a fact: whether survivors of a ship-wreck are a substantial or an insubstantial minority. Facts can only be ascertained they cannot be debated. The alternative solution to this problem proferred by the *Yashresh Ya'aqov* is forced and refutable and the solution suggested in *Responsa Ḥatam Sofer EH* 65[135] is extremely forced and not at all logical."

IV.27. Rabbi Feinstein therefore says that both statements are true:

> "Those rescued from the sea constitute a substantial minority but there is only an insignificant minority of people who are rescued **and do not inform their family.** (For argument's sake we may say that, on average, of 100 people aboard ship, 30 survive a shipwreck but of these only 1 fails to communicate with his family within 3 months.) So it seems from Rambam, *Yad*, *Naḥalot* 7:3 who states that only when the memory of the disappeared father has become lost (אבד זכרו)[136] can his heirs take over his property because before that we must be concerned for his return since a **substantial minority** survive. However, when enough time has passed since his disappearance for his memory to have been forgotten we may

130 By Rabbi Yitsḥaq Elḥanan Spektor (1817-1896).

131 The Talmud does not actually mention "insubstantial" or "tiny" minority in its treatment of *mayim she'eyn lahem sof* but the *Rishonim* understand it to include such cases also. See the next two paragraphs.

132 *Tosafot Yevamot* 36b s.v. *Ha'* and *Avodah Zarah* 40b s.v. *Kol* and the Rosh *Yevamot* 36b (= 4:5) describe it as substantial whereas *Tosafot Bekhorot* 20b s.v. *Ḥalav Poter* and the Rosh *Yevamot*, beginning of final chapter (119a = 16:1) and *Hullin* 12a (= 1:16 near the end) describe it as insubstantial.

133 Commentary on *Yevamot* by Rabbi Shelomoh Drimmer.

134 I.e. whereas one could argue that the Rosh in *Yevamot* 36 is simply following the *Tosafot* (there) in declaring the survival rate of those lost at sea a **substantial** minority, one cannot explain the apparent contradiction to this in the Rosh at the end of the final chapter of *Yevamot* and in *Hullin* where he describes the survival rate as an **insubstantial** minority as being due to the Rosh's habit of following the lead of the *Tosafot* because there is no such statement of *Tosafot* there, neither in the last chapter of *Yevamot* nor in *Hullin* (but only in *Bekhorot* – see note 131).

135 S.v. *Hineh mah shekatav*.

136 I presumed this to be a period of 12 months in accordance with the Talmudic (*Berakhot* 58b) interpretation of Psalms 31:13. I later found that Rabbi Y. M. Epstein in *'Arokh Ha-Shulhan* makes exactly this presumption based on the same sources. See similarly in *Responsa Ḥatam SoferEH* 65 s.v. *Uviteshuvah 'aḥeret*, at the end.

> assume him dead because only the **very smallest minority** of those lost at sea survive **and** fail to contact their family after a protracted period. *Tosafot* and the Rosh maintain that because of an insubstantial minority the Sages would not have enacted any measure even in a case of a married woman but since the possibility of survival was substantial (say 25% - a degree of minority possibility which would trigger rabbinic enactments in other areas of the *Halakhah*)[137] they had to forbid her remarriage by rabbinic decree until the point of "the memory of him being lost" (*'avad zikhro*) i.e. a situation where the possibility of his survival had reached one of insubstantiality (say 1%). However, once that situation had been reached they extended the decree and forbade her remarriage (at least *ab initio*) due to the stringency of the law of a married woman (*humrat'eshet 'ish*) even beyond the point of *'avad zikhro* since some percentage of doubt remains (say 0.5%, 0.25%)[138] though if such a small percentage (say 1% or less) had obtained initially they would not have passed any enactment against her remarriage. If 0% doubt remained after *'avad zikhro* they would not have extended the prohibition any longer and they would have had to enter into the fraught area of "ruling on arbitrary limits" – נתת דבריך לשעורין - (in this case, time-limits). However, since some doubt, however small, always remains they forbade her remarriage so as not to enter the problematic area of arbitrary limits. We indeed find something similar to this in *Tosafot*, *Qiddushin* 11 in the answer of Ram of Narbonne."

Rabbi Feinstein concludes this section with the comment: "ברור דבר זה הרבה והוא נכון ואמת והארכתי"

"I have clarified this matter at great length. It[139] is well-based and true".

(x) ***Translating Rabbi Feinstein's responsum from 'facts' to 'law'***

IV.28. From the above *responsum* of Rabbi Feinstein regarding **factual** doubts in cases of *'erwah* is it possible to draw conclusions as to his opinion concerning **halakhic** divergences amongst the *Posqim* in this area? I think this question can be resolved as follows.

IV.29. Rabbi Feinstein wrote[140] that *Tosafot* and the Rosh maintain that because of an insubstantial minority the Sages would not have enacted any measure even in a case of a married woman but since the possibility of survival was substantial they had to forbid her remarriage by rabbinic decree until the point of *'avad zikhro,*[141] i.e. a situation where the possibility of his survival had reached one of insubstantiality. However, once that situation had been reached they extended the decree and forbade her remarriage (at least *ab initio*) due to the stringency of the law of a married woman (*ḥumrat 'eshet 'ish*) even beyond the point of *'avad zikhro* since some percentage of doubt remains though **if an insubstantial % had obtained initially they would not have passed any enactment against her remarriage**.

IV.30. Thus Rabbi Feinstein argues that an insubstantial minority is insufficient to justify rabbinic stringency in cases of factual doubt. Only where the level of doubt was **initially** substantial (though less

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137 For example, where the rate of infestation of a fruit or vegetable is more than 50% the obligation to check it before eating is Pentateuchal. In cases where the rate is less than 50% the obligation is rabbinic. If the rate was exactly 50% (if such an exact measurement were possible) the situation would be one of *safeq de-'Oraita'* and the obligation would therefore be Pentateuchal according to the Rashba and rabbinic according to the Rambam.

138 See, however, the discussion by Dayyan Abramski in Feuerwerger (above, n. 117) 239 col. 2.

139 The clarification.

140 See IV:27.

141 See above, n.135.

than 50%) was an enactment deemed necessary (and this enactment was then perpetuated even beyond the point of insubstantial possibility).

IV.31. Now, minority **factual** possibilities (of the husband's survival) in the case of *mayim she'en lahem sof*, as we have seen,[142] are considered by some to be more of a halakhic problem than minority (stringent) **legal** opinions in cases of *'erwah*. Others do draw an analogy from fact to law[143] and apply the talmudic concern for even tiny minorities in the case of of *mayim she-'eyn lahem sof* to the halakhic decision-making process also – i.e. as regards matters of *'erwah*.

IV.32. However, according to Rabbi Feinstein, who says that insubstantial possibilities of factual doubt, even in matters of *'erwah*, need not be considered (save where they are the residue of substantial minority possibilities), even if we **do** compare legal debate concerning *'erwah* to the case of *mayim she'en lahem sof* it would still work out that insubstantial minority halakhic opinions need not be considered because such halakhic opinions are insubstantial minorities from the start unlike the minority possibilities of *mayim she'en lahem sof* which are the residue of a substantial minority. Whether or not he would take note, in a case of *'erwah*, of a stringency of a substantial minority of the *Posqim*[144] or he would differentiate between facts and law, I do not know.[145]

(xi) ***Analysis of the debate***

IV.33. I think we are now in a position to understand the sources of the four distinct opinions concerning (*ab initio*) stringency in matters of marriage and divorce:

A Those who do not compare fact (as in *mayim she-'eyn lahem sof*) to law (because in the former case there is always a possibility of the husband turning up whereas in the latter there is no possibility of the ruling of the *Shulḥan 'Arukh* and the *Posqim* changing) follow the usual halakhic methodology -

1 The most lenient position is taken by Rabbi Yosef Ḥazzan[146] who maintains that the Sefaradim should apply the accepted guidelines for halakhic rulings in all other areas of *Halakhah* to the area of *'erwah* also. This means that even lenient rulings of the *Shulhan 'Arukh* regarding *gittin* and *qiddushin* must be accepted amongst the Sefaradim even when these are against the majority of the *Posqim*. (At the same time, he **allows** a Sefaradi *poseq* to give a stringent ruling in such a case if the *poseq* feels that he cannot ignore the majority opinion.)[147]

2 Rabbi Hazan[148] also justifies a rabbi taking a stricter stance, i.e. accepting the *Shulhan 'Arukh*'s (and, in the case of the Ashkenazim, the Rema's) lenient rulings – even in the domain of *'erwah* – **only when these are supported by most of the *Posqim***.

B Those who do compare fact to law maintain one of the following positions -

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142 See above, IV:21, the opinion of the *Hiqrey Lev* who rejects the approach that takes a minority view of the *Posqim* into account although, of course, he accepts the talmudic concern for the minority in cases of מים שאין להם סוף.

143 Eg. Maharibal and Maharit AlGazi – see above, IV:20.

144 And rule strictly against the *Shulhan 'Arukh*, the Rema and *rov posqim* on the basis of *mayim she'eyn lahem sof*.

145 I have skimmed through all R. Feinstein's *'Even ha'Ezer responsa* but I have not found discussion of this point.

146 See above, IV:21.

147 Similarly it may be said that the Yemenite community would follow the Rambam's lenient rulings even against most *Posqim* in all matters – including *'erwah* though some express doubt about this. See IV.23 above. I am at present unaware of any Ashkenazi authority who takes a similar approach to the Rema.[148] See IV.21.

3 There are some[149] who insist on always taking into consideration – in *'erwah* matters – the (stricter) opinion of a substantial minority of the *Posqim* even if this is against the *Shulhan 'Arukh* and the Rema. These authorities compare fact to law and argue that just as the Talmud concerns itself (at least *ab initio*) with the substantial minority possibility in the case of *mayim she-'eyn lahem sof*[150] so must we be concerned for a substantial minority of (strictly ruling) *Posqim* in all matters of *'erwah*.

4 Finally, comes the most stringent camp[151] – that of those who maintain that we must take into consideration every strict opinion, even that of a lone *poseq*. These *posqim* base themselves on the stringency of the Talmud that disallows (at least *ab initio*) the remarriage of the wife of one who was lost at sea even if many years have passed since his disappearance though there is but an insubstantial likelihood of his still being alive.[152]

IV.34. As pointed out above,[153] according to Rabbi Feinstein's explanation of the theory behind the rules of *mayim she-'eyn lahem sof*, it is not possible to apply the stringency of insubstantial minorities – and certainly not the stringency of singular possibilities - that operates in such cases of uncertainty of fact to cases of uncertainty of law.

IV.35. As noted above,[154] the accepted practice amongst the Ashkenazim and Sefaradim is like the **fourth** group (*ab initio*) except in a situation of *'iggun* when the **second** group is followed. To my knowledge, the Yemenites follow the Rambam in all cases.

(xii) ***What prompted the stringency of the Talmud itself?***

IV.36. We have seen that the *Posqim* who impose various levels of strictness on the application of the laws of *gittin* and *qiddushin* appeal to the talmudic ruling concerning *mayim she-'eyn lahem sof*. However, the question remains, granted that the Talmud treats aspects of marriage law so strictly what lies behind this talmudic imposition of such extreme stringency?

IV.37. It may be that *'erwah* has not been singled out by the Sages but that their extremely strict treatment of it is to be seen as part of a pattern affecting all three major commandments where, when necessary, martyrdom is demanded – even in the absence of *ḥillul ha-Shem*. As the Talmud expresses it:[155]

כי אתא רבין אמר רבי יוחנן בכל מתרפאין חוץ מעבודה זרה וגלוי עריות ושפיכות דמים

idolatry being the ultimate crime against G-d, murder against man and adultery/incest against oneself. In the case of idolatry a biblical verse is given as the source: "And you shall love the L-rd your G-d…with all your life…". Hence, to avoid idolatry – the ultimate repudiation of the love of G-d – a person must sacrifice his life. In the case of murder, the Talmud finds no verse and proposes instead a piece of logic (*sevara'*): How do you know that your life is more precious than the life you would have to take to save your own?[156] As to adultery/incest, the Talmud deduces, by means of rabbinic *midrash*, from a biblical verse[157] that adultery is comparable to murder and that the former may therefore be presumed to share the

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149 Maharibal et al. See above, IV:11.

150 I. e. the husband may be of the 25% (?) who survive ship-wreck.

151 Rabbi Al Gazi et al. See above, IV.8.

152 I. e. he may be of the 1% or less who survive and fail to communicate with their family even after a prolonged period.

153 IV:29-32.

154 IV:23.

155 *Pesaḥim* 25a-b. See also: *Sanhedrin* 74a, JT *Shevi'it* 4:2, *YD* 157:1.

156 This does not apply when the other person himself is threatening your life. In such a case the rule of the pursuer (*rodef*) applies - הבא להרגך השכם להרגו. Since he initiated the attack upon your life the logic is reversed: How do you know that his life is more precious than your own? Since we cannot evaluate lives no **action** attacking another's life may be initiated but a **reaction** to such an initiation must be taken.

157 Deut. 22:26.

latter's requirement of martyrdom.[158]

IV.38. Hence we find in biblical – followed by rabbinic – law many stringent regulations reflecting the uniqueness of these three commandments. One of these stringencies that is common to all three is the suspension of the rule of *rov* and the concern for even insubstantial minorities. Hence, an idol can **never** be nullified,[159] in matters of danger to life we do not follow the majority and must often take **highly insubstantial minorities** into account[160] and a married woman whose husband was lost at sea may not rely on his being a part of the majority who, in such circumstances, perish and this remains true even when the minority possibility of his having survived has dwindled to **almost nothing**.[161]

V Conclusion

V.1. There are two main obstacles to finding a solution to the scandal of the contemporary *agunah* situation.

V.2. Firstly, there is the fact that biblical law has given the husband the power to refuse his wife a *get* and has forbidden the wife, thus chained to her former husband, to have relations with any other man. For her to do so would be a capital offence of adultery and any progeny born to her from any such relationship with another Jewish man would suffer the stigma of *mamzerut* with its tragic and irreversible consequences. The husband on the other hand is free to take another wife and any other children that he fathers would be perfectly kosher. Although there are important constraints on the husband's behaviour in rabbinic law – including the land-mark excommunication decree of Rabbenu Gershom – the fact remains that if a recalcitrant husband ignores all these and contracts a new marriage in spite of them or indeed if he goes on to father children without remarrying there is little in contemporary society that can be done to him and his subsequent marriage and children would be recognized by the *Halakhah* as kosher.

V.3. Secondly, there is the customary stringency in deciding any law touching upon marriage or divorce. This means that many remedies that have been proposed as solutions for the problems described in the preceding paragraph have never been adopted or, if they have, they have subsequently fallen into disuse, because a minority view, sometimes a tiny minority view, has opposed them. As we have seen above, current practice would refuse the adoption of a remedy if it would fall foul of the opinion of even **one** recognised halakhic scholar. As an example we may cite Rabbi E. Berkovits, *Tenai beNissu'in uvGet* (*TBU*, Jerusalem 1966) p. 25.

> "The **only dissenting voice** is that of *Shiltey ha-Gibborim* (*SHG*)[162] who argues that even where an explicit condition was declared immediately before intercourse, during the intimacy the couple will make an unconditional commitment to each other – i.e. the intercourse would become an act of unconditional betrothal."

This view would apparently render impossible any form of conditional marriage and it was indeed cited (amongst other objections) for that very purpose in *Eyn Tenai beNissu'in* (*ETB*, Wilna 1930):

> Some authorities say that even a condition repeated at *huppah*, *yihud* and *biah*

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158 Rav Aḥai Gaon in the *She'iltot* (no. 42) writes that the adulterer desecrates the woman with whom he sins and it is **as if he kills her**.

159 *YD* 140:1 (referring to an idol and items offered to it).

160 See IV.19 notes 118 & 119.

161 See IV.8, 20 and 27 above.

162 By Rabbi Yehoshua Boaz late 15th – early 16th century, who cites this opinion in the name of *Rabbenu* Yeshayah *'Aḥaron z"l* of Trani (Riaz), c. 1300.

> may be cancelled during the act of intercourse [*Shiltey ha-Giborim* quoting Riaz, *Ketubot*, *Pereq Ha-Madir*].
> [See *'Eyn Tenai beNissu'in* (1930), Rabbi Lubetsky (on p. 8), and Rabbi Danishevsky (on p. 35). The latter adds: "Though there are *posqim* who disagree with this and maintain that if an explicit condition were made at *nissu'in* and *bi'ah* it would be effective, **who will be able to tip the scale against Riaz**[163] **and *Shiltey Ha-Giborim* who quoted him**?]

V.4. The approach of יש כח ביד חכמים לעקור דבר מן התורה which, in emergency situations, applies still today,[164] is, I think, the one most unlikely to get any support from the *Gedoley haDor*. Hence, there is no hope of changing[165] the basic biblical or rabbinic laws described in **V.2.** – even if agreement could be reached that we do indeed have an emergency on our hands.

V.5. Therefore, the only way forward seems to be to try to find a method that will work within the constraints of biblical and rabbinic law. This is still an enormously difficult task but it would be rendered somewhat easier if we were free, where necessary, to rely on the views of most *posqim* as in other areas of the *Halakhah*, or at least if we were to disregard unique opinions or opinions of an insubstantial minority school.

Practical results?

V.6. I speak of a remedy for problems of divorce to avoid the wife's becoming an *'agunah* whether this be by means of conditional marriage or coerced divorce. Once a situation of *'iggun* has been reached the standard practice is already to rely on *rov posqim* though even there in emergency situations **I have suggested that it may be possible to rely on a minority or even a singular opinion in accordance with the *Taz* and his school** – see above, **I.4.**

V.7. With regard to coercion I have mentioned in **III.15** the discovery of a talmudic text ordering the coercion of a *get* for a *moredet* which would accord with the ruling of the Rambam's school. Hence the possibility that the widespread opposition to Rambam's ruling, led by Rabbenu Tam and endorsed by the *Shulhan 'Arukh*, would have disappeared in the light of this reading. If the opinion of the later *poseq* is to be overruled because the earlier authority's ruling had been recorded in a hitherto unknown manuscript, there is no reason why this should not apply to newly discovered manuscripts of the Talmud itself. Of course, in this case we are looking at divergent manuscripts of the same text but it at least casts a question-mark on the rejection of Rambam's position by so many *Rishonim*. Had they been aware of this reading would they have been so certain of their position **and does not this consideration add considerable weight to those who advocate the introduction of coercion in cases of *me'is 'alai*?**[166]

V.8. In the light of Rabbi Feinstein's convincing resolution of the apparent contradictions in *Tosafot* and the Rosh concerning *mayim she-'eyn lahem sof*, it is apparent 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* as I pointed out in **IV:32**. This would permit a more lenient approach to halakhic marriage and divorce in that it would reject the stringency advocated above in **IV:33 B4.**

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163 In *TBU*, 46, Berkovits notes that there is evidence that even Riaz – whom *SHG* is quoting - himself would agree that if the groom declares that he remains insistent on his condition the condition will remain in place. If this is correct, *SHG* is a unique opinion.

164 I have summarised the matter in my paper "Rabbi Morgenstern's Agunah Solution", 9.2.1-9.3.3.

165 Such change would anyway be only momentary according to the Rambam; according to the Rashba, however, once made it could be left permanently in place. See ibid., 9.3.2.

166 See the arguments for coercion in cases of *me'is 'alai* in, *inter alia*, *Responsa Tsits 'Eli'ezer* IV:21 and V:26; *Responsa Hekhal Yitshaq EH* I:2,3; *Responsa Yabia' 'Omer* III *EH* 18-20.

V.9 Furthermore, one must consider whether the situation regarding *get*-refusal today is one of compelling need (*she'at deḥaq*)[167] 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*. If so, in order to avoid ever reaching a situation of *'iggun* we could *ab initio* deal with *gittin* and *qiddushi*n in accordance with *Shulḥan 'Arukh* and *rov posqim* (as in **IV:33 B2** above) and ignore even substantial minority opinions, especially as Rabbi Yosef Ḥazzan and other great *posqim* have ruled that that is the *halakhah* even in normal (i.e. non-emergency) circumstances.[168]

It is my fervent hope that the arguments put forward in this paper will one day reach the *bet midrash* of the *Gedoley haDor* for their consideration. I know only too well that without their approval nothing in this area can ever change.

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[167] See, *inter alia*, the comments of Rabbi Yeḥi'el Ya'aqov Weinberg in his foreword to Rabbi Eli'ezer Berkovits, *Tenai beNissu'in uvGet* (Jerusalem 1966): "Rabbi Berkovits (who suggests the introduction of conditional marriage) has no intention, G-d forbid, of arguing against the great authorities of the previous generation (who had forbidden it)….. He has only revisited the problem **because the situation has worsened: the number of chained wives and the number of these who remarry without a *ge*t and go on to have more children, has greatly increased.**" See also *Responsa Ta'alumot Lev* (*EH* no. 14): "Even those who in practice take a strict view because of the stringency of forbidden sexual relations that is only when they can somehow force him to give a *get*. Not so in these lands where none can enforce the words of the sages and everyone does as he pleases…." and Rabbi Avraham Ibn Tawwa'ah, *Responsa Ḥut haMeshulash*,(printed as the fourth section of *Tashbets*, Lemberg 5651), *HaḤut HaShelishi* no. 35, p. 13a col. 2, s.v. *'Od ra'iti*: "Even those who say that one must not coerce a *get* (in cases of *me'is 'alai*)… permit *ab initio* coercion when the circumstances call for it." He then proceeds to demonstrate that this is true of the Rosh, Tur, Rashba, Rivash, Rashbets and Rashbash. It is thus clear from their words, he writes, that "even according to those who say one must not coerce, at a time when there is a need for coercion let them use force for a judge can only be guided by what his own eyes see".

[168] See above, IV:33 A1&A2.