Confronting 'Iggun

A combination of three possible solutions

to the problem of the chained wife in Jewish Law

This is the second volume of a five-volume series, by each of the members of the Unit:

Vol.1: Bernard S. Jackson, *Agunah*: *The Manchester Analysis* (Agunah Research Unit, vol.1, based on the Working papers of Yehudah Abel, Nechama Hadari, Shoshana Knol, Bernard S. Jackson and Avishalom Westreich)

Vol.2: Yehudah Abel, *Confronting 'Iggun*

Vol.3: Shoshana Borocin-Knol, *Agunah and Ideology*

Vol.4: Avishalom Westreich, *Talmud-Based Solutions to the Problem of the Agunah*

Vol.5: Nechama Hadari, *Agunah and the Protection of Women*

Vols. 1-3 are being published simultaneously in July 2011.
Vols. 4 and 5 will follow later in the year.

Ordering details, for one or more volumes, may be found at:
http://www.legaltheory.demon.co.uk/ARU.htm

Agunah Research Unit, Volume 2

Confronting 'Iggun

A combination of three possible solutions to the problem of the chained wife in Jewish Law

Rabbi Dr. Yehudah Abel

Deborah Charles Publications
2011

ISBN 978-1-906731-12-0 (hardback)

Published and Distributed by:
Deborah Charles Publications
On behalf of The Agunah Research Unit,
University of Manchester
E-mail: dcp@legaltheory.demon.co.uk
http://www.deborahcharles.co.uk

Printed and bound in Great Britain by CPI Antony Rowe, Chippenham and Eastbourne.

Abbreviations

Consensus	"Halakhah - Majority, Seniority, Finality and Consensus" (Working Papers of the Agunah Research Unit, no.7, June 2008): http://www.mucjs.org/Consensus.pdf (Abel)
GK	"Comments on "*'En Tenai BeNissu'in*" by R. Zevi Gertner and R. Bezalel Karlinski" (Working Papers of the Agunah Research Unit, no.13, November 2008): http://www.mucjs.org/Gertner.pdf (Abel)
EH	*'Even Ha'Ezer*
ET	*Encyclopediah Talmudit*
ETB	*'Eyn Tenai BeNissu'in*, Wilna 1930 (R. Yehudah Lubetsky, ed.)
HKT	"*Hafqa'ah, Kefiyyah, Tena'im*" (Working Papers of the Agunah Research Unit, no.12, June 2008): http://www.mucjs.org/HKT.pdf (Abel)
IM	*'Iggerot Moshe*
Morgenstern	"Rabbi Morgenstern's Agunah Solution" (Working Papers of the Agunah Research Unit, no.5, June 2008): http://www.mucjs.org/Morg.pdf (Abel)
OMH	*'Otsar Mefareshey HaTalmud*, *Gittin* I & II, Jerusalem 5757 & 5760 respectively
OH	*'Oraḥ Ḥayyim*
Plight	"The Plight of the *'Agunah* and Conditional Marriage" (Working Papers of the Agunah Research Unit, no.4, November 2008): http://www.mucjs.org/MELILAH/2005/1.pdf (Abel)
SA	*Shulḥan 'Arukh*
SHG	*Shiltey HaGibborim*
SQN	*Seder Qiddushin WeNissu'in* (Freimann)
TBU	*Tenai BeNissu'in UvGet* (Berkovits)
Yad	*Rambam, Yad HaḤazakah* (= *Mishneh Torah*)
YD	*Yoreh De'ah*

Contents

The contents of this book are purely theoretical. Nothing written or cited in it is intended for use in practice. Any practical question in the area of personal status in Orthodox Judaism, whether touching upon marriage, divorce, bastardy or conversion, must be submitted to those with the appropriate Orthodox halakhic authority.

Introduction

An Outline of the Problem

Once a Jewish couple have been married in accordance with Orthodox Jewish law – in the ceremony known as *qiddushin* (see pp.3-4, below) – the marriage can only be dissolved, during the lifetime of the husband, by a bill of divorce – known as a *get* – handed by the husband to the wife. Although monogamy is the current practice in the Jewish world, in biblical and talmudic law a man is permitted to practise polygamy whereas a woman cannot have more than one husband at a time. For her to do so would be a capital offence of adultery. Furthermore, any children conceived from her second husband before she received a *get* from the first – regardless of whether there had been a civil divorce – would be classified as illegitimate progeny (*mamzerim*) and would be permitted to marry only into a very limited segment of the community and even then any children from that marriage would likewise be *mamzerim*.

On the other hand, a man who takes a second wife without having divorced his first, though in violation of a ban of excommunication (at least in the case of Ashkenazi communities) issued about 1000 years ago and attributed to Rabbenu Gershom, would not be committing adultery and any children born from that second union would not be *mamzerim*. Thus Jewish women, in matters of matrimony, are distinctly disadvantaged.

This is not all. The Talmud records a tradition, based on Deuteronomy 24:1, that a *get* is valid only if written by the husband *of his own free will* (*Yevamot* 112b. Cf. Rambam, *Yad HaḤazaqah*, *Gerushin* 1:1, 2). If he is forced to write it and deliver it, or, more appropriately, to agree to have it written and delivered, it would usually be disqualified as a coerced divorce – *get me'useh*.

Clearly then, if an Orthodox Jewish married couple split up and there are, as often, disagreements and recriminations, the husband is in a position simply to refuse to give the *get* unless and until he receives everything he wants. If he wants revenge, this can take the form of refusing his wife a divorce for the rest of his life.

Even in those cases where the Talmud permits forcing the husband to agree to the divorce (see *EH* 154) we have problems nowadays. In talmudic times the State apparatus would flog him until he agreed (*Mishnah 'Arakhin* 5:6). In today's world that is usually not possible. Reasoned argument or persuasion can be sufficient; bribery has, sadly, sometimes to be resorted to but often, because of the husband's desire for revenge or due to his pure spite, no solution can be found. In Israel, where imprisonment or even solitary confinement can be employed, the chances of

success are better but it doesn't always work.

Five approaches to this problem have been proposed over the years:

(i) the replacement of *qiddushin* with concubinage,
(ii) the preparation of a *get* at the time of the *qiddushin*,
(iii) the retroactive annulment of the marriage by enactment of the Jewish religious authorities,
(iv) the coercion of the husband,
(v) the introduction of a condition into the *qiddushin* formula.

The proposal in this work is a tripartite solution based upon (ii), (iii) and (v) with the possible addition of (iv) in the State of Israel.

Chapter One

Conditional Marriage

The Formula for Conditional Qiddushin/Nissu'in

The formula would have to conform to the rules of conditions as set down in the Codes and *Responsa* (for example, condition preceding contract, doubling to reflect effects of conditional fulfilment and breach, and positive result preceding negative result) and would have to command unanimous consent amongst the *Posqim*. Great care would have to be taken so that the meaning of all terminology employed would be abundantly clear. *Even so, no condition could ever be employed without the approbation of the Gedoley haDor, the leading sages of the Orthodox Rabbinate*.

There are many examples in the Mishnah (e.g. *Qiddushin* 2:3) of conditions in *qiddushin* and these are accepted into the sphere of practical *Halakhah* without question (*EH* 38). So it would seem that we have here a straightforward and ample solution. It is not, however, as simple as that.

The problem arises when (as will always be the case with a condition to avoid '*iggun*) the condition is meant to apply *not only to the qiddushin*, executed by the statement of the groom ("Behold you are betrothed to me with this ring according to the Law of Moses and Israel") as he places the ring on her finger before two valid witnesses, *but also to the nissu'in*, the later stages of the marriage process (*ḥuppah*, *yiḥud* and *bi'ah* = canopy, seclusion and intercourse), because the Talmud says (*Yevamot* 107a et al.) as a general rule, *'eyn tenai benissu'in*: there is no condition in *nissu'in*. (The *qiddushin* forbid the bride to every man; the *nissu'in* permit her to the groom.)

However, it is accepted by most authorities that the Talmud does not mean that a condition in *nissu'in* is *impossible* but only that if the couple are joined in *qiddushin* conditionally and then enter *nissu'in without repeating the condition* it is *presumed*, or at least *suspected*, that they have foregone the condition and have entered their marriage unconditionally (*Tosafot*, *Yevamot ibid*., s.v. *'Amar Rav Yehudah*). The reason they would, or at least might, do this is that they would not wish to cohabit in a relationship that might retroactively prove to be promiscuous should the condition be unfulfilled and the marriage be thereby retroactively annulled. Some say that even if they were not religious and not concerned about promiscuity they would still prefer the definite relationship of an unconditional marriage to the comparatively uncertain relationship of a marriage predicated on a

condition (see below, p.21). On this view, one can be sure that the couple do not wish to cancel the condition only if they repeat it directly before each stage of *nissu'in*.[1]

Nevertheless, because there are so many concomitant complications and dangers inherent in conditional marriages (see below), there is only one case recorded in the codes (*EH* 157:4, gloss) and (after a period of uncertainty) ultimately accepted by the later (= post-*Shulḥan* '*Arukh*) authorities where a conditional *qiddushin and nissu'in* is accepted and that is the case of the apostate brother.

The Apostate Brother

If a man dies childless his widow is bound to her husband's brother who either marries her (*yibbum* – levirate marriage) or releases her by *ḥalitsah* (the removal of his shoe etc.), as described in Deuteronomy 25:5-10. The usual rule nowadays is to allow *ḥalitsah* only. Until *ḥalitsah* is performed the widow cannot remarry.

It sometimes happened that a man seeking a wife had a brother who had apostatised and who, should *ḥalitsah* become necessary, would refuse, on principle or out of spite, to go through the ceremony. Such a person was unlikely to find a woman willing to marry him, because she would fear that should he die childless and the brother still be alive she would never be able to perform *ḥalitsah* and, therefore, never be allowed to remarry. Therefore, when a man with such a problematic brother wanted to marry, it was permitted for him to do so with a condition, first introduced by Rabbi Yisrael of Bruna (c.1400-1480, Germany), in his *qiddushin* and *nissu'in*, stating that should circumstances that create the need for *ḥalitsah* arise for his wife, then he is not now marrying her and so she will not be bound to her brother-in-law and will not require *ḥalitsah*. This solution was ultimately used for other cases where *ḥalitsah* would not be possible – where the brother was dumb, insane or missing. The full details of this condition are set out *inter alia* in Rabbi Y. M. Epstein, '*Arokh HaShulḥan*, *EH* 157:15-17.

Extension of the Condition to all Marriages

A number of attempts have been made to expand the application of conditions to all marriages, in order to obviate the tragedy of '*iggun*. I shall attempt to describe these proposals, the opposition they aroused, the differences drawn by the

[1] In such a case it would be necessary to make prior arrangements for the wife's future financial support. Otherwise, with the retroactive dissolution of the marriage, the *ketubbah* also would be annulled and she would lose all her post-marital rights. See Rabbi B.M.Ḥ. Uzziel, *Responsa Mishpetey* '*Uzzi'el EH* 44 and similarly Rabbi Eliyahu Ḥazzan, *Resp. Ta'alumot Lev EH* I.5. The same would be required in the case of retroactive *hafqa'ah* but see below, text at note 142.

opponents between conditions to avoid the need for *ḥalitsah* and conditions to avoid the need for *get*, and suggested responses to the opposition.

Divorce in France was unknown until the introduction of civil divorce on 29th July 1884. In order to avoid the disastrous consequences of Jewish women who had been divorced civilly remarrying without a *get*, the French rabbinate, after failed initial attempts at a solution by way of communal annulment and the recognition of the State divorce as a *get*,[2] sought the advice of Rabbi Eliyahu Ḥazzan, Chief Rabbi of Alexandria 1888-1908, who suggested, somewhat guardedly, the introduction of conditional marriage.

The essence of his response, as recorded by Freimann (*SQN* 389), reads as follows.

> Perhaps there is hope by means of a condition at the time of *qiddushin* and *nissu'in* [presumably = *ḥuppah*] and at the time of seclusion [presumably = *yiḥud* and *bi'ah*]. I know that this permissive ruling is not generally agreed upon; nevertheless, it is of some help, because those who allow it are fit to be relied on – in the time of pressing need in which we find ourselves – for the rescue of the daughters of Israel and in order not to increase *mamzerim* in Israel. (*Responsa Ta'alumot Lev* III 49).

Rabbi Ḥazzan also sent a copy of this *responsum* to Rabbi Ḥayyim Bijirano – Sage of the Sefaradim in Bucharest who had also been asked by his community to find a solution for '*iggun* (*ibid*., 48).

In 1887 the French rabbinate decided to accept the suggestion of Rabbi Ḥazzan and to introduce a conditional clause into every Jewish marriage in France stating that if the State judges should divorce the couple and the husband will not give a divorce according to the Law of Moses and Israel, the betrothal shall not be effective.[3]

Rabbi Lubetsky describes (*ETB* 4, col. 1, line 11) this proposal of the French rabbinate to introduce a condition into marriage, but fails to mention the fact that it was based on a *responsum* of Rabbi Ḥazzan. Due to the fierce opposition aroused by the proposal the matter was dropped only reappearing in 1907 in the form of a condition that did not mention the *get*: "Behold you are betrothed to me on condition that you will not be left an '*agunah* because of me so if the State judges should divorce us this betrothal shall not be effective."

---

2 *ETB* 2. Cf. Atlan 213 at n. 5, quoting *L'Univers Israelite* IV (1885) 101-03.

3 For 1887 – as opposed to 1893 given by Freimann (*SQN*, 389, para. 4) – see *ETB*, p. 5, col. 1, top.

Objections (R. Lubetsky in 'Eyn Tenai BeNissu'in) and Responses (R. Berkovits in Tenai BeNissu'in UvGet)

In the following paragraphs the concluding citations in square brackets refer to all preceding paragraphs as far as the previous citation.

The objections cited in R. Lubetsky's *'Eyn Tenai BeNissu'in* are of three types (cf. *TBU*, 57): ethical and policy-driven, legal (halakhic) and practical.

A. Ethical and Policy-Driven Arguments

A1. *Objections: Undermining Jewish Marriage?*

1. Introducing such a condition on a general basis is close to destroying the institution of *qiddushin*, *get*, *yibbum* and *ḥalitsah*. The Talmud refers to the prohibition to abrogate the commandment of *yibbum*, for example by marrying the mother of one's brother's wife so that in the event of the death of the brother without children it would be impossible to perform a levirate marriage as the sister-in-law would be one's wife's daughter also (*Yevamot* 17b), and elsewhere there is criticism of the abrogation of the commandment of *tsitsit* by avoiding the wearing of four-cornered garments (*Menaḥot* 41a). The French proposal is not as bad as the former but it is similar to the latter in that it is a search for legal ways of avoiding the commandments.

   [*ETB*, Rabbis: D. Z. Hoffmann 17, Breuer 21, Tovish 26.]

2. The civil law will be seen as the mistress being obeyed by the law of the Torah and the Reform movement will say that what they rid Judaism of openly (*get* and *ḥalitsah*) the Orthodox got rid of surreptitiously and this *Ḥillul Ha-Shem* would not be obviated even if the condition were to be formulated in a halakhically permitted manner.

   [*ETB*, Rabbi D. Z. Hoffmann 18.]

3. Another argument against the condition is that it creates a situation of *ha'aramah* (evasion of the law) in order to jettison *qiddushin*, *get*, *yibbum* and *ḥalitsah* because the condition makes it clear that the couple really want a civil marriage merely dressed up as *qiddushin*. As the *ha'aramah* is as blatant as if it had been explicitly expressed *and* we are dealing with a case of pentateuchal (as opposed to rabbinic) law it is impossible to apply the

principle of *devarim shebelev 'eynam devarim*.[4]

[*ETB*, Rabbi M. S. HaKohen 31a-b.]

4. Consequently, they are treating Jewish marriage as concubinage because they are making it so easy for either side to walk out and dissolve the marriage through the civil courts (and then, automatically, through the condition) thus replacing Jewish with Noaḥide marriage as recorded in *Yerushalmi Qiddushin* 1:1. The conditioned *qiddushin* (apparently reflecting their desire to create a true Jewish marriage without its attendant possible future problems) is no more than a cover for concubinage.[5]

[*ETB*, Rabbi M. S. HaKohen 29b bottom – 30a top.]

5. This condition would mar the ethos and sanctity of marriage. For example:
   (a) It would be so easy to dissolve the wedding bond.
   (b) Adultery would lose its gravity because the paramour would say, "Maybe she is not married because she need only go to the civil court and undo her marriage retroactively."

[*ETB*, Rabbis: D. Z. Hoffmann 18, P. L. Horowitz 27, M. S. HaKohen 30, Tenenbaum 32, Zilberstein 38, Schwartz 42.]

Responses

R. Berkovits recognises important weaknesses in the French condition and does not set out to defend it (*TBU* 67) though it could be defended against some of the critique levelled against it. He furthermore produces evidence from within *ETB* itself to demonstrate that the objections put forward therein were aimed only at the condition(s) proposed by the French rabbinate and nowhere in that pamphlet is a ban on conditional marriage *per se* promulgated. He suggests that a condition that makes the *bet din* the arbiters of the matter rather than the civil courts could be halakhically and ethically acceptable, for example one which would retroactively annul the marriage if within two years of a civil separation and the advice of the *bet din* to divorce he still maintains his refusal to grant her a *get*. He refers to this or some similar condition as "our condition": *TBU* 57-8, 166-68.

R. Berkovits argues that none of these concerns (above, paragraphs 1-5) is relevant to his condition according to which the State alone achieves nothing; their

[4] Unexpressed intentions – "We really want civil marriage not true *qiddushin*" – are, as a rule, of no legal consequence. Here, however, where the true intention is obvious, and we are dealing with a matter of biblical import, they *are* of legal consequence and the fact that they deny it and claim that they do indeed want a Jewish marriage is of no avail.

[5] Civil marriage, concubinage and Noaḥide marriage are, halakhically, three names for the same thing.

divorce decree must be accompanied by a *get* from the husband (which is usually given) and only in rare cases when he refuses *though the bet din says he ought to give it* will the marriage be annulled.[6] Therefore, adultery will still be a serious matter because the marriage will only be retroactively annulled if a *bet din* says he should give a divorce *and* he refuses to do so – not a common combination (para. 5); she can't just walk out (para. 4); the annulment of the marriage will be only through his refusal to accept the counsel of the *bet din* so in no way will the State be seen to be in charge nor will any evasion of Jewish law be apparent (paras. 3 & 2).[7] It would not be the end of *gittin* because probably he will give a *get* of his own accord since he knows that he will achieve nothing by refusal since then the marriage will be annulled. If in spite of that he doesn't give it, it is still possible that a *bet din* will persuade him to do so. If a *bet din* says he is right not to give it – that's also no problem. Only in cases where they say he ought to give a *get* and he refuses will there be annulment (para. 1): *TBU* 57-8.

A2 *Objection:* '*Wife-Swapping*'

Legalised wife-swapping could become the norm as the wife would be free to marry another by means of retroactive annulment of her first marriage and then to annul the second marriage and return to her first partner. The Torah, however, forbids a divorced woman to return to her husband if she was married to another and her second marriage had ended in divorce or widowhood (Deuteronomy 24:4) and Ramban there explains that this was to make it impossible for people to legally swap their wives and then take them back.[8] By means of the retroactive annulment that the French rabbinate want to make available to all, this form of wife-swapping would be legalised because relationships could regularly prove to be no more than concubinage (to which the above-mentioned Torah prohibition does not

6 Note that R. Berkovits does not limit his suggested condition to cases where the Talmud says *kofin* or *yotsi*' (we *force him* to divorce or *he must* divorce) but he includes all cases where it is proper, becoming, to do so – using the term *min hara'uy* (one could also describe the required behaviour as *kehogen*). By this, I think he means cases where there is a moral obligation to give a *get* (a sort of *ḥiyyuv bediney shamayim*) but I don't think he refers to cases where the husband is in the right but is asked to act piously beyond even moral obligations (*middat ḥasidut*).

7 We may add that since annulment will only be used to undo a marriage *where the bet din has said that it should be ended* (by divorce) no *ḥillul HaShem* is being committed, since the annulment will only serve to bolster the power of the *bet din* either because the mere threat of annulment by condition will encourage the husband to give the *get* or, if he proves obstinate, because the annulment will achieve by means of dissolution that which the *dayyanim* advocated by means of divorce.

8 For an early ascription of such behaviour to the peoples of the biblical period see the *midrash* quoted in Rashi to Genesis 10:14.

apply). Though legal, such conduct would be highly immoral.

[*ETB*, Rabbis: P. L. Horowitz 27, Zilberstein 38, Schwartz 42.]

Response

R. Berkovits argues, however, that any such concern is not applicable in the case of his proposed condition. Are we really to be concerned that in order to exchange wives people will (i) go to the civil courts and obtain a divorce (which they may not receive) and (ii) go to the *bet din* to obtain an order (or advice) to the husband to give a *get* (which they may well not obtain because the *bet din* will not be so easily satisfied that the circumstances justify divorce) and (iii) achieve annulment by his refusing to give the *get*? Surely not: *TBU* 67. (Cf. *Responsa Maharam Padua* 19 where it is stated that a concubine who had left her husband and been married to another man with *qiddushin* and then divorced, is permitted to return as a concubine to her first husband though he would prefer, he says, that she should reunite with her first husband with *qiddushin*. In either case, he says, there would be no problem of *maḥazir gerushato*. At no point does he express disapproval of her returning to her former husband.)

A3 *Objection: Connivance of Religious Authorities in a Sin?*

Against the argument of the French rabbinate that although their condition is not ideal it is still better by far to allow women to remarry *with* a condition and *without* a *get* than allowing a situation to develop wherein married women will remarry *without* a condition and *without* a *get*, the Hungarian rabbinate respond with a quotation from Rabbi Yitsḥaq ‘Aramah[9] in gate 20 of his ‘*Aqedah* where he writes that even a great sin of a private individual committed without the knowledge of the public and without the connivance of the religious authorities is preferable to even a small sin committed with the knowledge of the public and with the connivance of the religious authorities.

[*ETB*, Hungarian protest 49. Cf. Rabbi Tenenbaum 32.]

Response

R. Berkovits responds that they wrote this because they maintained that the condition of the French rabbis was against the *Halakhah*. However, we have proven clearly that our condition is as far from that condition as east is far from west. If it is true, as Rabbi Kook *zts*’’*l* said,[10] that according to the *Halakhah* a

9 C. 1420-1494.

10 See below, text at note 98.

condition of this nature at *qiddushin* and *nissu'in* is theoretically possible, one can certainly not maintain such a stance [of refusing to act].

Especially is this so nowadays when it is no longer a question of individuals but a problem of general import which touches upon the sanctity of the entire people. We no longer have communities as in the past with record books in which to list the tainted families. In the present situation in most of the exile of Israel we have neither the possibility nor the power to keep ourselves separate from those families as regards marriage.

In our many sins, our generation is not like theirs. For example, in *ETB* (5) one of the rabbis[11] put forward a suggestion to the French rabbinate that instead of a condition they should institute that after civil divorce if the former husband wishes to marry another woman no rabbi shall organise for him *ḥuppah* and *qiddushin* before he frees her (his first wife) with a *get* in accordance with the law of the *Torah*. He concludes his words with a question of the innocent: "Is that not enough?". Happy is the generation whose rabbis could still believe in enactments like that!

How much the situation has changed for the worse in our time we can also understand from a quotation of one sentence from a letter of the "mighty ones" of the previous generation, namely "The Elder Decisor" the Gaon Rabbi David Freidman *zts''l*, *Av Bet Din* of Karlin and the Gaon Rabbi Ḥayyim Ozer Grodzynsky *zts''l*. This is what they say: "Even the rabbis of the Reform movement have not dared to touch the fundamentals of the law of marriage and divorce so that they should not be cut off from the congregation of the people of Israel!"

That was the situation in their time, at least in Europe. Most of the Jewish people live nowadays in lands where the Reform rabbinate will officiate at a marriage of any two people[12] so long as they have been divorced from any previous marriage in the civil courts and they do not care whether or not the woman has received a *get*.

Furthermore, one cannot say that what we are trying to do is an enactment for the wicked. Nowadays, the majority of our brothers who go in the ways of Reform did not forsake the way of the Torah and the *Halakhah*. Rather, they have never known it; they are like "kidnapped children":[13] *TBU* 69.

11 Rabbi Y. Lubetsky.

12 Even, nowadays, at intermarriages and single-sex partnership ceremonies.

13 I.e., taken from their parents and brought up without halakhic Jewish observance – cf. *Shabbat* 68b.

A4. *Objection: Thinking of Divorce at the Time of Marriage*

Rabbi Pinḥas HaLevi Horowitz objected to the French condition and wrote that besides [objections from the point of view of] our Holy Law, it is an abomination from the viewpoint of etiquette and human decency, and an evil device, that at the time that a man enters into the bond of marriage with "the wife of his covenant" (Cf. Malachi 2:14) he should already be thinking of how to be rid of her: *ETB* 27.

Response

Begging the forgiveness of His Honour, R. Berkovits responds that, to the poverty of his understanding, Rabbi Horowitz has overstated the case. If the couple were agreeing to such a condition as an individual exception to normal practice, perhaps his criticism could be justified. If, however, there were an enactment in order to avert tragedy and it were to become the regular custom, there would surely be nothing to fear because each would automatically understand that the condition was necessary for the public benefit but it does not reflect their personal feelings for each other.

Was not the *ketubbah* itself instituted so that it should not be easy in his eyes to divorce her? Are we to say that by handing the *ketubbah* to the bride, improper thoughts [of divorce] have already entered into the mind of the husband?: *TBU* 70-71.

B. Halakhic Arguments

B1. *Objections: Conditions Cancelled at Bi'ah*

1. A condition at betrothal may become subsequently cancelled at a later stage of the marriage process (*ḥuppah, yiḥud, bi'ah*)[14]. This is because the couple will (or may) forego the condition so that the *qiddushin* become retroactively unconditionally valid[15] or because they will (or may) use the act of intercourse to create an unconditional *qiddushin*.[16] Although this latter possibility in principle requires two witnesses to the intercourse, the situation may often be regarded as being the focus of "virtual testimony", so that if the couple live together as man and wife and this is public knowledge this can be considered testimony to intercourse for the purpose of

[14] See above, p.3.

[15] Rif, Rambam, *Tosafot*, *SA EH* 38:35. See *TBU* 23.

[16] Rashi, Ramban, Rashba, Rosh, *Tur* – see *TBU ibid*.

qiddushin: *Bet Shemuel*, *EH* 31:9, sub-para. 22, quoting Re'ah (see Appendix I). In either case their reason would be that they do not wish to cohabit in a relationship that may prove retrospectively to be promiscuous.

[*ETB*, Rabbis: Lubetsky 8, 13, 14; Hirsch 19-20,
S. M. HaKohen 22, Y. Y. Rabinowitz 24,
Vinter 25, Tovish 26, Horowitz 27, Epstein 33,
Danishevsky 34-5, Zilberstein 38, Shapira 40.]

2. This is not a problem in the case discussed by Mahari Bruna – the case of the apostate brother[17] – where the condition will retroactively dissolve the marriage only if there are no children and only after the death of the husband. It is argued that in such a case the couple will not mind if the relationship becomes retroactively promiscuous because their main concern is that there should not be "tainted" children born by means of an intercourse that ultimately proves illicit. Furthermore, the husband is not too concerned about something that occurs (albeit retroactively) only after his death. Thus the condition will be maintained. The condition of the French rabbinate, however, would retroactively dissolve the marriage during the husband's life-time and would be effective even if there were living children from the marriage.

[*ETB*, Rabbi Lubetsky 4, 9, 13; London *Bet Din* 15;
Rabbis: Tenenbaum 32, Danishevsky 35.]

3. The *Naḥalat Shiv'ah* states[18] that only if the marriage were to be retroactively annulled after his death would the husband not mind the illicit intercourse that would be concomitant with the retroactive annulment[19] and that is why Mahari Bruna's condition is acceptable.[20]

[*ETB*, Rabbi Lubetsky 30, footnote.]

4. The couple could declare that they do not care about the possibility of promiscuity by insisting on their condition at all the stages of *nissu'in*. The French condition, however, which was made only at the *qiddushin*, would be invalid. To be effective, it would have to be a replica of the apostate

17 See above, p.4.

18 In this paragraph, the distinction between during life and after death is attributed by R. Lubetsky to a classical authority – Rabbi Shemuel ben David HaLevi, author of *Naḥalat Shiv'ah*.

19 Thus he will feel no need to cancel his condition.

20 This means that any condition that would annul the marriage during his lifetime, creating retroactive illicit intercourse, would be anathema to him and we would therefore fear a cancellation of the condition during *nissu'in*.

brother condition, i.e. it would not only have to be made at *qiddushin* but also at *ḥuppah* and again at *yiḥud* and again at the first *bi'ah*. Two valid witnesses would have to hear the condition each time and the bride and groom would have to swear an oath '*al da'at rabbim*[21] that they will never forego the condition.

[*ETB*, Rabbi Lubetsky 4; Hungarian protest 49.]

5. Is it really possible in today's world (1908), especially when the parties are not so religiously committed, to arrange witnesses for the act of intercourse – to hear the condition, albeit from outside the room, being recited by the groom to the bride while they are in bed together?

[*ETB*, Rabbis: Lubetsky 4, 9; Hoffmann 17, Hirsch 20, M. S. Dvinsk 30, Tenenbaum 32, Danishevsky 36, Hungarian protest 49.]

Response to paragraphs 1-2

The concern for retroactive illicit intercourse is relevant in the cases in the Talmud and *Shulḥan 'Arukh*[22] where the condition refers to the *present status* of the wife, for example where the groom made *qiddushin* on the condition that the bride is not subject to vows. The groom knows that at any moment it could become apparent that this woman has misled him and that he was tricked into marrying her so that the marriage is really non-existent because he never wanted such a marriage. If this happened after intercourse it would be the case that he has engaged in sexual relations outside marriage – *bi'at zenut*. To avoid this possibility it is presumed that, if he has not discovered, between the *qiddushin* and *nissu'in* (a period of 12 months in talmudic times), that she is subject to vows and he nevertheless enters *nissu'in* without repeating his condition, he has foregone the condition. Thus the *qiddushin* become retroactively unconditionally valid[23] or the act of intercourse functions as an unconditional *qiddushin*.[24]

However, in the case of Mahari Bruna's condition the point is not that the husband accepts upon himself the possibility of illicit intercourse should the marriage be ultimately retroactively annulled. Rather, the fact is that even if the marriage were to be retroactively dissolved *there would be no illicit intercourse* because both of them agree to live together as man and wife although both know that the condition could be breached at some future time and that the marriage

21 An oath dependant on the mind of the public. Such an oath can never be annulled. Cf. *Gittin* 36a et al., *Yoreh De'ah* 228:21. See the discussion in *OMH*, *Gittin* II, cols. 573-82.

22 *Ketubbot* 72b-74a, *EH* 38:35.

23 Rif, Rambam, *Tosafot*, *SA EH* 38:35. See *TBU* 23.

24 Rashi, Ramban, Rashba, Rosh, *Tur* – see *TBU ibid*.

would then be retroactively annulled. She has not misled him and he has not misled her. Thus, there is no reason for them to forego the condition.[25] Rav Landsofer (quoted in *Me'il Tsedaqah* no. 1) quotes the *Baḥ* who quotes Rabbi David Kohen (*Responsa Redakh*, *bayit* 9) as saying that since she remains married to him, albeit doubtfully, all his life, and can be parted from him only with a *get*, in no way can their sexual relationship be considered promiscuous. The same view is expressed in *Shav Ya'aqov EH* II no. 39, in *Naḥalat Shiv'ah* 22:8 and in *Tsal'ot HaBayit* (at the end of *Bet Me'ir*), sec. 6.[26]

The last mentioned brings indisputable proof from the Rosh (*Qiddushin*, *Ha'Ish Meqaddesh* 8 – and R. Berkovits adds Rabbenu Yeroḥam (*netiv* 22: 5, 8) in the name of *Tosafot*) – that even where there is no married status whatsoever (even rabbinically) and *no get or even me'un*[27] *is required* (for example a girl in her minority married to a husband by her mother in the absence of her (living) father or a boy in his minority married to a girl in her majority), even there, there is no question of illicit intercourse since they are cohabiting in a decent manner as man and wife. Such is the ruling in the *Tur* and *Shulḥan 'Arukh EH* 37:14. (In the case of both partners reaching majority and continuing to cohabit a *get* would be required to end the marriage.)

How much more so can this be said of a marriage governed by the condition of Mahari Bruna, where she cannot simply walk out without a *get*, and only in a small minority of cases (where the husband died childless, predeceased his wife, never divorced her and the problematic brother-in-law is still alive) would the marriage ever be annulled. Similarly, our condition results in a marriage which she can exit only with a *get*, and only in a minority of cases (where there has been a civil divorce *and* he has been told/advised by a *bet din* to give a *get and* he has refused to do so) would there be annulment, so there, also, there would be no possibility of

25 And it need not, therefore, be repeated after *qiddushin*.

26 See similarly in *Responsa Rivash* 194 (cited in *Mishneh LaMelekh*, *'Issurey Bi'ah*, 18:2, s.v.*Wera'iti*); *Shittah Mequbetset*, *Ketubbot* 3a, s.v. '*Od katav z"l welikh'orah* (according to Rashi's understanding of talmudic *hafqa'ah* – but the logic may fit annulment by condition also. See similarly in *Responsa Rambam* (Blau) no. 356); *Responsa Bet Naftali* 45 (i) s.v. *uve'emet*; *Noda' BiHudah* II *EH* 27 (at the end); *Responsa Sefer Yehoshua* (R. Yehoshua Heshil Babad) *Pesaqim Ukhtavim* sec. 10: 'since their relationship is in the form of a marriage' – which was stated regarding talmudic retroactive annulment but would clearly apply to conditional annulment also; *Responsa Maharam Schick EH* no. 70, paras. 13-16 (referring to the apostate brother and based upon *sefeq sefeqa*, *rov* and *she'at doḥaq*; *Responsa Melammed Leho'il*, part III (*EH* and *HM*), no. 22, s.v. *Taqqanah kezot* (referring back to the *responsum* of Maharam Schick); *Responsa She'erit Yosef* (R. Yosef Reizen), no. 8 (regarding mistaken transaction). Cf. *OMH Gittin* II, 33a, cols. 427 n. 52, 433 n. 81 and 438 n. 114.

27 A female minor whose father has died may be given in marriage, with her consent, by her mother or brothers, if they feel that this is necessary for her protection from promiscuity, and such marriage is rabbinically sanctioned. Its annulment does not require a *get* and is brought about by a verbal declaration by the girl of her desire to end the relationship. This is known as *me'un* – refusal.

promiscuity and where there is no promiscuity there can be no taint on the children.

Indeed, R. Berkovits argues that his condition creates a marriage that is less uncertain than that which the condition of Mahari Bruna brings about because, in the latter case, the husband has no control over whether or not the marriage will one day be annulled since, unless he divorces her, he obviously cannot stop a situation requiring *ḥalitsah* from arising. In the former case, however, the only way the marriage could be annulled is if he is recalcitrant towards the advice of the *bet din* and stubbornly refuses to give his wife a *get*. It is obviously within his power not to behave in such a way: *TBU* 32-34.

More than this we find in *Tosafot*, chapter *Hashole'aḥ*, regarding the principle of annulment (*Gittin* 33a s.v. *We'afqe'inho rabbanan*), that Rabbi Shemuel (= Rashbam) asks how we can ever make an adulterous married woman liable to the death-penalty since the warning[28] is a *hatra'at safeq*[29] for perhaps he will (at some future time) send her a *get* (through an agent) and cancel it.[30]

Rabbenu Tam answered that in the above case the warning would not be considered doubt-bound because we follow the *rov* (majority) and the majority do not divorce their wives and of those who do the majority do not cancel the *get* that they have sent through an agent before it reaches the wife without informing the wife or the agent. In addition, we attribute to her the *ḥazaqah* (presumed status) that she has now – that of a married woman.

Rashba in his *novellae* to *Ketubbot* 3a answers similarly the questions of the above-mentioned *Tosafot*. However, he adds another answer: since the cancellation of the *get* is dependent on others, namely the husband, and in no way is it dependent on her, the warning is considered certain. This answer also applies to Mahari Bruna's condition, where the annulment comes about through circumstances quite beyond her control. So , too, with R. Berkovits's condition: the

[28] This must be given immediately prior to the sin; without it (almost) no death penalty can be carried out.

[29] I.e. "a doubt-bound warning" which, according to some views in the Talmud, is not valid.

[30] Rabbi Shemuel means that he might do this without informing his wife or the agent, in which case the *get* is invalid in Biblical Law but the Sages, in order to avoid the possibly calamitous results of such behaviour, declared it valid, which in itself is impossible but is achieved by means of the Sages' *retroactive annulment of the marriage*. (This is the case according to Rabban Shim'on ben Gamliel. According to Rabbi, like whom the *Halakhah* is fixed, the husband's cancellation would be effective even though he transgressed the Law by failing to inform the wife or the agent if he at least informed a *bet din* and, possibly, even if he informed two other people. However, even Rabbi agrees that if the husband informed only one other person his cancellation is not recognised and the *get* remains effective.) So the warning given to any married woman regarding adultery is always doubt-bound because we cannot know that the scenario just described will never take place, and if it does she would not be guilty of adultery because it would retroactively work out that she was not married at the time of her intercourse with the second man.

annulment of the marriage is not in her hands but is dependent entirely upon the husband (and the *bet din*). It follows, therefore, that so long as he has not acted in a way that will cause the marriage to be annulled she has the status of a definitely married woman as regards every aspect of the law: *TBU* 58-9 & 70.[31]

Response to paragraph 3 (Naḥalat Shiv'ah)

Rabbi Berkovits expresses astonishment that *Naḥalat Shiv'ah* could say that only if the marriage were to be retroactively annulled after his death would the husband not mind the illicit intercourse that would be concomitant with the retroactive annulment. How can it be that a believing Jew would not care about illicit intercourse just because it was so declared only after his death? Furthermore, there is not a word of this in *Naḥalat Shiv'ah*, as we shall see on examining his words. In *Naḥalat Shiv'ah* 22:8 the author asks how Mahari Bruna could have enacted a conditional marriage in the case of the apostate brother since the Talmud states unequivocally (*Yevamot* 94b, 95b, 107a) that there cannot be a condition in *nissu'in*. He answers that we do not find a condition in *nissu'in* if she leaves him during his life so that his intercourse becomes retroactively promiscuous[32] but if the condition takes effect only after his death and all his life his intimacy with her was on the basis of his betrothal – such a condition we do find in *nissu'in*.[33] In those cases described in *Yevamot* the references are to her leaving him (on the basis of the condition) during his lifetime. It would seem from this that *Naḥalat Shiv'ah* would not agree to any condition that would retroactively dissolve a marriage during the lifetime of the husband.

However, R. Berkovits continues, such a stance requires understanding. In *Noda' BiHudah* I *EH* 56 the questioner (a pupil of Rabbi Landau) mentions that he has seen "in a certain responsum" that there is a difference between a condition that will undo the marriage after the husband's death (which can be made because the acts of intercourse will not be retroactively considered promiscuous, so the couple will feel no need to cancel it) and one which will undo it at some time during his life (which cannot be made because the acts of intercourse will be retroactively considered promiscuous so they might cancel it at *nissu'in*). It seems that the questioner had seen this distinction in *Naḥalat Shiv'ah* and asks what

31 Whereas one could debate whether any of these arguments (Redakh, Rosh, Rabbenu Tam (2) and Rashba) provides justification for the condition of the French rabbinate – especially that of 1907 – it seems clear that both the condition of Mahari Bruna and that of R. Berkovits would be vindicated by each one of them.

32 And therefore we fear that he will cancel the condition at *nissu'in*.

33 R. Lubetsky and others understood this to mean that in this case the condition will not be cancelled by the groom at *nissu'in*, because he does not care about promiscuity that can only become retrospectively apparent after his death. See above, p.12, no.2.

difference it makes, since when the marriage is annulled it will surely *always* result in retroactive illicit intercourse? One could distinguish between these two cases by saying that when the marriage is dissolved retroactively after his death he does not object (because he won't be there to see it) and will therefore not cancel the condition since the retrospective illicit intercourse does not become apparent during his lifetime, whereas when the marriage is retroactively dissolved while he is still living he does object (because he will be there to see it) and will therefore cancel the condition because the retrospective promiscuity becomes apparent during his lifetime. However, surely it is no more acceptable to him to practise illicit intercourse that will become apparent after his death any more than if it will become apparent during his life!

The answer, says R. Berkovits, seems obvious. *Naḥalat Shiv'ah* writes explicitly that when the [*apostate brother*] condition takes effect *after death*, so that during his life he had intercourse on the basis of his betrothal (as part of married life), this is not promiscuous intercourse. The point is clearly that since during the marriage the acts of intimacy were all in a marriage context there can be no problem of promiscuity. When he excludes from this the conditional arrangement where the marriage is undone retroactively *during his life* he is referring to the other case under discussion – the case of *vows/blemishes* mentioned in the Talmud (*Ketubbot* 72b-74a) – for it is only these two cases that he examines.[34] *Naḥalat Shiv'ah* never discussed our type of condition and there can be no doubt that it belongs with the condition of Mahari Bruna since in our condition too the couple are aware that the condition could one day be breached yet still agree to live together as man and wife. That cannot possibly be regarded as promiscuity: *TBU* 53-4; 60.

[34] In this latter case, if he would insist on his condition throughout *nissu'in* and the marriage would be retroactively cancelled if she were found to have been subject to a vow or blemished, every intercourse would be regarded as having been promiscuous because, had she been honest with him, *he would never have wanted the marriage and he would now regret that he had ever been intimate with her, since the entire relationship was under false pretences* (cf. text at notes 22-24 above). We therefore fear that the condition will be foregone at *nissu'in*.

According to R. Berkovits, *Naḥalat Shiv'ah* uses the terminology of 'lifetime' and 'after death' merely as markers for the two cases under discussion: vows and blemishes are called 'lifetime conditions' and Mahari Bruna's is a 'posthumous condition' but the *reason* that the lifetime condition is invalid and the posthumous condition is valid has nothing to do with the fact that one takes effect during his lifetime and the other only after his death. It is rather because in the first case (a condition referring to the present – during the lifetime of the groom), if she is in breach, the groom has been tricked into a marriage he did not want and such a marriage cannot be viewed as valid whereas in the second case (a condition referring to the future – in this case after death but, as Berkovits convincingly argues, not necessarily so) he is fully informed of the possibility of retroactive annulment and willingly takes this on board (as explained above, text at notes 25-31).

Response to paragraphs 4-5

R. Berkovits responds that the question as to whether a condition made at *qiddushin* would be cancelled at *nissu'in* is relevant only when the various stages of *nissu'in* were carried out *setam* (i.e. without repetition of the condition) but if there was a clear declaration that the procedures were on the same condition as that expressed at the *qiddushin* there is no question of the cancellation at any stage of *nissu'in* nor even of the intercourse being intended as an unconditional act of marriage. Thus is the *halakhah* recorded in *Ḥelqat Meḥoqeq* (*EH* 38:49) in the name of *Magid Mishneh*, Rosh and *Hagahot Asheri*. The *Bet Shemuel* (*EH* 38:59) adds *Tosafot* to these sources.

This repetition of the condition, however, is necessary only in the cases discussed in the Talmud such as "on condition that you are not subject to vows". However, in the case of the condition of Mahari Bruna and the condition that R. Berkovits proposes, even without repetition after the *qiddushin* the condition will be effective for each stage of the *nissu'in*, including the intercourse, for the following reason.

Why, he argues, ever make a condition if you know you are going to forego it later because of the fear of promiscuity?[35] Yet the Talmud says that though the *qiddushin* were on condition that she is not subject to vows, if the *nissu'in* took place without repetition of the condition, we must presume that the couple have, or at least may have, foregone the condition. *Ḥatam Sofer* in *responsum EH* II 68[36] explains as follows:

> It makes sense there (in the case of vows) to say that the condition is in suspense until it becomes clear to him whether it has been fulfilled (she has no vows and the marriage stands) or it has been breached (she has vows and the marriage never took place). Therefore, he makes a condition at the *qiddushin* and, although he knows that in the end he will cancel at the *nissu'in*, nevertheless he says, 'Up to the *nissu'in* I shall investigate thoroughly and find out if she is subject to any vows, and anything not clarified by then – this being an unlikely situation – I shall forego and make the marriage unconditional.' However, the condition (made to avoid) the attachment to the apostate levir is one that will not be clarified throughout the lifetime of the husband. If then it was their intention to cancel it at *nissu'in*, why did they make it at all? What point is there in the condition?

[35] Or for any other reason. Obviously, according to R. Berkovits's earlier argument (pp.13-16, *Response to paragraphs* 1-2), that there is no retroactive promiscuity in the case of Mahari Bruna's or his own condition, there is no need to repeat the condition at all because there is no reason to fear that he might want to cancel it and the mere fact that they entered *nissu'in*, *yiḥud* and *bi'ah* silently – i.e. without repeating the condition – would also not imply its cancellation for the reasons now given.

[36] See also *Bet Shemuel EH* 157:6.

Exactly the same argument, says R. Berkovits, could be made for a condition to free her from becoming an '*agunah* due to her husband's refusing her a *get*: *TBU* 52-3.

Furthermore, R. Berkovits points out that there are additional reasons for saying that even without repeating the condition after *qiddushin* we may assume that they do not intend to forego it. Although the following reasons were given by the earlier *Posqim* only *vis-à-vis* the condition of Mahari Bruna, R. Berkovits argues that they clearly apply with equal force to his own proposed condition:

(i) Nowadays when *qiddushin* and *nissu'in* are performed together there is no reason to think that they mean the condition at *qiddushin* to be cancelled at *nissu'in*, as already pointed out in *Responsa Terumat HaDeshen* (end of no. 223) and in *Ḥatam Sofer* (ibid. s.v. *We'omnam*). The latter states clearly (ibid. s.v. *Wa'ani*, end and s.v. *We'omnam*, end) that the repetition of the condition at the various stages of *nissu'in* is only a stringency and *is not essential*: *TBU* 48.

(ii) The condition was made for her own future protection, so even if he wished to cancel it she would certainly not do so, as pointed out in *Responsa Me'il Tsedaqah* no.1, and an unconditional betrothal cannot happen without her consent. In the Mishnah's case where he made *qiddushin* on condition (that she is not subject to vows) and made *nissu'in* without repeating the condition we fear that he cancelled the condition because it was in his interest only and she certainly would not object to its cancellation: *TBU* 37.

(iii) There would be no illicit intercourse even if the marriage was retroactively annulled in the case of Mahari Bruna's condition or our condition, so that *neither of them need feel any need to cancel it*: *TBU* 32-34.[37]

Rabbi Aqiva Eiger[38] says (in the case of Mahari Bruna's condition) that the groom must repeat the condition immediately before the first intercourse and also swear an oath "on the public mind" that he will never forego the condition, so that rather than presuming that he may use any future intimacy as betrothal to avoid promiscuous intercourse we must presume that he will not do so in order not to transgress his oath.[39] Why is all this necessary? Surely if the oath is sufficient for all future acts of intercourse so that the condition need not be repeated before each one, it is sufficient for the first intercourse also. Therefore, if at the *qiddushin* the condition were to be pronounced accompanied by an oath "on the public mind" never to forego it at any time that should suffice because we could then rely on the

[37] As explained above, text at notes 25-31, and in note 35, above.

[38] 1761-1837, Germany.

[39] A far more serious offence than promiscuous intercourse.

presumption that he would never transgress his oath, neither at any stage of *nissu'in* nor at any act of intercourse.[40]

B2 *Objection: An Objection from Riaz even where the Condition is Repeated before Bi'ah*

Some authorities say that even a condition repeated at *ḥuppah*, *yiḥud* and before *bi'ah* may be cancelled *during* the act of intercourse [*Shiltey HaGibborim*[41] quoting Riaz,[42] *Ketubbot*, *Pereq HaMaddir*].

[*ETB*, Rabbis: Lubetsky 8, Danishevsky 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 and *SHG* who quoted him?]

Response[43]

Not only is this opinion of *SHG* contradicted by *Tosafot* and Rosh but it can be shown that Rif and Rambam also disagree with it.[44] However, the truth is that Rif, Rambam and *Tosafot* do not directly contradict *SHG* because they explain that in a case where he made *qiddushin* on a condition and then he performed *nissu'in* or intercourse without repetition of the condition, the condition may have been foregone and thus the betrothal may have been unconditionally reactivated. If,

40 R. Berkovits's point here is in addition to the arguments raised earlier, according to which a single declaration of the condition at *qiddushin*, even if unaccompanied by any oath, is, strictly speaking, sufficient both in the case of Mahari Bruna's and R. Berkovits's condition.

41 R. Yehoshua Boaz, late 15th-early 16th cent. (henceforth, *SHG*).

42 R. Yeshayahu Aḥaron Zal of Trani, Italy, end 13th cent.

43 The ruling of *SHG* in the name of Riaz is relevant in the conditional cases of the Talmud (vows and blemishes) where a retroactive annulment would render the marriage promiscuous, so that one could argue that in spite of having repeated the condition immediately before intercourse the couple may cancel it to avoid the possibility of a retroactive illicit relationship, but in the case of the condition of Mahari Bruna and in the case of the R. Berkovits condition, where the relationship would be considered licit even when viewed retrospectively after retroactive annulment (see above, note 40), the couple would not feel the need to forego their condition at intercourse so that the opinion of *SHG* would be of no relevance. Nevertheless, R. Berkovits argues that even where *SHG*'s ruling is applicable – in the Talmud's case of a condition concerning vows or blemishes – even there it need pose no problem, as he proceeds to demonstrate.

44 In *TBU* 45 and 62 R. Berkovits adds also Rabbenu Yeroḥam. I. Warhaftig, "Tenai BeQiddushin WeNissu'in", *Mishpatim* I (5725), 203-210, on p. 206 in footnote 28 records that the Me'iri on *Ketubbot* 73a cites an opinion like that of Riaz in the name of the *Geoney Sefarad* and rejects it.

however, the groom repeated, even once, after *qiddushin*, that all his wedding procedures are predicated on his original condition the betrothal remains bound by that condition and the groom *can no longer forego it* (cf. *TBU* 28. Cf. Ran to Rif, *Ketubbot* 73a, s.v. *Garsinan baGemara'*).[45] *SHG*, however, follows Rashi who explains that the fear is not that he might have foregone his betrothal condition, thus retroactively activating an unconditional marriage, but that he might use his intercourse as a new act of unconditional betrothal. Because he definitely abhors illicit intercourse he may, in spite of having repeated his condition immediately before intimacy, change his mind and use his intercourse as a new act of unconditional *qiddushin*.[46]

This can fit only with Rashi's view (see *TBU* 24) that he *definitely* wishes to avoid illicit intercourse and therefore his intimacy was *certainly* for betrothal. This

[45] I. Warhaftig, *ibid*., p. 209, footnote 52, argues that the Ran's stance is applicable only to vows and blemishes where an insistence on his condition would annul the marriage at the moment of insistence. According to the wording of the Ran this means at the moment he sees the extent of the blemishes or discovers the nature of the vows and refuses to accept them – and his original condition at the *qiddushin* meant that he leaves the matter in abeyance until he discovers the truth of the situation. However, R. Berkovits argues that the same should apply even if he declares his insistence at any other post-*qiddushin* moment without having discovered if there are in fact vows and blemishes and, if there are, what their nature is, so that a future foregoing of the condition would not reinstate it. Even accepting R. Berkovits's extension of the Ran's meaning, it is not possible to deduce from this that in the case of a condition dependent on some future contingency a post-*qiddushin* declaration that he remains insistent about his condition would render it impossible for him subsequently to forego the condition and therefore *a conditional marriage would remain in force*. What the Ran said was that his insistence *immediately annuls the marriage* retroactively so that there remains no marriage at all and no subsequent foregoing of the condition can reactivate the conditional marriage. He did not say that the conditional marriage remains in force! Clearly, where the condition refers to the future, the fact that he insists on his condition at some point after the *qiddushin* does not annul the marriage because – unlike in the case of vows and blemishes – it is impossible for the condition to be breached as yet. Therefore, the Ran's rationale is not relevant. Warhaftig suggests that, in a case of conditions relating to the future, it would be feasible to render a future foregoing of the condition impossible by stipulating in the *qiddushin*-condition that he *does not make the status of his marriage depend on any future mindset that he might develop*. R. Berkovits's argument in this case, says Warhaftig, seems inaccurate.

[46] R. Berkovits is saying that if *SHG* shared the view of the Rif etc. (that the fear is that he might forego the condition and thereby reactivate the original betrothal unconditionally), *SHG* would not then be concerned that the condition repeated immediately before intimacy might still be cancelled at the last instant and the original *qiddushin* unconditionally resurrected. Only because *SHG* follows the view of Rashi etc. (that the concern is that he might use his intercourse as a new, unconditional *qiddushin*) is *SHG* concerned that the condition repeated immediately before intimacy might still be cancelled at the last moment and the intimacy used as a new, unconditional betrothal. I cannot understand this. The reason for *SHG*'s extreme stand is that he maintains that the groom definitely abhors promiscuity and will go to any lengths to avoid even a doubtful encounter therewith. If so, what difference does it make whether this avoidance is to be achieved through a new, unconditional betrothal (by *bi'ah*) or a retroactive, unconditional reactivation of the original betrothal? After all, we have no proof that *SHG* would agree with [R. Berkovits's understanding (see previous note) of the] Ran that once the groom has, post-*qiddushin*, confirmed his condition, he can no longer forego it.

certainty, weighed against the apparent certainty that he stands by his condition,[47] is sufficient to create a doubt – a possibility that he meant his intercourse as a betrothal.

One could argue against this that the Rosh also explains the situation like Rashi (*TBU* ibid.), yet the *Ḥelqat Meḥoqeq* infers from the Rosh's words that a reiterated condition would be effective and breach of the condition would dissolve the marriage and no *get* would be required. However, that presents no difficulty because the Rosh does not understand the assumption that *'eyn 'adam 'oseh be'ilato be'ilat zenut*[48] as a certainty but only as a probability, so that in a case where the condition was not repeated before intercourse (*ba'al setam*) the Rosh says perhaps he thought his condition (that she be without vows, for example) reflected the truth and so he was not careful to conduct his intercourse for the purpose of *qiddushin*. There is thus some doubt as to whether he betrothed [unconditionally] with his intercourse and, therefore, should the condition be breached, she would be only possibly married to him. Hence, the Rosh maintains that in a case where he had insisted on his condition at all stages of the wedding process, the *certainty* of the persistence of the condition will outweigh the *possibility* or *probability* of his having used the act of intercourse as an unconditional betrothal.

Rashi, however, maintains that he would always be determined that his intercourse be not promiscuous and would take no chances so that in a case of *ba'al setam* (he had intercourse without repetition of the condition) we regard his intercourse as *certainly* for betrothal and her marriage to him as *definite* even if the condition be breached. Where he explicitly reiterated the condition before the various stages of *nissu'in*, including the intercourse, it may be that Rashi would accept (i) the certainty of the condition, (ii) the certainty of betrothal by intercourse or (iii) regard the situation as a case of doubt. *SHG* opts for (ii). It is thus clear that *SHG* fits well only with Rashi. It is also clear that Rashi need not agree to the position of *SHG*.

R. Berkovits, however, suggests a different understanding of *SHG* according to which a condition could be formulated to overcome the presumption of its cancellation during intercourse. *SHG* writes that even though his intercourse was on a condition saying to her, for example, "I now have intercourse with you as your husband on the condition that you are not subject to any vow", the marriage will still be valid even though the condition was not fulfilled. The reason is that since no-one wants an intercourse which is illicit we may be sure that when carrying out the act they did intend it as a component of *nissu'in* and not of possible promiscuity, and the fact that he repeated his condition before the

47 Since he just said that his intercourse is governed by it!

48 A person would not make his intercourse promiscuous, when he could make it legitimate.

intercourse merely reflects his conviction that she would now admit it if the condition were unfulfilled, and his presumption therefore is that the condition has been fulfilled. When he discovers later that the condition was not fulfilled it is too late to undo the marriage because *'eyn 'adam 'oseh be'ilato be'ilat zenut*, which *SHG* understands to mean "A person cannot change his legitimate intercourse once it has taken place as such into a promiscuous intercourse." Thus *SHG* does not accord with *Tosafot* who explain *'eyn 'adam 'oseh be'ilato be'ilat zenut* as meaning that because he is unsure of her compliance with the condition he will forego it, so that the original *qiddushin* will be unconditionally reactivated and the intercourse will be definitely legitimate. Nor is his understanding like that of Rashi, who explains that the original condition stands (as regards the *ketubbah*) but the intercourse is intended as a new, unconditional *qiddushin*, i.e. because he harbours doubt as to her compliance with the condition, he now abandons his former position and betroths unconditionally with a legitimate act of intercourse. *SHG* means that the intercourse was intended as between man and wife (*nissu'in*) because he assumed that his condition has been fulfilled.[49] Once this has happened it is impossible to undo it, much though he might like to (as explained above).[50]

One may relate this to the question raised in the Talmud[51] regarding the concept of retroactive annulment, namely that while annulment is understandable if he betrothed with money (for then the Sages can operate *hefqer bet din* and retroactively sequestrate the ring of betrothal from him), it is less clear how it may be effected if he betrothed with intercourse. The Talmud replies that the Sages made his (legitimate) intercourse illegitimate. *SHG* understands that the Sages have this power but no individual has it.

It follows logically from this that if he made clear that he does *not* presume his condition fulfilled and that he realises the possibility of his bride being subject to vows and therefore he is repeating his condition *so that the intercourse will indeed be illicit if the condition is unfulfilled* then, if indeed it is not fulfilled, no *qiddushin*

[49] And not because he has changed his mind at the last moment and opted for *qiddushin* by intercourse.

[50] I do not see how R. Berkovits's interpretation can be right because if this were *SHG*'s meaning the condition would still stand since an act of intercourse intended as a component of *nissu'in* or of the marital relationship cannot create a new *qiddushin* (cf. the explanation of Shemuel's position (*Ketubbot* 72b) by Rashba and Rivash cited in *ET* I col. 554 at n.16). Thus the marriage would remain based upon the original, conditioned *qiddushin*. However, *SHG* says that in spite of the repetition of the condition before intercourse, we consider her unconditionally married after the intercourse!

[51] *Yevamot* 90b, *Ketubbot* 3a, *Gittin* 33a, *Bava' Batra'*, 48b et al.

will have taken place and she will not require a *get* to be free from him: *TBU* 25-27, 61-62.[52]

B3. *Objection: Even Irreligious Jews Intend a Definite Married Status*

Will they[53] swear they will never forego the condition during future intimacy and that their intimacy will never be intended to constitute betrothal? Will they care about the oath? One may argue that they do not care about promiscuous intercourse either but it is not the *sin* of illicit intercourse (about which many people today may not care) that makes couples forego their condition or intend *qiddushin* at intimacy; rather it is their abhorrence of lack of a definite married status that may make them abandon their condition (and this is something that still concerns even the irreligious today) and no oath of theirs (should they be persuaded to make one) is going to outweigh that.

[*ETB*, Rabbi M. S. HaKohen 30; Hungarian protest 49.]

Response

The oath was intended to offset the possibility of their fear of retroactive promiscuity leading them to change their mind at some point in *nissu'in* (especially at the act of intercourse). Since, as has been shown, there would be no such promiscuity in the case of Mahari Bruna's or R. Berkovits's condition, no oath should be needed. Nevertheless, as an added precaution we should adjure them as was done with Mahari Bruna's condition.[54] This oath can be made just once at the *qiddushin*.[55]

If they are the sort of people who do not care about breaking an oath (a most grave transgression) they certainly will not care about promiscuous intercourse (a relatively light offence) so they will not need an oath to dissuade them from foregoing their condition during *nissu'in* in order to avoid the possibility of promiscuity because promiscuity does not bother them.

However, Rabbi Me'ir Simḥah argued that it is not the need to avoid promiscuity that is the prime mover here but the need for security of married

[52] This interpretation of *SHG* is possible only according to R. Berkovits's novel explanation of the former's position. According to the generally accepted way of understanding his view no manner of insistence upon his condition – even if he says that he realises she might be subject to vows and if she is he wishes his intercourse to be illicit – will ever be sufficient to allow us to believe that his intercourse was really on condition because *once he has finished speaking* we believe *he changes his mind* and intends to effect *qiddushin*.

[53] The "orthodox non-observant" Jews of contemporary France.

[54] See above, text at note 21.

[55] See above, text at note 40.

status, for a definite relationship, something which is still desired even by the irreligious[56] who do not feel the gravity of breaking an oath. In order to assure this definite married status, the couple may forego their condition during *nissu'in* and, being irreligious, they will not be deterred by an oath.

R. Berkovits points out that this argument is valid in the case of the Talmud's condition[57] or the French proposal,[58] but in the case of his suggestion there is no need to forego the condition in order to preserve a definite married status because there is a superior solution. All he needs to do is to behave according to the law and ethics of Judaism so that should the situation of divorce arise he will give the *get* on the advice of the *bet din* so that the condition will not be broken and the marriage will not be annulled. The only "advantage" they would gain by using the alternative policy of foregoing the condition would be that *he* would then be able to chain her to a dead marriage and *she* would be able to suffer the agony of being an '*agunah*. Why should we believe that either of them would want to assure themselves, during their *nissu'in*, of such future "rights"?[59]: *TBU* 46, 49, 63-4.

B4. *Objections: Concubinage?*

1. Rabbi Meir Simḥah *HaKohen* of Dvinsk points to the discussion of the *Posqim* regarding the difference that must be drawn between a condition (*tenai*) which is effective in both rabbinic and Torah law and retrospective clarification (*bererah*), which, according to the *Halakhah*, is not operative in cases of Torah law (as opposed to rabbinic legislation). Of the three solutions put forward to this question (that of Rambam, Ramban and *Tosafot*) Rabbi Meir Simḥah prefers that of Ramban. According to this view, the case of a marriage "on condition my (the groom's) father agrees" would be classified as *bererah* (and, as the case is one of Torah law, not effective) since the condition is dependent on human *will* and not on an *act or occurrence* and is thus not like the condition of the Gadites and the Reubenites[60] (which serves as the paradigm for all legal conditions). The marriage would therefore be governed not by the rules of conditions (*Qiddushin* 3:4) where if the condition is fulfilled the marriage (or whatever agreement was being

56 I do not think this is any longer true among non-observant Jews in modern, secular societies.

57 See above, text at notes 22-24.

58 See above, pp.4-5, "*Extension of the Condition to all Marriages*".

59 According to this there would be a problem, if the couple are not religiously observant, in the case of Mahari Bruna's condition, since there the avoidance of annulment is not under his (or her) control. R. Berkovits does not address this. To me it seems that Rabbi Meir Simḥah's perspective on concubinage *vis-à-vis* Mahari Bruna's condition (p.26) provides an adequate solution.

60 Numbers 32:28-30: the Gadites and the Reubenites were granted their inheritance in Transjordan on condition that they assist in the conquest of the land west of the Jordan.

governed by the condition) stands and if the condition is not fulfilled the marriage is dissolved, but rather by those of *bererah*, so that *whether the condition is fulfilled or not* the marriage *fails to take effect*. Similarly, the condition of the French rabbinate makes the marriage dependent on the will of the civil court and not on an action.[61] According to Ramban, this would certainly be classified as *bererah* so that the marriage will fail to materialise no matter what happens with the condition. Thus, in the case of the French rabbinate's condition, we are left with pure concubinage which, according to Rambam, is prohibited, except for a king, due to two verses:

(i) "When a man takes…" (Deuteronomy 24:1) = by means of *qiddushin* (Mishnah *Qiddushin* 1:1) and

(ii) "There shall be no harlot…" (Deuteronomy 23:18).[62]

Hence, according to Rambam, one who lives with a woman in concubinage transgresses a positive and a negative commandment. How, then, can concubinage be permitted to a king?[63] Also, how can the *Posqim* permit a condition in the case of the apostate brother which, should it be unfulfilled (i.e. he dies childless, not having divorced her, and she and his brother outlive him), would result in the retroactive dissolution of the marriage and, concomitantly, the retroactive creation of a state of concubinage?[64]

Rabbi Meir Simḥah explains that the objection to concubinage is due to the ease which it creates for a woman to have many husbands in succession, including returning to a former husband (contrary to Deuteronomy 24:4[65]). This problem does not exist in the case of a king because even the *concubine* of a king (let alone his wife) is forbidden on pain of death to any other man. Even after his death she is permitted only to another king (cf. Adoniyah, who was executed because of Avishag the Shunammite: I Kings 2:21-25).[66]

When one considers the condition applied in the case of the apostate brother a similar situation is seen to obtain. The condition states that should circumstances that create the need for *ḥalitsah* arise for his wife then he is not now marrying her. Thus only if her husband died childless[67] does she become retroactively a

61 It seems that Rabbi Meir Simḥah had before him the 1907 version that does not mention his giving a *get* – see above, p. 5, last paragraph. See also *TBU* 165-66.

62 This means that the state of concubinage, according to Rambam, is one of promiscuity.

63 The kings of Israel were subject to the law like anyone else. See, *inter alia*, II Sam. 12:1-25, Mishnah *Sanhedrin* 2:2 and Rambam's commentary, Gemara *Sanhedrin* 19a.

64 See above, p.4.

65 In spirit if not in letter – see text at note 8, above.

66 Although he never touched Avishag, Adonijah's very request to wed her was tantamount to treason since it implied that he considered himself a king; see Rashi, Redaq and Ralbag to I Kings 2:22. Cf. *Yerushalmi Pe'ah* 1:1.

67 And he never divorced her and he predeceased her and his problematic brother.

concubine and only then could she marry another man. Throughout her life with her husband, however, she could never cohabit with any other man unless she first received a *get*, because it could never be known that she was in fact a concubine, rather than a wife, until after his death. Such a marital arrangement, even if subsequently proving to have been concubinage, would certainly not be promiscuous and the aforementioned positive and negative commandments would not have been transgressed.

In the case of the French rabbinate's condition we have no marriage but pure concubinage from the start, so that either party could opt out at will, change partner, then opt out of the second relationship and return to the first, etc., etc. This is regarded as an illicit relationship and is therefore forbidden by the Torah.[68]

Rabbi Meir Simḥah adds that even if the marriage and condition would be valid,[69] the ease with which she could obtain a State divorce and then (because of the condition) a dissolution, enabling her to repeat the performance with a second husband and then to return to the first husband, etc., would, with each retroactive annulment, still be seen as creating a promiscuous relationship forbidden by the Torah.

[*ETB*, Rabbi Meir Simḥah *HaKohen* 30.]

2. Rabbi David Zvi Hoffmann points out that in the case of the apostate brother it is unlikely that the condition will cause the marriage to be retroactively annulled and to be turned into retroactive concubinage. After all, most women do have children, it is quite possible that she will predecease him or that he will divorce her and it is also possible that the brother may die, be found, be cured or return to the fold, as the case may be, before he becomes a problem. In all such cases (a clear majority) the marriage will remain valid. Only in a small minority of cases (there were no children, he did not divorce her, he predeceased her, the brother is still alive and is still a problem) will the marriage be retroactively converted into concubinage.

The same could be said for the condition of the French rabbinate because most marriages will not end in civil divorce and even in those cases where they do the husband will usually give a *get* so that the dissolution of the marriage and the creation of retroactive concubinage will occur only in a minority of cases.

[68] According to the Rambam. Most *Posqim*, however, permit concubinage to the layman also. Furthermore, Radbaz maintains that even Rambam considers it only rabbinically proscribed. See note 73, below.

[69] This would be the case according to the definition of the difference between *bererah* and *tenai* posited by Rambam or *Tosafot* (cf. note73, below) according to which the French condition would not be classified as *bererah*.

Now we have a principle in the *Halakhah* known as *rov* (the majority rule)[70] according to which in cases of uncertainty we may rely upon the majority as representing the true face of any given situation. Hence, in both the above cases of conditional marriage, we should be entitled to allow the condition since in most cases it will not lead to concubinage.

However, the law states that we may not *lekhatḥillah* (*ab initio*) create a situation where we are forced to rely on the majority situation; only *bedi'avad* (*post factum*), once the situation has arisen of its own accord, may this principle be relied on.[71] If so, in both of the above cases of conditional marriage we should forbid the insertion of a condition because that is *lekhatḥillah* entering into a situation in which we are relying on *rov*.

There is, however, one further consideration. In *she'at doḥaq* (a situation of urgency, pressing need) we may do *lekhatḥillah* that which is normally acceptable only *bedi'avad*.

Hence the difference between the two cases of conditional marriage becomes apparent. The case of the apostate brother is *she'at doḥaq* because without the condition who will marry him and how will he fulfil the commandment of procreation? The employment of a condition in such a case is halakhically acceptable for in *she'at doḥaq* we may *lekhatḥillah* do that which is normally permitted only *bedi'avad* – i.e. rely on the majority.

However, the French rabbinate want to employ a condition in *every* marriage even though there is no *she'at doḥaq* and that means relying *lekhatḥillah* on most marriages not turning into concubinage. The employment of a condition in such a case is halakhically unacceptable for in normal circumstances we may not *lekhatḥillah* do that which is permitted only *bedi'avad* – i.e. rely on the majority.

[*ETB*, Rabbi David Zvi Hoffmann (17).]

[70] This 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 (as in the above argument of Rabbi Hoffmann) see *Ḥullin, loc. cit.* – cf. Abel, Consensus, §I.1.

[71] An example: a slice of meat from a permitted species of animal incorrectly slaughtered (= *nevelah* and, therefore, forbidden for consumption) accidentally fell (= *bedi'avad*) into a bowl in which were two identical slices of meat, both of which were from the same permitted species of animal correctly slaughtered (= *sheḥutah* and, therefore, permitted for consumption). All three may be eaten (though they should not be eaten together). However, it is not permitted to intentionally place (= *lekhatḥillah*) the slice of non-*kasher* meat with the two *kasher* ones and to mix them so that one no longer knows which is which so as to permit the forbidden slice (and if one did so all would be forbidden) – cf. *Shulḥan 'Arukh Yoreh De'ah* 109:1. Whether refraining from relying on the majority rule and, consequently, refraining from eating the meat in the former case, is forbidden (because it implies a heretical rejection of the rabbinic tradition) or permitted (as an act of piety) is discussed in the literature; see, *inter alia*, R. Ovadyah Yosef, *Yabia' 'Omer* VI *Yoreh De'ah* 7:2.

Responses

In the case of Mahari Bruna's condition, even if the *qiddushin* are retroactively annulled, the woman will not be considered to have been a concubine. A concubine can leave the marriage whenever she wishes with or without her husband's agreement so that the marital bond is loose ("a semi-harlotry") but a marriage based on the condition of Mahari Bruna cannot be annulled without a *get* and if she committed adultery she and her paramour would be liable at least to an *'asham taluy*;[72] thus it cannot be considered concubinage. The same can be said of R. Berkovits's condition.

In the case of the French condition, however, there is no firm bond between them either because there is no marriage at all due to *bererah* (Rabbi Meir Simḥah's first argument) so it is certain concubinage from the start or because the marriage can be easily undone (either by her merely obtaining a civil divorce according to the 1907 formula, or by her obtaining a civil divorce and his refusing to give her a *get*, according to the 1887 formula) and rendered concubinage retroactively (his second argument). Such a loose bond can rightly be viewed as proscribed: *TBU* 59 & 70.[73]

B5. *Objection: The Condition Contradicts Torah Law*

The condition suggested by the French rabbinate is in opposition to Torah law because it denies the right of the husband, granted by the Torah, to withhold a *get* if he does not want to give it.[74] Therefore, according to the rule recorded in the

[72] For details of this sacrifice see *ET* II 274b – 277a. See above, text at notes 22-31, for further, more potent arguments in this direction.

[73] It is noteworthy that Rabbi Hoffmann's only reason for permitting the apostate brother condition is the reliance on the majority in an urgent situation. This shows that, unlike Rabbi Meir Simḥah, he regards even Mahari Bruna's condition, if breached, as creating retroactive concubinage and, *a fortiori*, he would so regard the R. Berkovits condition. R. Berkovits does not address this point but I would venture to say that the situation we find ourselves in today, *vis-à-vis* '*iggun*, is most certainly one of urgency. Regarding Rabbi Meir Simḥah's arguments based upon Ramban's understanding of the concepts of *bererah* and conditions, which R. Berkovits describes as "very powerful" (*TBU* 65), I must register my surprise that R. Berkovits does not mention (i) that Ran, *Gittin* 25b, prefers the explanation of *Tosafot* to that of Ramban, (ii) that the *Shulḥan* '*Arukh* rules like *Tosafot* and Ran and regards conditions dependent on will as valid conditions and not as *bererah* (see *EH* 38:8) and (iii) that most *posqim* permit a concubine both to King and commoner: see the gloss of Ra'avad to *Yad*, *'Ishut*, 1:4; Rabbi Ya'aqov Emden, *Responsa She'elat Ya'bets*, II no. 15; *Responsa Bet Naftali*, 45, part 1, s.v. *Sof davar*, *Uve'emet* (i), *Uve'emet* (ii) and *Wa'afilu*; *Responsa Noda' Bihudah*, II *EH* 27, final paragraph. Note also that Radbaz (*Responsa* IV 225 = 1296) though he prohibits concubinage (to a layman), states that the Rambam considers the prohibition merely rabbinic.

[74] See Deuteronomy 24:1 with *Yevamot* 112b. Rambam, *Gerushin* 1:1,2.

Mishnah:[75] "…if one makes a condition against that which is written in the Torah his condition is void [and the act (unto which the condition was attached) remains unconditionally valid]", the French condition will be voided and the marriage contracted upon it will remain in force and unconditionally so.

[*ETB*, Rabbis: Lubetsky 4, 8, 13; Soloveitchik 28, Danishevsky 36. Hungarian rabbinate protest 49. For the apparent contradiction to this from Rashba, *novellae*, *Gittin* 84a, who countenances the condition: "If I divorce you (by a certain time) then you are betrothed to me… but if I do not divorce you (by that time) then you are not betrothed to me", see R. Lubetsky 8 and R. Danishevsky 36.]

Just as a husband cannot take a wife on condition that she shall not have the sustenance, clothing and conjugal rights granted her by the Torah,[76] and just as a priest who sells a beast to an Israelite cannot impose a condition on the sale to the effect that the buyer must give the three gifts therefrom only to the vendor,[77] so a bride cannot marry the groom on condition that he will divorce her (in certain given circumstances) even if he is unwilling (at the time of the divorce) to do so.[78]

[*ETB*, Rabbis: Lubetsky 8, Rappoport 25, Danishevsky 36.]

Response

The above argument in *ETB* is taken from Rabbi Meir Posner (1735-1807) who says, at the beginning of section 38 of his *Bet Me'ir*, that if one betroths on the condition that he will divorce it is considered making a condition against that which is written in the Torah. The *Bet Me'ir* compares this conditional marriage to a case where he marries her on condition that she has no claim to sustenance, clothing and conjugal rights where the marriage is unconditionally valid because the condition – being against the Torah – is cancelled. He also brings proof from the case of the priest who sold a cow to an Israelite "on the condition that the gifts are mine", where the condition is ineffective and the sale stands.

The *Bet Me'ir* is himself most uncertain and does not conclude that his view is

75 *Ketubbot* 9:1: *Kol hamatneh 'al mah shekatuv baTorah tena'o batel* [*uma'aseh qayyam*].

76 See *EH* 38:5 and *Bet Shemuel* there no. 10. For the apparent acceptance of such a condition by the Tosefta *Qiddushin* 3:7, see note 80 below. See also *Isaiah* 4:1 and commentaries.

77 See *Yoreh De'ah* 61:29 based on *Ḥullin* 134a and *Tosafot* there, s.v. *Ḥuts*, second answer.

78 We may note that this criticism helps us to understand why the French rabbinate changed the wording of the 1887 proposal ("If the State judges should divorce us and I will not give you a divorce according to the law of Moses and Israel, this betrothal shall not be effective") to that suggested in the 1907 proposal ("If the State judges should divorce us this betrothal shall not be effective"). See above, p.5.

halakhically correct, because it is opposed to the words of Rashba in *Gittin* 84a from which it is clear that a marriage on condition that he will (in given circumstances) divorce is a halakhically valid arrangement. Within a wider debate, the Talmud there states that a woman has no way of entering a marriage which she will be able to leave without her husband's consent. Rashba asks why she cannot enter the marriage on condition that the husband will divorce her at some future time, so that if at that time he refuses to divorce her the marriage will be retroactively annulled and she will anyhow be free. He answers that *indeed she could do so* but that (for reasons irrelevant to us at present) that answer would not solve the Talmud's problem there and that is why the Talmud did not suggest it. Nevertheless, some rabbis quoted in *ETB* took up the suggestion of the *Bet Me'ir* and tried to explain the words of Rashba in such a way that they would not contradict the suggestion of the *Bet Me'ir*.[79]

R. Berkovits thinks that the *Bet Me'ir* was right not to stand on his opinion against a plain reading of Rashba, because marriage on condition of divorce is not at all comparable (i) to marriage on condition that the wife shall have no marital rights or (ii) to a priest's sale of a cow on condition that the Israelite buyer shall have no rights to distribute the gifts therefrom to whichever priest he wants. In (i) he wants the marriage but without one part of marriage that the Torah imposed: food, clothing and conjugal rights.[80] In (ii) he wants a sale but without one part of the sale that the Torah imposed: the buyer's right to give the gifts to whomever he wishes.[81]

However, in the case of one who marries on the condition that he will divorce, the condition is not that he shall divorce *against his will*. No-one forces him to marry this woman and if he agrees to the condition (to divorce) because he wants the marriage, at least for a time, then he also *wants* to give the divorce because he wants the marriage.[82] True, it may be that when it comes to giving the divorce he

79 See p.30, first citation of *ETB*.

80 He doesn't say, "…on condition that you forego your rights" but "on condition that no such rights of yours shall exist". The former wording would be valid as recorded in Tosefta *Qiddushin* 3:7 (Zuckermandel 339:25-26. In the New York 5721 edition of the *Talmud Bavli* this paragraph of the Tosefta *Qiddushin* is 3:9.) As regards the effectiveness of the condition that she forego '*onah* see *Minḥat Bikkurim* to the Tosefta there and *SA EH* 38:15 and *Bet Shemuel* there, sub-paragraphs 10, 11 and 12.

In Isaiah 4:1 the women themselves are foregoing their rights without even having been requested to do so. Hence, the arrangement there would certainly be valid.

81 He doesn't say, "…on condition that you give up your rights and give the gifts to me" but "on condition that the gifts are mine", i.e. "no right of distribution of yours shall exist".

82 So the condition is not that he *has no right* to withhold divorce nor even that he *has foregone his right* to withhold divorce – which latter, it seems to me, should be in order, at least according to the *Bet Yosef* that rules that if a husband swore an oath that he would divorce his wife (in whatever particular circumstances) he must do it and can be forced to do so by a *bet din*: see *Pitḥey Teshuvah* 134, no. 8; *ET* V cols. 705-6 – but that he is agreeing now to *willingly divorce* her in the future if that becomes the proper thing to do.

may have changed his mind and not want to give it but this is not at all clear at the time of making the condition and the Rosh has already ruled in section 33 of his *responsa* that so long as *at the time of making the condition* it is not clear that the fulfilment thereof will be against the Torah such a condition is not "a condition against the Torah". Therefore, since he betroths on condition that he will divorce, at the time of the condition he intends to divorce willingly and so is not uprooting anything in the Torah by means of this condition.

It is furthermore possible to say that even if we judge the situation from the point of view of that which obtains in the end, when he is not willing to divorce and does so reluctantly, only to avoid the retroactive annulment of the marriage, that also is considered "of his own free will". Such a situation matches exactly the case in *Bava' Batra'* 47b *wedilma shani 'onsa' denafshey me'onsa' de'aḥariney* as Rashi explains there s.v. *shani 'onsa' denafsheh*: "He needs money and due to that he sells[83] his belongings [that is considered selling them] *willingly* so it can be said that he makes up his mind and hands over possession (to the buyer)".[84] The same applies in our case. There is no external pressure. There is no-one forcing him to give a *get* to his wife. He can refuse and the marriage will be annulled. If he wants the betrothal to be retrospectively confirmed and because of that he goes ahead and divorces her, this too is considered of his own free will: *TBU* 64-5.

B6. *Objection: 'Eyn Tenai BeNissu'in*

If we allow such a condition (at *qiddushin* and *nissu'in*) we will have to explain *'eyn tenai benissu'in* (there is no condition at *nissu'in*) like *Tosafot*: *'eyn regilut lehatnot benissu'in* – it is not *usual* to make a condition at *nissu'in*[85], but, if stipulated, such a condition would be valid. However, if we introduce – as the French rabbinate wish to – such a condition as the norm then it *would* be usual to make a condition at *nissu'in* and we would thus be in contravention of the Talmud.

[*ETB*, Rabbi Danishevsky 35.]

Response

R. Berkovits cannot understand this. Surely if we interpret *'eyn tenai benissu'in* as *Tosafot* suggest, it is not a rule (there cannot be a [valid] condition in *nissu'in*) or a law (one is forbidden to make a condition in *nissu'in*) but merely an observation on social conduct (there is not [usually] a condition in *nissu'in* because people do not usually make one). If the social ethos changes – so be it! In talmudic times people

83 I.e. he is forced by his financial needs to sell.

84 I.e. the acquisition by the buyer is legally valid.

85 As opposed to *qiddushin*.

behaved in accordance with Jewish law and ethics and if they didn't the *batey din* had the power to enforce compliance so that there was, except in unusual circumstances, no need for conditional marriage and it was, therefore, not usual to make a condition in *nissu'in*. If today, unfortunately, we often cannot rely upon people to behave according to the dictates of Jewish law and ethics and the *batey din* have no power to enforce their rulings, it is understandable that conditional marriage becomes a more general requirement. Thus, the facts change and it may become usual to make a condition in *nissu'in*: *TBU* 67.

B7. *Objection: Lack of Experience*

If Rabbenu Yeḥiel of Paris said that conditional *gittin* shall no longer be allowed due to our lack of expertise in the rules of conditions, how can we introduce conditional marriage as the norm? True, he permitted a conditional *get* in the case of a *kohen* who needed to free his wife from attachment to his brother, so that if the *kohen*-husband dies she is retroactively divorced and does not require *ḥalitsah* and if he recovers she is not divorced and can return to him.[86] But in that case even if there were some fault in the condition, rendering it invalid, so that if he died she became a widow and not a divorcee but thinking that she was a divorcee she remarried without *ḥalitsah*, that would only amount to the transgression of a negative command without higher penalty and would not result in the *mamzerut* (irredeemable illegitimacy) of children born from her remarriage. In contrast, the French rabbinate's condition would, if faulty, permit a married woman to another man which would entail the transgression of a negative command carrying the penalty of *karet* (excision) and capital punishment and the *mamzerut* of any children born from the second union.

[*ETB*, Rabbi M. S. Shapira 40.]

Response

R. Berkovits expresses astonishment at this. Rabbenu Yeḥiel did not make an enactment against conditional divorce in general but only in the case of *shekhiv mera'* (one who is dangerously ill) – and there, there is good reason for it. R. Berkovits is sure that Rabbi Shapira did not see the enactment of Rabbenu Yeḥiel as it appears in its source in the glosses on the *Semaq*.[87] This is the statement of the gloss on the *Semaq* in section 184:

[86] The problem is relevant only to a *kohen*. A Levite or Israelite could divorce her unconditionally and, if he recovers, remarry her. This option is not open to a *kohen* who is forbidden to marry a divorcee – even his own.

[87] *Semaq* = *Sefer Mitsvot Qatan* by Rabbi Yitsḥaq of Corbeil, a pupil of Rabbenu Yeḥiel of Paris, glossed by Rabbi Perets ben Eliyah of Corbeil.

> … for if he says ['This is your *get*] from today [if I die'] and he died on that day, Rabbenu Tam says, 'I do not know how to judge it – perhaps he means [that it is her *get*] from now, at the time of handing it over, or maybe he meant at the end of the day and if he did mean at the end of the day and he died on that day, the *get* would be rendered worthless.[88] So my teacher, Rabbenu Yeḥiel, was accustomed to require in the case of a *get* of a *shekhiv mera'* that the divorce be absolute without any condition, in order to extricate himself from any doubt and uncertainty. But he would insist that they accept upon themselves the ban of excommunication if they would not observe the communal enactment to remarry [if and] when he would recover.

This is how the law is recorded in *Shulḥan 'Arukh EH* 145:9 in the gloss of Rema.

It is clear, then, that one cannot derive from this that one must not, in general, divorce or marry on a condition. Only in the case of the *get* of the dangerously ill did Rabbenu Yeḥiel of Paris introduce his enactment, and simply in order to extricate ourselves from the doubt of Rabbenu Tam. Thus it is obvious that the matter is irrelevant to the Berkovits proposal: *TBU* 67-68.

B8. *Objection: The Distinction between Mahari Bruna's Condition and R. Berkovits's*

The following opinion is not cited in *ETB* but in the first volume of Rabbi Yosef Rosen's work *Tsafenat Pa'ne'aḥ*, as reported by R. Berkovits. In section 6 there, Rabbi Rosen writes a *responsum* to the question: If a condition be made in a marriage stating that if he rebels against his wife and marries another woman then his marriage to his first wife will be retroactively annulled, would such a condition be valid? His answer is negative – only a condition that takes effect after his death such as Mahari Bruna's can be valid. Rabbi Rosen's reasoning is as follows.

> There are two types of acquisition in *qiddushin*. One is the (personal) acquisition that makes her his wife, the other is the (ritual) acquisition that makes her forbidden to all others. A condition can be made on the first acquisition (which, understandably, is under the couple's control) but not on the second (which remains in the domain of the Ritual and can only cease with the death of the husband or with divorce).
>
> The commandment of *yibum*/*ḥalitsah* issues from the personal aspect of the marriage and it can be obviated by a condition because that condition is operating after the death of the husband when the ritual aspect of the marriage has come to an end. However, a condition to annul the marriage during the lifetime of the husband can never work because at that time the ritual aspect of the relationship is still in existence and that is an absolute and not subject to human conditioning.

[88] Because a husband cannot give a *get* after his death. The latter section of this quotation in R. Berkovits is inaccurate; I have translated directly from the text of *Hagehot Semaq*.

> This is the meaning of *'eyn tenai benissu'in*: a condition in *nissu'in* is impossible during the husband's lifetime.

This, R. Berkovits observes, is the outstanding innovation of the Gaon (of Rogachov) and nothing like it is to be found in the writings of those *posqim* we mentioned earlier (who deal with conditional marriage).

Response

I know that I am not even "as the skin of a garlic"[89] in front of His Majestic Excellence, the memory of the holy and righteous be for a blessing, but nevertheless, "it is Torah and I need to learn".[90]

Rabbi Rosen notes that Tanna'im debate this point in *Yevamot* 15a in the account of the daughter of Rabban Gamliel who had been married to Abba, Rabban Gamliel's brother. Abba had died without children and Rabban Gamliel performed levirate marriage with her (his daughter's) co-wife. As Rabban Gamliel was of the school of *Bet Hillel* who forbid *yibbum* not only with a forbidden close relative but with her co-wives also, how was this possible? The Talmud's third reply is that there had been a condition in the daughter's marriage which proved unfulfilled; hence her marriage to her father's brother was retroactively annulled. Thus she had never been married to him and there was, therefore, no prohibition on Rabban Gamliel's marrying her co-wife. This view is premised on the opinion that there can be a condition in *nissu'in*. The other view there is that there cannot be a condition in *nissu'in* and Rabban Gamliel was permitted to marry his daughter's co-wife for an entirely different reason.

R. Berkovits points out that Rashi explains there that the one who holds that there is no condition in *nissu'in* maintains that he will forego his condition and not want to make his intercourse illicit – as it is stated in chapter *HaMaddir*.[91]

This is not in accordance with the Gaon Rabbi Yosef Rosen.[92]

Also from that discussion in *HaMaddir*, R. Berkovits has a difficulty with Rabbi Rosen's innovative interpretation. According to Rabbi Rosen's understanding of *'eyn tenai benissu'in*, the discussion in the Talmud (as to whether Rav's reason for necessitating a *get* after *nissu'in* even if the condition at *qiddushin* was found to be unfulfilled is due to a concern that he may have foregone his condition (a) simply because it was not repeated at *nissu'in* or (b) due to a concern that he may not wish

89 Cf. *Bekhorot* 58a.

90 Cf. *Berakhot* 62a.

91 *Ketubbot* 73a.

92 Because he says that the inapplicability of a condition to *nissu'in* is due not to the couple's fear of illicit intercourse but to the "ritual acquisition" component of marriage being beyond human control.

to chance his intercourse proving retroactively illicit) does not make sense. According to the Gaon, Rav's reason is that it is *halakhically beyond one's power* to make a condition on a ritual acquisition, for Rav holds like the Tanna in *Yevamot* who maintains that '*eyn tenai benissu'in*.

There is a further difficulty with his view from the Tosafists who explain in a number of places (*Ketubbot* 73a s.v. *Lo' Tema*'; *Yevamot* 107a s.v. *Bet Shammai et al*.) that '*eyn tenai benissu'in* does not mean that a condition in *nissu'in* is not *effective* but that it is not *usual* because people tend to forego it in order to avoid possible illicit intercourse. From this it is clear that a condition in *nissu'in is* effective but, according to the Gaon, '*eyn tenai benissu'in* means that it is *impossible* for such a condition to have any validity.

From the aforementioned Rashba[93] also it is clear that a condition can be effective in *nissu'in*.

It is thus clear that this novel interpretation of the Gaon of Rogachov goes against the *Rishonim* and does not seem reconcilable with the Talmud itself: *TBU* 60-61.[94]

C. Practical Considerations

C1. *Objection: Creation of* '*Doubtful Marriages*'

If conditional marriage were the norm, it would eventually happen that the wife takes *qiddushin* from another man or that the husband gives *qiddushin* to one of his wife's (unmarried or doubtfully married) close relations (e.g. her sister) and this would create a doubtful state of marriage requiring a divorce. Albeit that this is highly unlikely, we have to take into consideration that if all marriages were conditional then over a long enough period of time such a thing might eventually occur. If all marriages were unconditional no such doubts could ever arise.

[*ETB*, Rabbi Hoffmann 18.]

Response

Perhaps Rabbi Hoffmann was concerned with this in the case of the French condition because it would have allowed the wife to break up her marriage, if she

93 See above, text at n.79.

94 It was also rejected in Responsa *Devar 'Avraham* (III 29), *Seridey 'Esh* (III 22), and *Hekhal Yitsḥaq* (II *EH* 30). Cf. Rabbi S. Daichovsky, "Nissu'im 'Ezraḥiyim", *Teḥumin* II, 252-66, at pp.257 and 260.

wanted a new husband, by simply obtaining a civil divorce[95] and so would be automatically and retroactively unmarried according to *Halakhah* and thus could leave for her new husband.[96] This is not the case with our condition, where retroactive annulment cannot be achieved without the civil court's ruling for divorce, the consent of the *bet din* and the intransigence of the husband. She is not so likely to anticipate the achievement of this threefold requirement and thereby to accept *qiddushin* prematurely, so maybe Rabbi Hoffmann would agree that this concern is, in our case, too far-fetched even to merit consideration: *TBU* 66.

C2. *Objection: Fear of Mistakes*

The employment of conditions requires great expertise but today every young student is *mesadder qiddushin* (oversees betrothals).

[*ETB*, Rabbi Hoffmann 17.]

1. Even if those administering *qiddushin* are well-versed in the halakhic requirements thereof, someone, somewhere, sometime is going to err, so that the condition will not be valid, and if the wife subsequently remarries without a divorce relying on the condition, her children from the second marriage will be *mamzerim*. This may be an unlikely scenario, but no less unlikely than the possibility that a husband lost in the ocean is still alive even though many years have passed since his disappearance. Yet because of this highly unlikely possibility the Sages did not allow the wife to remarry for fear of adultery and bastardy.

[*ETB*, Rabbi Shapira 40.][97]

[95] Rabbi Hoffmann refers only to the version that makes no mention of *get*. Even according to the version that does mention it, it is an automatic requirement on the husband following the civil court's ruling without reference to a *bet din*, and retroactive annulment would follow immediately upon his refusal, so her departure from the marriage would still be easy. Rabbi Hoffmann's concern may, therefore, be valid according to that version also.

[96] Since her marriage could be so easily retroactively dissolved, the concern is understandable that she might, in her enthusiasm, accept *qiddushin* from her forthcoming partner even before being released from her present husband, anticipating that those *qiddushin* would be, retrospectively, effective when her present marriage would be (shortly) retroactively annulled. No such easy, retroactive annulment could be anticipated in the case of R. Berkovits's condition, so she presumably would not be tempted to receive *qiddushin* from anyone else before her present marriage is halakhically terminated.

[97] R. Berkovits does not address this argument. It may be that, even if the two cases are comparable, one can answer that the authority to invent rabbinic decrees did not extend beyond the talmudic (or geonic) era: see *ET* V col. 540. See also *Responsa 'Iggerot Moshe*, *EH*, I 79, where Rabbi Feinstein explains that 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*, *Nahalot* 7:3 who states that only when the memory of the disappeared father has become lost (*'avad zikhro*) can his heirs take over his property because

2. Rabbi Kook wrote: "Although it is clear that an explicit condition is effective even in *nissu'in* (as was customarily done in the case of an apostate brother) we have not agreed to introduce conditional marriage as a general enactment because of the damage that can arise from this through those who are not well-versed in the laws of conditions and generally in the laws of marriage and divorce, yet are involved with such matters even though they have no right to be."[98]

(Letter dated 3 *Tevet* 5686 published at the beginning of *Torey Zahav* by Rabbi S. A. Abramson, New York 5687): *TBU* 68.

Response

R. Berkovits argues, however, that if it is really possible to enact conditional marriage according to the *Halakhah*, we are permitted to deliberate and find a solution to the practical questions. We should not simply cling – without renewed investigation and contemplation and calm consideration – to the practical concerns of earlier generations: *TBU* 68-69.

---

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 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, says Rabbi Feinstein, 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 30% – a degree of minority possibility which would trigger rabbinic enactments in other areas of the *Halakhah*) 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. 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, although if that percentage had obtained initially they would not have passed any enactment against her remarriage. Of course, 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" – *natata devarekha leshe'urin* (in this case, time-limits, i.e. after how long do we reach the point of 0%?). However, since some doubt, however small, always remains, they forbade her remarriage so as not to enter the problematic area of arbitrary limits (by having to decide after how long we reach the point of (e.g.) 1%) According to this, Rabbi Shapiro's comparison fails because the possibility of error by the *mesadder qiddushin* is insubstantial *from the start*. Cf. Abel, Consensus IV 24-32.

98 As per *SQN*, p.???. Cf. *Qiddushin* 13a, *EH* 49:3.

R. Berkovits's Conclusion and Standing

R. Berkovits writes,

> To my limited understanding, the gravest problem is that through inserting a condition into marriage, all marriages will be of only doubtful status, as the rabbis of Hungary argued in the case of the French proposal. We must also give consideration to the ethical and religious effects on Jewish marriage of the enactment of a condition in the marriage ceremony. However, it seems to me that we need not reject the proposal on these grounds.
>
> As we have already seen,[99] since under our condition she would be considered as being in a marital relationship with him, she could not walk out of the marriage without a *get* and anyone else who had intercourse with her would be liable to bring an '*asham taluy*.
>
> The ethical and religious fibre of marriage is really dependent upon education and upon the ethical and religious conscience of the married couple, upon the influence of society and upon the conditions of everyday life. From the point of view of human psychology it seems to me that a condition in marriage will not cause an unravelling of the bond between man and wife even in the slightest degree.
>
> A person's conduct in the area of sex and married life is not defined or affected by such distant causes as the possibility of the annulment of the marriage in accordance with a particular condition. On the contrary, I say that the very [existence of the] condition will stress, in the eyes of the couple, the religious and ethical obligation that lies on both of them to lead their lives as a team and to conduct themselves towards each other according to the directives of Jewish ethics.
>
> On the basis of all the above I venture to suggest, with awe and reverence, that our fathers have left us space[100] to open up again this serious question, and that the grave problems affecting the married life of the entire people (of Israel) nowadays oblige us to reconsider the matter. There is hope that with the help of the Lord a solution will be found on the foundations of the *Halakhah* and in accordance with this Holy Torah of ours that will remain unchanged for all eternity." (*TBU* 68 -71).

What did R. Berkovits achieve?

Taking full and respectful note of the opposition of the *Gedolim* to the solutions proposed by the French rabbinate in 1887 and 1907, Rabbi Berkovits in his *Tenai BeNissu'in UvGet* revisited the problem of *get*-refusal by conducting a broad and profound examination of the talmudic and rabbinic texts relevant to three questions: conditional marriage (chapter 1); written authorisation (*harsha'ah*) at the time of the *qiddushin* for the writing of a *get* should it become necessary in the

[99] See text at notes 22-31, above, and the first two paragraphs preceding note 73.

[100] Cf. *Ḥullin* 7a.

future (chapters 2 and 3); and communal annulment of marriage (chapter 4). On pages 57-71 of his work he responds in detail to all the arguments in *ETB*.

On the basis of this analysis, he concludes that solutions to the '*Agunah* problem can indeed be found within the *Halakhah* and argues that the wholesale opposition of the leading halakhic authorities (cited in *ETB*) was aimed at the French proposals which, R. Berkovits agrees, were halakhically and ethically wanting. There was never any ban issued against *any* condition in *nissu'in*, *per se*.[101] In addition, he argues, the situation had become so severe that action could no longer be avoided.

Although R. Berkovits does not say so, it seems to me that the three approaches to the problem in *TBU* could be combined into a single three-fold approach creating a "triple-doubt" effect. If, after all the arguments and proofs, there exists any residual doubt about the halakhic efficacy of conditional marriage, we can rely on a *get*, prepared from the time of the *qiddushin*. Should there be doubt about that too, we can rely on the operation of retroactive communal annulment which also has its supporters amongst the *Gedoley HaPosqim*.[102]

Support for R. Berkovits

In the introductory remarks to *TBU* which are described as a *haqdamah* (introduction) but amount to a *haskamah* (approbation), *HaGa'on* Rabbi Yeḥiel Ya'aqov Weinberg *zts''l* refers to our author as "*HaRav HaGa'on* Rabbi Eliezer Berkovits" and describes the halakhic analysis and debate in the work as being outstanding in the enormous erudition and exceedingly profound acuity that they evince.

> With clear and straightforward logic he descends to the very foundations of the *Halakhah* and brings up pearls by means of which are answered many perplexing questions with which a number of our teachers amongst the "later authorities" *z"l* wrestled. There is no doubt that this work merits publication and *broad deliberation by the leading halakhic authorities ... I have not seen the equal of this work amongst the books of the various 'Aḥaronim amongst contemporary authors* (emphasis added).

Rabbi Weinberg also points out that Rabbi Berkovits has no intention, G-d forbid, of arguing against the great authorities of the previous generation quoted in *ETB*. He has only revisited the problem because the situation has worsened: the number

[101] See below, text at note 337.

[102] See, inter alia, R. Ovadyah Yosef, "Kol HaMeqaddesh 'Ada'ta' DeRabbanan Meqaddesh We'Afqe'inho Rabbanan LeQiddushin Mineh", *Torah Shebe'al Peh* (Jerusalem 5721), 96-103, and the synopsis thereof in HKT Section A: *Hafqa'at Qiddushin BaZeman HaZeh* §§VI-XII. See below, pp.47-53.

of chained wives, and the number of these who remarry without a *get* and go on to have more children, has greatly increased. Furthermore, the opposition of the *Gedoley haDor* was aimed mainly at the French rabbinate's proposed condition which made the civil courts the decisive factor, whereas R. Berkovits's condition removes the reliance on the gentile authorities from the condition and makes the conduct of the husband the main factor.

The main point at issue, says Rabbi Weinberg, is: "Do we refuse to contemplate conditional *qiddushin* and *nissu'in* because it will undermine the assured sanctity of marriage or do we make this sacrifice in the interest of saving women from being chained to marriages long dead and, indeed, from committing adultery and bearing *mamzerim*?"

Of course, this does not mean that Rabbi Weinberg agreed in practice to the immediate implementation of R. Berkovits's conclusions but that he agreed that the material was worthy of the close attention of the *Gedoley haDor*. As Professor Marc Shapiro observes:[103] "Although he may have had some specific objections to R. Berkovits's proposals, Weinberg left no doubt that he approved of the latter's general approach to finding a satisfactory method of conditional marriage."

Was Rabbi Weinberg's approbation ever withdrawn?

Rabbi Menaḥem Mendel Kasher, in answer to a request from Rabbi Dov Katz, of the Office of Religion of the State of Israel, published a *responsum*[104] in which he analysed in detail R. Berkovits's work stating, in conclusion, that there was nothing essentially new in the work, that even if there were it would be of no avail as the Orthodox rabbinic leadership proscribed (in *LeDor 'Aḥaron*, 1937) *any* conditional marriage and that Rabbi Weinberg had written to him stating that he was unaware of this and therefore regretted ever having written the letter of approbation to R. Berkovits. (See below for comments on this by Professor Shapiro.)

It is interesting to note, however, that R. Berkovits is anxious to demonstrate, in his second addendum (*TBU*, 166-168), that his condition is far removed from that of the French proposal and that the main objections in the *responsa* in *ETB* were aimed only at that latter condition. Furthermore, at the end of this second addendum (*TBU* 168-171), he demonstrates that *LeDor 'Aḥaron* does not in any way outlaw conditional *nissu'in* in all cases. This addendum reads like a response to Rabbi Kasher's conclusions as published in the *No'am* article though that was published only in 1968 whereas *TBU* had been published two years earlier. The

103 *Between the Yeshiva World and Modern Orthodoxy*: *The Life and Works of Rabbi Jehiel Jacob Weinberg 1884-1966* (London 1999), 190-91.

104 "Concerning Conditional Marriage" (Heb.), *Noam* 11 (1969), 338-53.

matter requires further investigation.

Shapiro (*ibid*., 191 n.83) writes:

> There has been some dispute regarding Weinberg's approbation ever since R. Menaḥem Kasher (*ibid*.), in the midst of a strident attack on R. Berkovits's book, published a letter from Weinberg in which the latter expressed regret over writing this approbation. Despite R. Berkovits's claim that this letter was a forgery, Kasher never produced the original. (R. Berkovits's final statement on this issue is found in his *Jewish Women in Time and Torah* (Hoboken, NJ, 1990, 111: 'I regret to say that my work has not been given serious consideration, and instead all kinds of statements have been made maintaining that my teacher, Rabbi Y.Y. Weinberg, *z"l*, withdrew the moral support that he gave to the work. I have to declare that in all these statements and rumours there is not the slightest truth.')

Shapiro then adds the following two points:

1. R. Berkovits's book was originally going to be published in *No'am*, the halakhic annual edited by Kasher, until the latter, presumably because of fear of the religious right, decided this could not be done. The work, with a good portion of it already in print, was then transferred to Mosad Harav Kook which completed the publication. These facts are never mentioned by Kasher in his attack on R. Berkovits's book, in which, by the way, he refuses to mention R. Berkovits's name, referring to him instead as 'a certain rabbi'. (Soon after R. Berkovits's book was published, Kasher sent him a letter, a copy of which is in my possession, congratulating him on the appearance of the book!) Nor does Kasher mention the fact that Weinberg's approbation was actually addressed to *him*, and not to R. Berkovits (a copy of Weinberg's original letter is in my possession). According to R. Berkovits, Kasher refused to publish the work without this approbation (interview with R. Berkovits).

2. A letter (in English) from Rabbi Moshe Botchko to Rabbi Leo Young, dated 31 Dec. 1965, a mere three weeks before Weinberg's death when he was too ill to write personally, reads:

> > Rabbi Weinberg has received your telegram as well as your letter in connection with the work of Dr. Berkovits. However, he is not well at all these days – may the Almighty grant him *Refuah Shelemah*. He asked me to write to you on his behalf, and to let you know that he has not changed his mind at all, and he thinks that it is a very good thing, that the work should be printed in the *Hanoam*, to stimulate the discussion and the clarification on the matter. He asked me to state it, in unequivocal terms, that he stands 100% to his previous mind, and he really does not understand what has made Rabbi Kasher suddenly change his mind, since he wrote to Rabbi Weinberg that he is thrilled with the work.

Further support for R. Berkovits's proposal

In the first paragraph of the above-mentioned footnote Shapiro adds, "It is worth noting that, according to Rabbi Moshe Tendler, as quoted by Rabbi Leo Young in an undated letter to R. Berkovits, R. Moshe Feinstein expressed theoretical approval of R. Berkovits's position." I have since seen in R. Zevi Gertner and R. Bezalel Karlinski, "'*Eyn Tenai beNissu'in*", *Yeshurun* X (5762), 711-750, on p.747, footnote 117,[105] that Rabbi Eliyahu Jung passed a copy of R. Berkovits's *Tenai BeNissu'in UvGet* to one of the *Gedoley HaPosqim* in the USA requesting an opinion. The *Gadol* replied that from a purely halakhic perspective he is not opposed to the idea but it is difficult for him to agree to it in practice. This unnamed *Gadol*, I suspected, was Rabbi Feinstein and Rabbis Gertner and Karlinski are referring to the same event as that described by Professor Shapiro. Professor Shapiro subsequently confirmed to me that this is indeed the case.

The late Dayan Berkovits, *Av Bet Din* of the Federation of Jewish Synagogues, London (and a nephew of R. Eliezer Berkovits), wrote in a paper delivered at the London Conference of the International Council of Jewish Women in Sept. 1988:[106]

> Here I will refer you to a book by my late uncle, Dr. Eliezer Berkovits, who was a leading Jewish philosopher and a leading *halakhic* scholar. Thirty years ago he wrote a major *halakhic* work called *Tenai BeNissu'in UvGet* (Conditional Clauses in Marriage and Divorce Agreements, Jerusalem, 1968, in Hebrew), in which, rather than attempting to import alien concepts into the Jewish structure, he analysed the structure of a Jewish marriage and attempted to put forward a proposal, based on solid halakhic reasoning, to show that you can build into the marriage contract a provision for a dissolution in certain circumstances, without the need for a *get*. The proposals are complex, they are controversial, but I believe,[107] not because he is my uncle, but because he is the first person who tackled it with a fundamental look at the structure of Jewish law, rather than attempting to import concepts from other systems or to take very rare, isolated situations and extrapolate them, like the annulment proposal. He attempted to look at the fundamental structure of the Jewish law of marriage and divorce, and I think that the way forward is to reopen that avenue and to re-examine it.

Combining Solutions

Considering the traditional opposition of the majority of the *Posqim* to a general

105 See GK para. 40.

106 Downloaded at the time from www.icjw.org.uk/halachicindex.htm, but apparently no longer available on-line. Copies may be requested from Bernard Jackson <bsj@legaltheory.demon.co.uk>.

107 The predicate of this sentence is missing.

enactment of conditional marriage we might hope to win more support if, as the title of this book suggests, we rely not on conditional marriage alone but on a combination thereof with two other solutions, namely communal annulment and a delayed *get*. This has two advantages.

The first is simply that of the multiple doubt effect, in this case a triple *safeq* because although there is a question mark on the effectiveness of each of the above solutions, not one of them is without its supporters among the *Posqim*. Each remains a solution at least according to some authorities so that between them they could operate in practice as well as in theory. Even if the supporters of contemporary *hafqa'ah* and delayed *get* are both minority schools so that they could not constitute a valid *sefeq sefeqa*',[108] conditional marriage is halakhically effective according to almost all *posqim*,[109] so that it presents us with more than the 50% support needed for leniency in one of the components of *sefeq sefeqa*' and in such a case the other component(s) can be doubts where a lenient outcome is supported by less than 50%.[110]

The second is that the one solution may be fortified by the presence of the other. For example, one of the objections to conditional marriage was that it meant that the wedding bond could be too easily (retroactively) undone so that the couple, in order to avoid the resultant retrospective promiscuous relationship (forbidden according to some views), might feel the need to remarry unconditionally (by means of intercourse). However, the less likely it becomes that the marriage would be retroactively undone by breach of the condition, the less likely is it that any promiscuity could occur. Thus, according to some opinions, even if a situation arose in which the husband refused to divorce his wife with a new *get*, the marriage would be *prospectively* concluded by the delayed *get* or by the communal annulment and no retroactive promiscuity would result. This makes it less likely that the couple would ever feel the need to remarry unconditionally.

Similarly, the opposition of many *posqim* to the contemporary application of *hafqa'ah* is based partly on the argument that we do not find in the classical sources any example of post-betrothal annulment without a *get* (that is internally valid but externally flawed). In the talmudic literature the otherwise valid *get* has been cancelled and in the geonic literature it has been coerced. The tripartite solution, however, presents us with *hafqa'ah* accompanied by a *get* that is, at most, externally flawed by the husband's cancellation. This very much strengthens the argument for the efficacy of the *hafqa'ah*. The corollary is also true: The *hafqa'ah*

[108] R. Ovadyah Yosef, *Yeḥawweh Da'at* I *Kileley HaHora'ah*, *Kileley Sefeq Sefeqa*' no. 11 (p.26a).

[109] See text at note 98 above, in the name of R. Kook and text at note 105 above, in the name of R. Feinstein (supporting the theory of R. Berkovits's *TBU*). Cf. *Yad, Gerushim* 10:19; *EH* 149:5.

[110] R. Ovadyah Yosef, *ibid*.

lends strength to the validity of the *get* just as we find the Rosh explaining that the talmudically unsanctioned power of the Ge'onim to enforce a *get* can be the better understood if viewed as based upon annulment (which, though also talmudically unsanctioned, can be explained as validated by the couple's conditioning their marriage upon the decrees of the sages – '*kedat Mosheh weYisra'el*').

Chapter Two

Annulment

In the Talmud

In Babylon,[111] where the Amora'im held judicial power over the Jewish community, efforts to stem improper behaviour in the area of betrothal took the form of enactments by the authorities rather than of betrothal conditions as was customary in Israel, due to the fact that the Amora'im of '*Erets Yisra'el* were powerless to enforce Jewish law. Rav forbade "betrothal in the street" (without proper preparation), betrothal without prior *shiddukh* (= without parental involvement), betrothal by means of sexual intercourse and the groom's lodging in his father-in-law's home. Any one of these offences was punishable with *makkat mardut* – flogging by rabbinic decree (*Qiddushin* 12b).

These measures were intended to put an end to the problems of secret or hasty betrothal but, in the event of transgression, resulted only in punishment of the guilty party but not in the annulment of the betrothal which was deemed effective *post factum*.

That hasty betrothals were common in Babylon is clear from the reports in the Talmud of people performing *qiddushin* with all sorts of items, apparently whatever was at hand – a bundle of tow cotton, a piece of black marble, a branch of myrtle, a mat of myrtle, silk-strain (*Qiddushin* 12-13), a cup of wine (*Qiddushin* 45a) and the flesh of the stone of half-ripe dates (*Gittin* 89a)!

Rav's pupils went even further than their teacher. Rav had punished the offenders but had allowed their betrothals to stand. His pupils took the bold step of annulling the improper betrothals entirely. In one case, the Talmud reports (*Yevamot* 110a) an occurrence that occurred in *Narash*.[112] An orphaned girl had been given in marriage as a minor by her mother, such an act constituting a rabbinic betrothal only. When she had reached maturity and was about to enter into *nissu'in* with her husband she was carried away by another man to whom she was (willingly) betrothed. Rav Beruna' and Rav Hanan'el ruled that the second betrothal was invalid and she should return to the first husband without a *get*. Later Amora'im gave two possible explanations for this ruling. Rav Pappa said that the second man took her *after* the *nissu'in* with the first had taken place; hence the second "marriage" was ineffective. Rav Ashi said that the second man had taken

[111] For the material up to p.49, end of second new paragraph, see Freimann, *SQN* 12-14.

[112] Narse in Babylonia.

her and betrothed her *before* the first one had made *nissu'in* yet his betrothal, though valid by the law of the Torah, was annulled by the rabbinic authorities: he acted improperly so they (the authorities) treated him improperly by annulling his betrothal (*'afqe'inho rabbanan leqiddushin mineh*). If the betrothal took place in the usual manner – with a ring or its equivalent (*qiddushey khesef*) – the annulment is easily achieved by means of *hefqer bet din* (the court retroactively confiscating the property with which the betrothal was made) but, asked Ravina, what if the second one betrothed by means of intercourse? Rav Ashi responded that the Sages have it in their power even to disqualify such a betrothal by declaring the intercourse promiscuous.

The power of annulment was applied also in a case of 'betrothal by coercion' (*Bava' Batra'* 48b). Although a betrothal requires the consent of the woman in order to be valid, where that consent was obtained by force the betrothal would, technically, be valid, i.e. it would be recognised in Biblical Law. In order to frustrate such evil designs the Sages applied here also their right of annulment.

Rashi[113] understands that in both these cases the power of the Sages to interfere in a betrothal, which is a private contract between two willing individuals sanctioned by the Torah, derives from the formula used by the groom declaring that the betrothal should be effective "according to the Law of Moses (the Divine Written and Oral Law) and Israel (the Rabbinic Law)". Since he made his betrothal dependent on the rabbinic authorities, it stands to reason that he meant it to take effect only if they agree with it, i.e. it is as if he had made a conditional marriage: you are betrothed to me only if the Sages do not disagree with this marriage. Here they do not agree, hence the annulment.

The Tosafists point out a difficulty with Rashi's interpretation, namely that here the groom did not betroth in accordance with the will of the Sages. On the contrary, his behaviour was in opposition to their will, so how can we assume that he intended his betrothal to be subject to the Sages' agreement? Furthermore, the Talmud does not mention here, as it does in the following cases (see below), that we take for granted that he subjected his betrothal in this manner. They therefore explain that in cases such as this the Sages are using their biblically granted power to abrogate Biblical Law by confiscating the wedding ring, invalidating the wedding document or declaring the wedding copulation promiscuous (depending on how the betrothal was effected).[114]

In the final generations of the Babylonian Amora'im we find further extensions of annulment. This time the betrothal (and marriage) were perfectly acceptable, yet were annulled at a later stage. The three examples in the Talmud are as follows.

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

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

1. *Gittin* 33a, *Yevamot* 90b

A husband sends an agent to deliver a *get* to his wife and then, without the knowledge of the wife or the agent, he cancels the *get* or the agency before the *get* reaches her and, by Torah law, the *get* is rendered ineffective. As the wife will believe the *get* to be valid and will act accordingly, the Sages forbade such action by the husband, imposed a sanction of flogging and *declared the get valid*.[115]

2. *Ketubot* 3a

A husband issues a *get* "if I do not return by a certain time" and he would have returned within the time but failed to do so because of circumstances beyond his control (*'ones*). By Torah law the *get* is not valid because he did everything he could to return and his failure to do so was not his choice. The Sages, however, enacted that *the get is valid* (*'eyn 'ones begittin*). This enactment is explained in *Ketubot* 2b-3a as being due to both chaste women and dissolute women. If the Rabbis had let the biblical law stand so that in a case of his not returning due to circumstances beyond his control the *get* would be invalid, then every time a husband failed to return on time a chaste wife would think that perhaps this was due to an *'ones* and she would remain an *'agunah*, although it may well be that there was no *'ones* and the *get* is valid. On the other hand, an immoral wife would presume that there was no *'ones* and would remarry whereas in fact there may have been an *'ones* and the *get* would thus be void. Once the Sages enacted that there is no *'ones* in *gittin*, so that if the husband did not arrive back on time the *get* is always valid no matter what the reason for his delay, both the chaste and the immoral wife could remarry safely.

3. *Gittin* 73a

A dangerously ill person divorced his wife and, on recovery from his illness, expressed the wish to retract. By Torah law he can do so because he clearly intended to divorce only because of his impending death. However, the Sages declared the divorce valid in spite of his retraction. The reason for this enactment is that if the biblical law (which says that the *get* is valid if he dies[116] and is invalid if he recovers[117]) were allowed to stand the false impression would be created that this

115 This accords with the opinion of Rabban Shim'on ben Gamliel. According to Rabbi (Yehudah HaNasi), like whom the *Halakhah* is fixed, the husband's cancellation would be allowed to stand if he declared it in the presence of a *bet din* (of three and some say even two) even though neither the wife nor the agent was informed.

116 Because it was only on the understanding that he would die that he gave the *get*.

117 Because he never intended the divorce to go through in case of his recovery.

get was given on the understanding that it would take effect after the husband's death, and that is why it is valid if he dies but not if he survives. This would lead to the error that a *get* given on such an understanding would be valid whereas the truth is that it would not be valid. However, once the Sages ruled that the *get* is valid even if he recovers no-one could possibly think that he gave the *get* on condition that it take effect after his death.[118]

In all these three cases the Talmud asks: "Can there be a *get* which the Torah declares invalid that the Sages validate?" In each case the reply is "Yes,[119] since everyone who betroths does so on condition of the Sages' concurrence". Here, they withdrew their agreement and consequently brought about the retroactive annulment of the betrothal.

These cases differ from the former two (Narash and betrothal by coercion) in that (i) in these three cases the annulment is not triggered at the time of the betrothal but after both the betrothal and the wedding and (quite possibly) years of marriage and the birth and raising of a family and (ii) in these cases the groom did not behave improperly because the betrothal (and wedding) were perfectly legal and moral. Nevertheless the Sages had good reason to annul these marriages and, as the Talmud states, relied on the fact that "*kol dimeqaddesh 'ada'ta' derabbanan meqaddesh*" – "everyone who betroths does so only if the Sages [remain] in agreement [with the betrothal]" – thus by withdrawing their consent the Sages can retroactively annul any marriage when they see fit to do so.

The theory of rabbinic dissolution of marriage in the three cases of post-betrothal annulment

(i) The majority view[120] is that the annulment actually works retroactively[121] to the moment of *qiddushin* so that the couple's marriage is deemed never to

118 See *Gittin* 73a and Rashi there s.v. *Gezerah*.

119 The Talmud answers in the positive אין (= yes) in the sense that the *get is* rendered effective by means of the retroactive dissolution of the *qiddushin*.

120 Rashi, *Yevamot* 90b, s.v. *We'afqe'inho rabbanan*; *Tosafot*: *Ketubbot* 3a, s.v. *Tinaḥ* and *Gittin* 33a, s.v. *We'afqe'inho*; Ritba in *SM Ketubbot* 3a, s.v. *Wekhatav HaRitba*; Me'iri, *Ketubbot* 3a, s.v. *Kol she'amru* et al.: see *ET* II p.137 col. 2 – p. 138. The concept of annulment of marriage is nowhere alluded to in the Yerushalmi. It first appears in the final era of the Babylonian Amora'im – in the days of Ravina and Rav Ashi. Although Rabban Shim'on ben Gamliel's ruling *is* recorded in the Yerushalmi (*Gittin* 4:2) it is explained as being part of the broader authority of the Sages to abrogate Biblical Law (see note 124 below) and not as an independent concept of 'marriage annulment'.

121 See, however, *OMH* to *Gittin* 33a, col. 436, s.v. *Kammah*, where it is recorded that a number of great *'Aḥaronim* stated that *hafka'ah* takes effect only from the time that the (flawed) *get* reaches her hand. This produces a prospective annulment but for reasons other than those described in (ii), (iii) and (iv).

have existed. The logic is that since the groom declared that he is marrying according to the biblical and rabbinic law, which is understood to mean that the marriage is conditional on the continuing acquiescence of the rabbinic authorities, once a situation arises which causes those authorities to withdraw their approval the condition for preservation of the marriage has been broken and the union becomes automatically retroactively defunct.

(ii) Some[122] explain that the Sages validated the externally flawed *get*. This means that the annulment is prospective.

(iii) Others[123] suggest that the groom's awareness of the possibility of rabbinic retroactive annulment – something he does not want as it will reduce his relationship with his wife from one of holy matrimony to one of secular (and possibly sinful) concubinage – will force him to validate the divorce in his heart and the *get* thereby is biblically valid in spite of any indication to the contrary. Again, this means that the annulment is prospective.

(iv) Yet others[124] maintain that the *get* remains biblically invalid but the marriage is annulled prospectively[125] as part of the broader principle that the Sages hold the power to introduce enactments that override Biblical Law not only passively but even actively.[126]

The rationale in the two cases of immediate annulment

As to the rationale behind the law in the cases of immediate (or concurrent) annulment – the case of Narash and that of coerced betrothal[127] – some say[128] that

122 Ri HaLavan in *Tosefot Ri HaLavan*, *Ketubbot* 3a, s.v. *Kol dimeqaddesh*. This means that in spite of the husband's declaration of cancellation of the *get* (for example) in his heart he really adheres to the ruling of the Sages who validated this *get*. See *OMH ibid*., cols. 434-35 and footnote 89.

123 Ramban, *Ḥiddushey Ketubbot* 3a s.v. *Shavyuha* citing Rashbam; Rashba in *responsum* I 1162: see *ET* II p.137 at note 22. This view is similar to, though not identical with, that of Ri HaLavan – cf. *OMH ibid*., col. 435, lines 2-3: '*Similarly* [to Ri HaLavan] Ramban wrote in his *novellae*'.

124 *Yerushalmi Gittin* 4:2. *ET* II p.138, at note 22, citing *SM* quoting 'There are some who answer'. This accords with the view of Rav Ḥisda in the Bavli in his dispute with Rabbah – see *Yevamot* 89a-90b. Note, however, that in given situations Rabbah too would countenance active abrogation – see *ET* XXV cols. 634-37 (top) and especially notes 205 and 230.

125 Cf. Elon, *HaMishpat Ha'Ivri*, I, 522 and note 55.

126 For further discussion of this matter and for a historical-critical investigation of the sources see A. Westreich, "Annulment of Marriage (*Hafka'at Kiddushin*): Re-examination of an Old Debate", Working Papers of the Agunah Research Unit, no. 11, available at http://www.mucjs.org/publications.htm.

127 See text at notes 112-113, above.

there also the rationale is as in (i) but others[129] object that, since in those cases the betrothal was not in accordance with the Sages' will, the rationale must be as in (iv).

Current Rabbinic Annulment

As Freimann, *SQN* p.14, indicates: This declaration "'*ada*'*ta*' *derabbanan meqaddesh*" has been the subject of endless debate throughout the ages. Was annulment applied, on the basis of this rationale, only in these three cases or are these three merely examples, so that annulment can be applied whenever it is a logical requirement in other cases? Are the Sages (*Rabbanan*) referred to only the Talmudic Sages or is this power of annulment invested in the leading scholars of every generation? Is the declaration that the betrothal was conditioned on the consent of the Sages to be understood as limited to cases where the groom explicitly made such a condition or is the condition taken as implicit in the formula of betrothal or is the meaning that the Sages utilised their legal authority to impose this condition upon every betrothal and wedding regardless of the wording and intention of the groom (*tenai bet din*)? Is the 'condition' literally just that or is there here no real condition but some other legal concept of assumed intention like the "*ada*'*ta*' *dehakhi*" (on such an understanding [he would not have acted]) that we find in other areas of the *Halakhah*? The post-talmudic sages have grappled with all these questions – and related ones – from the geonic to the modern period.

The argument for current rabbinic annulment without a *get* would have to be based on (i) and it would be effective only according to the minority of *Posqim* who accept the possibility of annulment nowadays, even in cases not mentioned in the Talmud even after a valid *qiddushin* and *nissu'in* and even without any *get*.[130] It is clearly not viable according to (ii) and (iii). It is also not possible according to (iv), because no-one can introduce *any* new decrees or enactments after the period of the Talmud[131] (and some say after the period of the Ge'onim)[132] let alone such as would abrogate Biblical Law. However, if annulment is co-opted together with

---

128 Rashi. See *ET* II p.139 col. 2, note 48.

129 *Tosafot*. See *ET ibid*., note 49.

130 See the discussion below, pp.52-60.

131 Rosh, *Shabbat* 2:20, as per *ET* V col. 540 note 165. Note however, that geonic enactments in *financial* matters are accepted into the *Halakhah* – see, *inter alia*, *Sefer HaYashar LeRabbenu Tam* (Jerusalem 5732), number 24, p.40 line11. Note also that this refers to new legislation obliging all Israel, as the talmudic decrees do; it does not exclude the possibility of local enactments. Cf. Elon, *HaMishpat Ha'Ivri*, I 529, n.6. It also allows for even universal legislation in periods of emergency – see below, n.134.

132 *Maggid Mishneh*, *Ḥamets UMatsah* 5:20, as per *ET ibid*., note 164.

other possible solutions (to create a multiple doubt solution) and one of those solutions is an externally flawed *get*[133] it could be a valid contribution according to (ii) and (iii) also. Furthermore, if the current situation of '*iggun* could be classified as an emergency, annulment would be possible even according to (iv) according to the majority of *Posqim* who rule that emergency legislation is possible nowadays also, even if that would mean *actively* abrogating Biblical Law.[134]

Dr. Freimann's conclusion

In the very last paragraph of *Seder Qiddushin WeNissu'in* (p.397), Freimann suggests that it is the power of annulment, *and that alone*, which will solve the plague of '*iggun*. He writes as follows:

> The cure must come from the same source as the problem. The source of the evil of criminal '*iggun* is our loss of independence and judicial authority; the collapse of internal discipline and the licentiousness towards Jewish Law amongst a large part of our people. True, we cannot restore the crown of the judicial autonomy of the *batey din* of the Diaspora. However, the establishment of the highest religious institution in the Land of Israel, the place of the Jewish People's vitality, has restored to the People of Israel an authoritative religious centre with authority throughout the Jewish World. After the destruction of the Torah centres in the countries of Europe, we have no remnant but the Torah of this land and the eyes of all Israel look to this highest religious institution as to the last fortress for the preservation of the Law and the Tradition which is left to us as a remnant from the destruction of the Exile.
>
> No longer can one hope for authoritative, legitimate action in the area of religion and law from any other place. No longer can one use the excuse of saying that perhaps there is in the generation a *bet din* as respected and as great as them.[135] This position gives to the *batey din* of the chief Rabbinate of the Land of Israel,[136]

133 I.e. the text of the *get* is valid but an outside factor – the husband's free-willed consent to the divorce – is lacking.

134 *Responsa Tsemaḥ Tsedeq* (1) no. 28 in a gloss of the author's son; implication of the *Rishonim* who did not discuss what type of *bet din* has the power of abrogation; *Responsa Rashba*: VI no. 254, *Meyuḥasot* no. 244; *Responsa Ḥakhmey Provincia* I no. 64 (where, by the way, the author supports the Rambam's ruling for *kefiyyah* in the case of the *moredet*); *Yeshu'ot Ya'aqov OḤ* 242 sub-para. 2; *Ḥesed Le'Avraham* (Te'omim) *EH* 10 s.v. '*Od* where it is stated explicitly that even the *'Aḥaronim* possess the authority to abrogate Biblical Law; *Responsa Bet Yehudah HM* 11; *Responsa Bet Shelomoh YD* 29; *Iggerot Moshe OḤ* I 33 (though the subject there is only the abrogation of a positive commandment). Cf. *ET* XXV, col. 611, footnote 22 and cols. 637-639, at footnotes 231-44.

135 In which case no *bet din* could act in the matter of marriage regulation for fear that a greater, or equal, *bet din* might disagree with any proposed marriage enactment.

136 Unfortunately, the Chief Rabbis of Israel were not always leading *Gedoley HaDor* and even those who were could not always claim that their *bet din* was superior to all others in Israel or in the Diaspora.

from a halakhic perspective also, power and authority which no *bet din* of the people of Israel had during the latter generations.

The most important *bet din* in a generation possesses great authority – to judge and to hand down rulings and to requisition property and to annul marriages and to institute enactments based upon 'the superior power of the *bet din*'.[137] This authority imposes obligations.[138] Due to the power of this authority it is incumbent on the leaders of our highest religious institution to prepare, when the time comes, the arrangement for the restoration of our religious-social life following the days of the Holocaust and the Destruction. Among the painful problems that will stand before them will be the problem of personal status, the concern for the sanctity of the Jewish family in the Land [of Israel] and in the Diaspora. Applying the same measure of awareness of life's pains, of sensitivity to the needs of the hour and of flexibility in light of the conditions of place and time demonstrated by our teachers who authored enactments and agreements in former generations, it will be possible to strengthen [matters] in the area of the loss of religious authority and of the collapse of obedience to Jewish Law.

Even if the Fear of Heaven and the fear of handing down halakhic rulings of the Great Ones of our generation take precedence over their wisdom[139] let there not be in them any of the measure of the humility of Rabbi Zekharyah ben Avqulos which destroyed our Temple and burnt down our Palace and exiled us from our land[140] but rather [let there be in them] of the measure of the humility of Hillel the Elder who used to interpret unofficial expressions (*leshon hedyot*) in order to save a large group of Israel from excision and destruction.[141]

May there be favour from before Our Father in heaven to preserve amongst us Sages of Israel who will know how to firmly establish the House of our Life and to restore the Divine Presence to our midst.[142]

137 *Koaḥ bet din yafeh*. See *Yevamot* 90b *et al*.

138 *Noblesse oblige*.

139 As it should be: see *Avot* 3:9 (Rabbi Ḥanina ben Dosa).

140 *Gittin* 56a.

141 Tosefta *Ketubbot* 4:9.

142 Based on the weekday morning liturgy following the Torah reading in the Ashkenazic rite and on the Sabbath morning liturgy on Sabbaths preceding *Rosh Ḥodesh* following the Torah and *Haftarah* reading in the Sefaradic rite. If annulment as envisaged by Freimann were introduced, it would be necessary to make prior arrangements for the wife's future financial support; otherwise, with the retroactive annulment of the marriage, the *ketubbah* also would be annulled and the wife would lose all her post-marital rights. See Rabbi B.M.Ḥ. Uzziel, *Responsa Mishpetey 'Uzzi'el EH* 44 and similarly Rabbi Eliyahu Ḥazzan, *Resp. Ta'alumot Lev EH* I.5, who point out the necessity of this in the case of a marriage being retroactively dissolved due to breach of condition. See, however, *OMH* to *Gittin* 33a, col. 437, n. 108, citing R. Ya'aqov Zvi Yalish (in *Melo' HaRo'im*) who rules (in cases of rabbinic annulment) that even without special arrangements she would be entitled to her *ketubbah*. *OMH* presumes that this is due to the fact that after the retroactive annulment there remains a rabbinic marriage and cites R. Shelomoh Eiger (in *Sefer Ha'Iqqarim* II 357) who 'writes about this at length'. See also R. Ovadyah Yosef, text at note 162, below.

Rabbi Professor Menaḥem Elon

In his survey of marriage annulment Menaḥem Elon[143] demonstrates from many sources that annulment by even contemporary sages even in cases not mentioned in the Talmud is possible and he suggests that the unwillingness of many *posqim*[144] to permit in practice, in the area of marriage law, that which they regarded as perfectly acceptable in theory was due to the scattering of the Jewish people all over the world and the resultant divisions into countless communities each with its independent *bet din*. This would inevitably lead to variations in marriage practices so that a woman whose marriage had been annulled in one place might well be regarded as still married in another – a problem that would hardly arise in other areas of Jewish law. He writes:[145]

> It seems that the vast historical change … that has taken place in Jewish existence with the return of Jewish Sovereignty is sufficient to bring about change in the existing tendency towards avoidance of activating the authority to legislate. Just as the cause of this reticence was the fact of scattering and dispersal, of local communal legislation and of the lack of a central Jewish authority, so the cause of reactivating legislative authority must issue from the new situation of ingathering and unification, of the formation of a central authority, which will bring about legislation for all Jewry. The halakhic centre which is in the Land of Israel is fit to be – and in fact is – the main centre and holder of the halakhic hegemony over all the Jewish Diaspora. Consequently it is entitled to take for itself the right to introduce enactments that will be from the moment of their introduction – or in due course – the heritage of the Jewish people everywhere. The new historical situation suffices to bring about also a new halakhic situation whose innovative point will be the return of the Crown to its former glory.[146] This new situation contains also a power of authorisation – which, as it authorises, so it obliges[147] – to restore the activity of legislation in all branches of Hebrew Law, including betrothal and marriage, to its full capacity in the interests of the improvement of the world of the Law and the world of Israel.

These words are reminiscent of Freimann cited above, but whereas Freimann underscores the point that a leading halakhic centre in Jerusalem will have the power to introduce enactments of annulment due to its unquestioned seniority of scholarship *vis-à-vis* all other halakhic bodies, Elon sees the advantage of a renewed Jerusalem halakhic centre as being in its ability to communicate with, and

143 *HaMishpat Ha'Ivri*, Jerusalem 5738, I chapter 20, pp.686-712.

144 Including the *Shulḥan 'Arukh* and the *Mappah*.

145 *HaMishpat Ha'Ivri* I p.712.

146 *Yoma* 69b.

147 See note 138.

align with itself, all other Jewish religious authorities in the world.

Recent Discussion of post-Betrothal Annulment with and without a Get

In the recent debate between Rabbi Shelomoh Riskin and Rabbi Zalman Neḥemyah Goldberg[148] the latter repeatedly insists, in opposition to Rabbi Riskin, that retroactive annulment *without a get* is nowadays out of the question. Only where there was an [externally] invalid *get* – as in the cases in the Talmud – can such annulment apply. Rabbi Riskin's arguments from the Rosh's interpretation of the *taqqanat haGe'onim* (i.e. that the *taqqanah* was based on post-talmudic *hafqa'ah* demonstrating that retroactive *hafqa'ah* is possible even after the *ḥatimat haTalmud*) are rejected by Rabbi Goldberg because the enactment of the Ge'onim also operates only together with a *get* (again externally flawed as in the cases of the Talmud[149] but here due to talmudically unsanctioned coercion).

However, Rabbi Goldberg does not address the one clear case of post-betrothal annulment without a *get* that Rabbi Riskin cites in the name of the Rema as recorded in *Darkey Mosheh* (*EH* 7:13), regarding the report in *Terumat HaDeshen* (no. 241) of the permission granted by contemporary leading rabbis to women who had been taken captive as a result of the 'Evil Decree of Austria' to return to their husbands even if the latter were *kohanim* (which could involve a Torah prohibition). Rema writes:

> I think that it is possible that the great authorities of that time who rendered this lenient decision did not do so on the basis of the established *Halakhah* but as an emergency ruling necessitated by the needs of the moment because they were concerned about the future of those women, for if they knew that they would not return to the "husband of their youth" they might go astray and therefore the rabbis took a lenient line. Don't wonder how it is possible to be lenient with a possible Torah prohibition because (I think) they relied on the principle בל המקדש אדעתא דרבנן מקדש hence *Bet Din* held the power to annul their marriages so that each one became retroactively an unmarried woman at the time of her being raped and so was permitted to return to her partner.[150]

148 This debate was conducted in *Teḥumin*: R. Shlomo Riskin, "Hafqa'at Qiddushin – Pitaron La'Aginut" *Teḥumin* (22), 191-209; R. Zalman Neḥemiah Goldberg, "Hafqa'at Qiddushin 'Eynah Pitaron La'Aginut", *Teḥumin* (23), 158-160; R. Riskin, (23) 161-164; R. Goldberg, (23) 165-168. There is also a summary article of Riskin's position in '*Amudim* XIV 17-22. See further: Shlomo Riskin, "Hafqa'at at Kiddushin: Towards Solving the Aguna Problem in Our Time", *Tradition* (36:4) Winter 2002, 1-36; Jeremy Wieder, "Hafqa'at Kiddushin: A Rebuttal" *ibid*., 37-43; Shlomo Riskin, "Response", *ibid*., 44-53; Jeremy Wieder, "Hafqa'at Kiddushin: Rejoinder", *ibid*. (37:1) Spring 2003, 61-78.

149 See text at notes 115-118, above.

150 I do not know how this helps in the cases where the husband was a *kohen* – but see text at note 161, below.

Thus Rema was willing to countenance *post-talmudic* dissolution of marriage even *after an appropriate betrothal* even *in a case not mentioned in the Talmud* and even *without an (externally disqualified) get* and even *in the absence of an enactment embodying annulment* or, indeed, of *any enactment whatsoever*. Possibly Rabbi Goldberg did not see any need to respond because (i) Rema is not sure of the reasoning of "the great authorities of that time"; (ii) the case involved either a rabbinic prohibition or at most a non-enhanced biblical prohibition, which is not the case with adultery; and (iii) there is doubt nowadays about the priestly status of all *kohanim* – see *Ba'er Hetev*, *EH* 6:2. See, however, the words of R. Ovadyah Yosef below (pp.58-59).

It should also be noted that this very discussion took place almost 600 years ago (c.1470) between Rabbi Shemuel Ibn Ḥalath and Rabbi Yosef (Ḥayyun?) of the sages of Portugal. The former mustered a number of arguments to prove that the *bet din* even nowadays has the authority to annul marriages and maintains that this is so even *after the qiddushin [and nissu'in] have taken place in conformity with Halakhah and communal enactment* if this is necessary to save a woman from '*iggun*. Rabbi Yosef dismisses Rabbi Shemuel's ruling pointing out that whereas marriages *improperly contracted* may be dissolved if there is a communal enactment to annul them, those which have been correctly effected can be later annulled only in the cases where there is a *get* (that is disqualified by Torah law but effective by Talmudic law through annulment of the marriage, as explained in the Talmud).[151]

There is also a relevant record in "a very ancient scroll" (published at the end of *Ḥayyim waḤesed Mussafia*, Livorno 5604, letter צ"ד) in which were gathered the customs and practical *novellae* of the early rabbis of Jerusalem from the time of the Nagid Rabbi Yitsḥaq HaKohen Sulal and his company from the year 5269. It is stated in section 94 of the scroll as follows.

> In *Yevamot*, ch. *Bet Shammai*, "אפקעינהו רבנן לקידושין מיניה" – the Sages annulled his marriage because everyone who betroths does so only with the consent of the Sages. Thus when he betroths improperly the Sages annulled his betrothal. I asked כמהרש"ן [his identity is unknown] why they did not, accordingly, release the '*agunot* in one go and he answered me that the *Ge'onim* said that in a case of a woman already [properly] married that they should persuade him to divorce and it is proper to be concerned [about the leniency of annulment and it is, therefore, better to obtain

[151] See Freimann, *SQN* 80. I discovered a report of this debate in Rabbi Y. M. Toledano, *Responsa Yam HaGadol*, no. 74 where he tells us that he had found an account of the argument between Ḥayyun and Ibn Ḥalath in an ancient manuscript *responsum* of Ḥayyun wherein it was mentioned that a number of Portuguese rabbis of the time accepted Ibn Ḥalath's ruling and as a result *a number of* '*agunot were actually released*. The MS *responsum* of Rabbi Yosef Ḥayyun was published by R. Toledano in the monthly '*Otsar Ḥayyim* (published by Rabbi Ḥ. Ehenreich in Romania) 5690, 210-24. Cf. R. Ovadyah Yosef below, text at notes 159-164.

> a *get*]. *Nevertheless, if the Sages would agree to annul marriages [without a get, even after they have been properly contracted and even after nissu'in] that would be halakhically acceptable* but past cases where she was already properly married before any such agreement – we lesser mortals could not annul.[152]

Coincidental Betrothal Annulment

Rabbi Goldberg agrees that even nowadays one could introduce annulment enactments which would operate *at the moment of* the *qiddushin* by invalidating the act of the *qiddushin* (and hence there would be no requirement of a *get*) but he points out that the Rema rules that *in practice* even this is not to be allowed.[153]

Misleading sources

Admittedly, writes Rabbi Goldberg, there are cases such as the missing husband whose death is attested by only one witness – even if the 'one witness' be a pagan's innocent talk – where the Sages allowed remarriage on the basis of annulment (without a *get*), but that is because there is convincing evidence (albeit not proof) that the husband is dead, and there is also the assumption that a woman enquires carefully before remarrying[154] due to the fact that she is aware of the severe repercussions that would ensue were she to remarry and her husband subsequently to return. For permitting nowadays the practice of annulment in the case of *get* refusal, however, we have no precedent whatsoever in the *Halakhah*. Rabbi Goldberg is at pains to point out that it is not his own opinion that he is putting forward but that of the Rashba in his *Responsa*, I:1162.[155]

More negative views

The lengthy article by Rabbi David Lau, *Hafqa'at Qiddushin Lemafre'a' BeYamenu*,[156] comes to a similarly pessimistic conclusion, as does that by Eliav Shochetman, "Hafqa'at Qiddushin – Derekh 'Efsharit LeFitron Ba'yat Me'ukevot HaGet?",[157] who argues (like R. Goldberg) that the *Rishonim* quoted by Berkovits[158]

152 Freimann, *ibid*., 113. See also Rabbi Y. M. Toledano, *ibid*. For further comment on this ancient scroll, see text at note 164 below, in the name of R. Ovadyah Yosef.

153 *EH* 28:21. See R. Ovadyah Yosef below, pp. 59-60, s.v. Coincidental Betrothal Annulment.

154 *Daiqa' uminasba'* – cf. *Yevamot* 25a et al.

155 On this argument from the Rashba, see below, R. Ovadyah Yosef, p.58, and R. Eliezer Berkovits, p.62 (bottom).

156 *Tehumin* XVII 251-271.

157 *Shenaton HaMishpat Ha'Ivri* 20 (5755-5757), 388-92.

158 See below, p.62.

never proposed annulment subsequent to a properly performed *qiddushin* except in the presence of an externally flawed *get* – as in the source cases in the Talmud.

Rabbi Ovadyah Yosef - a positive note

In an article titled "Kol HaMeqaddesh 'ada'ta' DeRabbanan Meqaddesh We'Afqe'inho Rabbanan LeQiddushin Mineh",[159] Rabbi Yosef writes that from the rationale suggested by the Ramban and the Rosh for the Ge'onim's *taqqanat hamoredet*, namely that it is based on the power of annulment, we can infer that even nowadays the sages of each generation are empowered to enact the annulment of marriage (even after a properly conducted *qiddushin*); such power is not limited to the talmudic sages alone.

He adds that the author of *Responsa* '*Ezrat Yisrael*[160] argues that the Rambam agrees that coercion in the case of *me'is* '*alai* is an enactment of the Ge'onim and not talmudic law. This would mean (accepting the aforementioned argument of the Rosh) that the Rambam also maintains that retroactive annulment can be introduced by the post-talmudic sages in cases not included in the rubric of annulment by the Talmud.

This contradicts the view of the Rashba (*Responsa* I:1185) who maintains that we can only apply annulment in those cases where it is explicitly permitted in the Talmud. Perhaps, writes Rabbi Yosef, Rashba was following his opinion expressed elsewhere (*Responsa* VI:72), that the *taqqanat haGe'onim* was an emergency measure only, in response to the circumstances prevailing in Babylon at the time. It follows therefore, adds R. Yosef, that even according to Rashba, one could introduce retroactive *hafqa'ah* nowadays for the emergency needs of our time.

He backs this up with the statement of the Rema in *Darkey Mosheh* ('*Even Ha'Ezer* 7:13) that the reason the Great Rabbis of Austria permitted captured women to return to their husbands even if the latter were *kohanim* was not in accordance with the regular *Halakhah* but was an emergency ruling. "Though this meant permitting a possible Pentateuchal prohibition, I think," writes the Rema, "that they relied on that which we say – *Kol dimeqaddesh 'ada'ta' derabbanan meqaddesh* and there was [therefore] power in the hands of the *bet din* to annul the women's marriages so that they were considered unmarried, so that even if they had had relations they are permitted to their *kohen*-husbands."

Rabbi Yosef notes the obvious difficulty with the Rema's suggested interpretation of the ruling of the *Gedoley Ostreich*, namely that even if a woman was unmarried at the time of her captivity a relationship with a gentile would

159 *Torah Shebe'al Peh* (Jerusalem 5721), 96-103.

160 Rabbi Yisrael Shapira.

forbid her to her *kohen*-husband, and suggests possible solutions.[161] In the course of his discussion he says[162] that even after '*afqe'inho* there remains a rabbinic marriage. This will explain why the Rashba insists that annulment by itself is not enough; a[n externally flawed] *get*, or some other additional reason for permission to remarry, must be present to overcome the problem of the residual rabbinic state of marriage.

He furthermore notes that, however one understands the Rema, it is clear that at a time of great need one can apply annulment even nowadays (i.e. even in cases not mentioned in the Talmud, even after *nissu'in*, even where there is no *get*, and even where there was no preceding enactment of annulment in the given circumstances).

He then informs us that he discovered amongst the enactments of the Rabbis of Jerusalem from 5269 (= 1509) which were printed at the end of the book *Ḥayyim WaḤesed Mussafia* (letter צ"ד) that in their opinion it is possible to annul marriage even after the *ḥatimat HaTalmud*.[163] He concludes that although a number of *posqim* disagree – Rivash (Responsa, 399), *Peney Yehoshua* in the name of Rabbi Betsalel Ashkenazi (*Quntress 'Aḥaron* to *Ketubbot* 3a) and the *Peraḥ* (*siman* 125 sub-section 39) – nevertheless at a time of great need it would seem that there is a possibility to take a lenient stance in accordance with the aforementioned *posqim*.[164]

Coincidental betrothal annulment – in practice?

The final section of this article deals with post-talmudic enactments to annul *qiddushin* which were conducted in defiance of communal agreements. Rabbi Yosef declares that the debate amongst the *Posqim* concerning contemporary competence to annul marriage concerns only annulment *after proper execution* of *qiddushin*. Where, however, the *qiddushin* were improper, having been carried out

161 In addition to these it is worthwhile consulting that offered by R. Meir Hameiri in '*Ezrat Nashim*, *Sefer Shelishi* (London 5715), 93-94.

162 *Torah Shebe'al Peh* (Jerusalem 5721), p.101, final paragraph.

163 See above, p.56, n.151, and see Freimann, *SQN*, 113-14. From the context ('*iggun*) and wording of this document it is clear that the opinion of כמהרש"ן (identity unknown) referred to in this enactment is that if the [contemporary] sages would agree to [retroactively] annul [even consummated] marriages [that take place] from the time of the enactment on [even without any kind of *get*] this would be valid. This has been noted also by Rabbi Ya'aqov Moshe Toledano in *Responsa Yam HaGadol* no.74, who points out that although the *Nimmuqey Yosef* (*Ketubbot* 63) states unequivocally that the post talmudic authorities cannot annul a properly executed marriage that may be only where the annulment is declared by the authority of the local community, which is indeed the situation of which the *Nimmuqey Yosef* speaks. The ruling of the Jerusalem Rabbinate of 1509, however, may refer to a general enactment of the contemporary Sages.

164 At this point it sounds as if Rabbi Yosef is proposing reliance on annulment alone in an emergency situation of '*iggun*. See, however, below.

in defiance of a communal decree, *very many Rishonim* agree to the contemporary effectiveness of enactments of annulment. Even the Rashba, who explicitly limits the application of annulment to those cases described in the Talmud, wrote in a *responsum* cited in *Bet Yosef* (end of *EH* 28) that such initial annulments can be made by means of judicial confiscation of the marriage ring. The Rivash (*Responsa*, 399) rules similarly and so the Rashbets (*Responsa*, II 5). Maharam Alashqar (*Responsa*, 48) cites the Rosh as holding the same opinion and as adding that even if the *qiddushin* performed against the communal enactment were executed by means of intercourse they would be rendered promiscuous by the enactment and therefore ineffective. Many of the great *'Aḥaronim* agreed to this and they are enumerated in *Kenesset HaGedolah* (*EH* 28, *Hagehot Bet Yosef* 37).

In the final paragraph, Rabbi Yosef notes that the Rashba agreed to such annulments only in theory but in practice he would not rely on them. Similarly, the Rivash requires the agreement of all the local Sages before he would agree to the practical application of such enactments. Nevertheless, he adds that Mahara ben Shimon in *Responsa UmiTSur Devash* (*EH* no. 6) maintains, along with many supporters, that one can rely in practice on enactments of annulment and the *bet din* that succeeded him did rely on annulment in actual cases.

It should be noted that Rabbi Yosef states in his list of rules of halakhic decision making (*Yeḥawweh Da'at* I (Jerusalem 5737) *Killeley HaHora'ah*, p.15 no.12) that "[if] a *poseq* concludes his *responsum* 'so it seems to me in theory but not in practice' or 'so it appears to me if [other] *posqim* will agree with me' we can assume that this is [merely] due to humility and we may [therefore] rely on his decision even in practice [and even if other authorities did not express their concurrence]."

Consensus and Sefeq Sefeqa'

Rabbi Yosef then notes that although we cannot adopt this practice because of our custom to demand consensus in matters of marriage and divorce,[165] we can apply it in cases where *qiddushin* have been made at the time of the *shiddukh* – against the will of the Sages and in defiance of a communal enactment (where even the Rashba and the Rivash etc. agreed in principle to the annulment of the marriage without any *get*, and expressed concern only for practice) – and the wife claims afterwards *me'is 'alai* and he refuses to divorce her in the hope of making some easy money. In such a case we can enforce a *get*. Although, as a rule, we cannot enforce a *get* in cases of *me'is 'alai* when we are dealing with a definitely married

[165] Which means that every single stringent opinion amongst the *Posqim* must be adhered to in matters of marriage and divorce (unless the stage of '*iggun* has been reached). See my discussion of this customary practice in "Consensus", §§IV.8-35.

woman, in this case we can rely on that which the Me'iri (*Qiddushin* 65a), amongst others, wrote, namely that in a case of doubtful *qiddushin* if the wife does not want to go ahead with the *nissu'in* (= *me'is* '*alai*), we can coerce a divorce. Although one can infer the opposite from some *posqim*, a doubt remains so that we have a *sefeq sefeqa*'[166] to be lenient.

Conclusion

From this article of Rabbi Yosef, it would seem that a declaration of retroactive annulment by the contemporary leading sages of Israel even without a prior enactment (and certainly with one) even in cases not matching the historical examples in the talmudic and geonic literature, even after the proper execution of *qiddushin* and *nissu'in* and even without any kind of *get*, would be sufficiently halakhically effective at least to create a *safeq*. Even if there is a majority against the effectiveness of annulment in such cases the fact that a minority supports it is sufficient to create a *safeq* that could combine with another, more substantial, *safeq* to form a *sefeq sefeqa*'.[167]

Arguments of R. Berkovits

R. Eliezer Berkovits, in the fourth chapter of *Tenai beNissu'in uvGet*, also discusses the question of contemporary annulment of marriage. He writes:[168]

> It is worthwhile to quote from the enactment of annulment of marriages that operated in Egypt in 5660 (= 1900). '…and the cure for this? The only answer is annulment, which has been used by the Ge'onim, *Rishonim* and *'Aḥaronim* in order to put a stop to the lawlessness of the oppressors; although they in their days had real authority over their communities how much more so do we, who have lost the internal authority of earlier days, need the power of communal annulment'.
>
> If the matter was so severe in their days how much more so is it today.
>
> The problems today are not usually problems of '*agunah* but of married woman who remarry without a *get* and bear *mamzerim*. The truth is that he who is strict nowadays with annulment is in effect multiplying *mamzerim* in Israel. To the point, here are the words of the author of *Ta'alumot Lev* (*EH* no. 14): "Even those who in practice take a strict view because of the stringency of forbidden sexual relations,

[166] Maybe the *halakhah* is like the Rif and the Rambam etc., that one can coerce in cases of *me'is* '*alai* even where there are definite *qiddushin* and, even if the *halakhah* is not so, maybe in a case of *qiddushin* given in defiance of a communal enactment there is no marriage at all.

[167] See the methodology of the *sefeq sefeqa*' in R. Ovadyah Yosef, *Yeḥawweh Da'at* I, *Kileley HaHora'ah*, *Kileley Sefeq Sefeqa*', 11.

[168] The discussion is set out on pp.119–161 and the conclusion (which I have here quoted in abbreviated format) appears on pp.161-64.

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 …"

Again, I say that if it was so bad in his time how much more so today.

On the basis of a number of great *posqim* who agreed to annulment in their time – Rosh, Rashba, *Tashbets*, Rivash, Maharam Alashqar – it can be argued that annulment today is not impossible. Maharam Alashqar writes (*Responsa* no. 48): 'I agree with Rivash that the community has the power to annul a marriage … on the basis of כל המקדש אדעתא דרבנן מקדש and I note that whereas Rivash agrees to this in theory even in the event of a single community, he allows it in practice only if *all* the communities in the country agree to it. I add that if *all* the rabbis of the country and *all* its communities or *most* of them agree to annulment, I will go along with them.'

This is also implied by Mabit (*Responsa* I 206) who says that he follows *Tashbets*, who forbade the practice of annulment only by individual communities. *Tashbets* is the source for his son, Rashbash, and Rashbash is the source of the *Bet Yosef* and Rema – and even if the source of Rema was Mahariq (as claimed in gloss to *EH* 28:21), Mahariq also spoke only of annulment by a single community or rabbi.

Hence, even those who ruled against the usage of annulment nowadays did not speak of enactments of annulment by all or most of the communities and rabbis in a country. Indeed, thanks to modern technology, there is now a possibility to achieve annulment by the enactment of not just all or most communities and rabbis 'in the country' but even in the world!

He pointedly adds:[169]

We have also shown that there is no difference between annulment of the marriage immediately after the *qiddushin* and annulment at a later time, for example, at the time of the divorce. [I.e. both are possible nowadays even in cases not mentioned in the Talmud, provided that there was a prior enactment specifying annulment in given circumstances and the enactment was agreed to by all the rabbinic authorities.] Such a distinction was drawn from the words of the Rashba[170] but we have demonstrated that … [this is not the meaning of the Rashba.][171]

169 *TBU*, p. 162.

170 See, inter alia, Rabbi Z.N. Goldberg, "'Eyn Hafqa'at Qiddushin Lelo' Get (Teguvah)", *Tehumin* (23) 165-68, at p.165, and see above, text at note 148.

171 See similarly in Freimann, cited on pp.52-53 above, and Elon, cited on p.54 above; Rabbi O. Yosef, pp.58-61 above. See also the debate on this very point between Rabbi S. Riskin and Rabbi Z.N. Goldberg above, text at notes 148-155; see also R. David Lau, above, text at note 156 and Shochetman, above, text at note 157.

Post-betrothal annulment agreed to by the couple at the *qiddushin*

Rabbi Ya'aqov Mosheh Toledano[172] proposed,[173] in 5691 (1930/1), that a condition be made at every marriage making it dependent on the continuing agreement of the local *bet din* so that if they see that he has not acted fairly with her they can retroactively annul the marriage. The condition should be repeated at the seclusion and should be accompanied by an oath. The wording of this *responsum* makes it clear that the intention is not really conditional marriage but rabbinic annulment which is validated by the fact that the groom states that he is marrying in accordance with the will of the contemporary local rabbinate, thus engineering a modern day equivalent of the Talmudic *'ada'ta' derabbanan meqaddesh*. He concludes (in bold) by declaring that he makes the final decision dependant upon the opinion of the leading rabbinic scholars of the generation.

Similarly, *Rabbi Menaḥem HaKohen Risikoff*,[174] Rabbi in Brooklyn, proposed[175] a condition making the marriage dependent on the continuing acquiescence of a Great *Bet Din* in Jerusalem, the groom declaring at the end of his betrothal formula: *kedat Mosheh weYisrael ukhdat Bet Din HaGadol biYerushalayim*. This

172 Born Tiberias, 1880, d. 1960. His first appointment was as rabbi and preacher in Tangiers. In 1929 he became *Av Bet Din* in Cairo and in 1933 *Av Bet Din* in Alexandria and deputy head of the Cairo Rabbinic Appeals Court. Subsequently, he was appointed Chief Rabbi in Alexandria (1937), Sefaradi Chief Rabbi of Tel Aviv-Jaffa (1942) and Minister of Religious Affairs (1958).

173 *Responsa Yam HaGadol* (Cairo 1931) no. 74. See also *SQN* 391, para. 8. In his introduction to these *responsa* (which carry three approbations, including one from R. Kook) he notes that the title *Yam HaGadol* alludes not just to his name (Ya'aqov Mosheh) but also to the great 'sea of the Talmud' because he based his arguments mainly on the Talmud itself and did not deal so much with the *'Aḥaronim*. He also asks for the reader's acceptance of the fact that he has issued a number of permissive rulings in cases which had not been dealt with by the rabbis of the preceding generation, and cites sources to demonstrate that one must rule as one knows to be right and ignore the scorn of second rate scholars. He writes: "I think that one can explain that [this account in the Yerushalmi] alludes to [a rabbi] whose permissive rulings surprise people somewhat. Such a one must know how to sweeten (make acceptable) his words on the basis of the 'Great Sea' which is the Talmud and he must also know whether or not the times necessitate such [lenient rulings] … He must issue his permissive ruling for the sake of Heaven and as a strengthening of the Faith and of the Law and then it will stand to his credit … Especially in these generations of ours of which it is said 'who makes a road in the sea and a path in the mighty waters' … which means that one must know how to guide the ship in the midst of the powerful 'waves' of changes that take place before our eyes and one must not issue stringent rulings and safety measures (*ḥumrot useyagim*) without purpose and without foundation …"

174 1866-1960. Studied in Volozhyn and Vilna and received ordination at age 17 from leading rabbis. He was appointed Rabbi of Kazan in 1895 but, following pogroms, he moved to America where he became rabbi in Brooklyn. He published many works covering a broad spectrum of scholarship – *halakhah*, *aggadah*, biblical commentary, responsa and sermons, including: *Sha'arey Zevaḥ* (1913) on *sheḥitah* and *terefot*, *Sha'arey Shamayim* (1937) on the *Shulḥan 'Arukh*, *Torat Kohanim* (1948) on the laws of *Kehunah*.

175 *Responsa Sha'arey Shamayim*, New York 5697, *EH* no. 42, as per *SQN* 394.

would empower the *Bet Din* to retroactively annul the marriage in cases of otherwise irresolvable '*iggun*. He concludes by requesting the opinions of the Sages of the generation.

Chapter Three

Preparing the *Get* at the Betrothal

Two Methods

There are two ways of doing this. One is the writing, on the orders of the groom, of a *harsha'ah* for the writing and signing of a *get* and its delivery to the wife in given future circumstances. The other is, again at the groom's behest, the writing, signing and delivery now of a *get* conditioned to take effect at a future defined moment.

The Harsha'ah (Power of Attorney) Method – Problem and Solutions

This method is subject to the objection that once the couple live together this can be construed as a cancellation of the *harsha'ah*. According to most *Rishonim* the *get* would be only rabbinically invalid due to the *fear* that there had been reconciliation and that he had therefore rescinded the *harsha'ah*, whereas according to Rambam it would be biblically invalid because the very fact of their living together is considered *proof* that he has cancelled the *harsha'ah*.[176]

The problem of possible reconciliation could be solved by the husband's declaration that his wife shall be believed to say that no reconciliation ever took place: see *Maggid Mishneh*, *Gerushin* 9:25 citing *Ḥiddushey Ramban* to *Gittin* [26b]. However, this would not help according to Rambam, because the seclusion according to him does not signal merely a possibility that reconciliation, and therefore cancellation, took place but is equivalent to an explicit statement by the husband before witnesses that he has cancelled the agency.

The problem can, however, be eased, even when taking on board the Rambam's stringent ruling, if the groom swears an oath on the public mind that he will never cancel the *harsha'ah*. We would then certainly assume that he has not done so according to most *Posqim* (who regard the prospect of cancellation as merely a possibility, a rabbinic concern which, by Biblical Law, can be ignored). Even according to the Rambam, who maintains that his seclusion *proves* that he has cancelled the *harsha'ah*, one could argue that the presumption that he would not break his oath outweighs the argument that seclusion proves cancellation.[177]

[176] See the casuistic discussion in *Maggid Mishneh*, *Kesef Mishneh* and *Leḥem Mishneh* to Rambam, *Yad*, *Gerushin*, 9:25 and *Mishneh LaMelekh*, *Gerushin* 3:5. Cf. *SA EH* 149:7 and *Bet Shemuel* there sub-para. 7.

[177] Indeed, if there were to be introduced an enactment to write at *qiddushin* a *harsha'ah* accompanied by an oath *'al da'at rabbim* made by the groom never to cancel then even if, at

Berkovits[178] argues convincingly that all the *Rishonim*, including the Rambam, would agree in a case where the *harsha'ah* is being employed to avoid future '*iggun* that their subsequently living together does not raise the fear of reconciliation and cancellation of the *harsha'ah* (most *Rishonim*) nor does it prove that cancellation of the *harsha'ah* has occurred (Rambam).[179] Only where the order for the preparation of the *get* was issued due to a wish to end the marriage as soon as possible do the views of the Rambam and the other Rishonim make sense, for in such a case their subsequent living together may indeed imply reconciliation and cancellation. In our situation, however, it is clear to all that there is no desire whatsoever to end the marriage and the only reason for preparing the *get* by means of a *harsha'ah* is to eliminate the possibility of future '*iggun*. Thus if the husband disappears[180] it will be possible to rely on this *harsha'ah* to grant her a *get*.

A second problem – and solution

The second problem is the fact that the husband does not *verbally* and *directly* instruct the scribe, witnesses and agent to act. Whether the *written*, signed instructions of the husband suffice to render valid the *get* written, signed and delivered in accordance with those instructions, is the subject of much complex debate in the Talmud and amongst the *Posqim* but, again, the resultant *get* would be sufficient to be reckoned as effective in a situation of '*iggun* so long, as R. Berkovits concludes, as the *harsha'ah* was signed by witnesses in *bet din* so that there is no possibility of forgery; he cites many *Rishonim* and *'Aḥaronim* as having

---

the time of the requested divorce, the husband states openly that he has broken his oath by cancelling the *harsha'ah* and he refuses to give a *get*, one could argue that, at least according to some authorities, he may be coerced to agree to a *get* because of his oath, as we find with one who swore to give his wife a *get* and then refused to fulfil his oath: see *ET* V 706 at n.96; *SA EH* 134:5 and *Piṯḥey Teshuvah ibid*. 8.

It is furthermore possible to argue that since he swore never to rescind the *harsha'ah* we may invoke the view (see *Temurah* 4b) that "Whatever the Merciful One said 'You shall not do' – if he did it, it is legally ineffective" (that is, according to those who rule that this doctrine applies even to prohibitions that the individual brought upon himself as with an oath: see *Piṯḥey Teshuvah EH* 157:4, sub-para. 9) so that his cancellation could be ignored and the *get* written without his present consent being required. Such a *get* would be at least doubtfully valid. Even according to those who deny its validity it may still be of help (like a *get batel*) in conjunction with annulment.

178 *TBU* 82-88, especially 86 s.v. נראה and s.v. יש and 87 s.v. אלא.

179 See below, note 209, for support for this argument in the *'Aḥaronim*.

180 But not if he loses his mind – *ET* VI col. 356 at notes 37-39. For a possible solution for cases of insanity and cancellation see text at notes 240-246, below.

so ruled.[181]

As a *harsha'ah* usually identifies the scribe and witnesses appointed by the husband, there would be a problem in employing this method when the *get* may be required in many years' time and we cannot be sure that the named individuals will be alive or available. Nevertheless, R. Berkovits argues that even if the *harsha'ah* is addressed to whomever may read it and states simply that *any three people* who recognise the husband's handwriting may act as scribe and witnesses, that would be sufficient and he cites Mahardakh[182] as having so ruled. Although even this would be problematic because after many years it may be difficult to find people who recognize the handwriting, since the *harsha'ah* has been signed by witnesses and has been approved in *bet din* there is no requirement for the handwriting to be identified since there is anyhow no danger of forgery.

The Get Method – Problems of Get Muqdam and Get Yashan

This method obviously avoids the second problem of the *harsha'ah* method mentioned above, because here the husband gives spoken orders directly to the scribe and witnesses to write the *get* and also delivers it to his wife. However, it is subject to the problem of suspected cancellation (of the *get*) during the marriage. It also encounters the obstacles of *get muqdam* and *get yashan*.

Get muqdam is*:*

(i) A *get* written and signed on a day subsequent to the date appearing on it. The reason for its invalidity depends upon the reason for the enactment of dating a *get*. Rabbi Yoḥanan said the enactment was introduced to counter the possible attempts of a husband to save his adulterous wife from prosecution by giving her a *get* and claiming that it was handed to her at a time preceding her extra-marital liaison. Resh Laqish said that since the husband loses his rights to the produce of his wife's *nikhsey melog* from the moment of the divorce, if there were no date on the *get* the husband could sell produce even after the divorce and argue that the *get* was given after his sale of the produce.[183]

According to Rabbi Yoḥanan, a pre-dated *get* would enable the wrongful

181 *ET* V cols. 571-72 at notes 67-80 and col. 573 at notes 91-100; Berkovits *TBU* pp.90-119. See *ET ibid*. col. 574 note 100 and Berkovits's conclusion in *TBU* p.118, s.v. לכאורה נ"ל and s.v. מה שאפשר.

182 *Bayit* 23.

183 As to the fact that there must have been witnesses to the delivery of the *get* to the wife ('*edey mesirah*) and these will know when the divorce actually took place, see '*Otsar Mefarshey HaTalmud*, *Gittin* I, col. 823 at n.41 and similarly in *ET* V col. 716 at notes 104 and 105.

acquittal of an adulterous wife. According to Resh Laqish, it would make it appear that lawfully sold produce from the wife's *nikhsey melog* was illegally disposed of by the husband and would thus empower the wife to falsely claim back all that produce from the buyers.

The *Shulḥan 'Arukh* rules that this type of *get muqdam* is invalid and records no dissenting opinion.[184]

(ii) A *get* signed on a day subsequent to the day it was written, whose date reflects correctly the day it was written but not the day it was signed. The Sages invalidate it and Rabbi Shim'on declares it valid.[185]

Rabbi Yoḥanan explains: The Sages maintain that the rationale behind the invalidation of a *get muqdam* is the fear of false acquittal of an adulteress so that in this case also[186] it is possible that she committed adultery after the date (of the writing) of the *get* and before its signing, but from the document it will appear that it was signed – and presumably delivered[187] – also at the earlier time so that she was divorced before the time of the adultery.

Rabbi Shim'on maintains that the reason behind the prohibition of *get muqdam* is the fear of her falsely claiming back produce sold by the husband legitimately but, because of the predating of the *get*, appearing to have been sold after he had lost the right to sell it. However, Rabbi Shim'on rules that once the husband has *decided* to divorce his wife, even though he has not yet done so, he loses all rights to the produce of her *nikhsey melog*. Thus if she claims back produce sold from the day of the writing of the *get* – which is correctly represented on the *get* in this type of *muqdam* – she will be within her rights, so there is no reason to invalidate it.[188]

Resh Laqish argues that according to both the Sages and Rabbi Shim'on the reasoning behind the enactment invalidating get *muqdam* is the concern about false claims for the return of what appears to be illegally sold produce, but the argument between them is regarding the point at which the husband loses his rights to the *nikhsey melog* produce. The Sages maintain – according to Resh Laqish – that he loses his rights at the time of the signing (= time of the delivery also[189]) and

184 *EH* 127:2. Such a *get* is rabbinically invalid and if delivered to the wife she would be, from the point of view of Biblical Law, divorced. The *Bet Shemuel*, *EH* 127 sub-para. 2, maintains that according to the Rambam and the *Shulḥan 'Arukh*, although the *get* must not initially be used and although even if it was used she may not remarry, if she did remarry she need not leave her second husband. For a discussion of the views of all the *Posqim* regarding the consequences of the delivery of this type of *get* to the wife see *ET* V cols. 708-10. For a view that the *get* might, in certain circumstances, be biblically invalid, see *ibid*. at notes 31 and 32.

185 Mishnah *Gittin* 2:2 = 17a.

186 As in the case of the first type of *get muqdam*.

187 Cf. *Tosafot*, *Gittin* 17b, s.v. '*Ad she'at netinah*.

188 *Gittin* 17b.

189 See note 187.

therefore the *get* is invalid because its date, which looks like the date of the writing and signing (and delivery), will enable her to claim back any produce sold after that date – which is in truth only the date of the writing, whereas the husband was entitled to sell even after that date until the time of the signing (and delivery).

Rabbi Shim'on says that the husband loses his rights at the time of writing and therefore the *get* is valid because she is right to claim back anything sold after that date, which is the true date of the writing.[190] On this point, Rabbi Yoḥanan agrees.[191]

The *Shulḥan 'Arukh*[192] rules that the *get* is invalid but records that some say (relying on Rabbi Shim'on) that it may be used in an urgent situation.[193]

(iii) A *get* written and signed on the date appearing thereon, but only delivered to the wife at a later date.[194]

Some *Rishonim* rule that such a *get* is not invalid as a *get muqdam*.[195] One reason given for this is that it is unusual to delay the delivery of a *get* once it is written and signed and the Sages did not apply their decrees to unusual circumstances.[196] Others make no such distinction[197] and declare this type of *muqdam* also invalid and so rules the *Shulḥan 'Arukh*, without recording the dissenting opinions.[198] However, in a case of '*iggun*, the '*Aḥaronim* permit its delivery *ab initio*.[199]

190 *Gittin ibid*.

191 See at n. 188.

192 *EH* 127:2. Cf. *ET* V col. 711, at notes 45 and 46. In this case also, the *Bet Shemuel*, *ibid*., maintains that according to the Rambam and the *Shulḥan 'Arukh*, although the *get* must not initially be used and although even if it was used she may not remarry, if she did remarry she need not leave her second husband.

193 Although the *SA* speaks only of a *get* written by day and signed the following night, the law is the same even if it were signed after many days – according to Rabbi Yoḥanan (*Gittin* 18a-b): see *Bet Shemuel ibid*. sub-para. 4 and gloss of the Gaon *EH ibid*. sub-para. 4.

194 It would seem that the same would apply if the *get* was given immediately but on the condition that it would take effect only at some time in the future – cf. the rules of *get yashan* below.

195 Rambam *Gerushin* 2:2; Ramban *Gittin* 17b, s.v. *Kasavar*; *Nimmuqey Yosef*, *Bava' Metsi'a'* chapter 1; '*Orḥot Ḥayyim* part 2, p. 164 (cited in *Bet Yosef*); *Kolbo* section 76; '*Ittur*, part I, *ma'amar* 1, *zeman*; *Bet Yosef* 127 citing *responsum* of Rashba = second answer in Rashba *Gittin* 17a, s.v. *WeRabbi Yoḥanan*; First answer in Rosh, *Gittin* 2:4 (end), as per *ET* V col. 713-14, n.83.

196 *Milta' dela' shekhiḥa' la' gezaru bah Rabbanan – Betsah* 2b et al. For further arguments to validate this type of *muqdam* see *ET* V col. 714.

197 *ET ibid*.

198 *EH* 127:5.

199 See in *Pitḥey Teshuvah EH* 127 sub-para. 6 (where the example is given of a husband who apostatised and though willing to hand over the *get muqdam* steadfastly refuses to authorise a new *get*) and cf. '*Arokh HaShulḥan* 127:31 – *ET* V col. 715 at n. 92.

Get Yashan is:

(i) A *get* which was written and signed (and correctly dated) but, before delivery, due to the husband's uncertainty, was kept in his possession (the couple meanwhile being in seclusion) and with which he later wishes to divorce her. Such a *get* is called *yashan* because its date is 'old'.[200]

(ii) A *get* that was written and signed (and correctly dated) but then deposited by the husband with an agent to be delivered at a future time after which the husband was in seclusion with his wife.[201]

(iii) A *get* given by the husband directly to the wife on condition that it take effect at a future time before which time the couple were in seclusion.[202]

The reason for the enactment against a *get yashan* is that should she become pregnant during the seclusion (in the period between the writing and receiving of the *get*), when she bears the child people may see the date on the *get*, presume that it accurately reflects the date of the divorce – whereas in fact she was divorced later – and say that the child must have been conceived out of wedlock. Though not a *mamzer*, the child would be 'blemished'.[203]

According to most of the *Posqim* if she was divorced with a *get yashan* she may remarry *ab initio*.[204]

Why is a *get yashan* not anyway invalid as a *get muqdam*?

Rashba[205] states that the rule of *get yashan* applies only if the husband sent it to his wife through an agent, in which case the early dating of the *get* becomes publicised due to the setting up of the agency (at least to the degree that the *bet din* will discover the true date of the divorce), so that there will be no possibility of an adulterous union going unpunished nor of the wife falsely claiming the return of produce from her *nikhsey melog*; hence such a *get* is not classified as a *get muqdam*. Nevertheless, since the layman will not be as aggressive as a *bet din* in his investigation of the rumoured ante-dating of the *get*, the assumption can be

200 Mishnah *Gittin* 8:4 = 79b, *Yad Gerushin* 3:5, *Tur* 148, *SA EH* 148:1. Cf. *ET* V 688-89 at notes 1-4.

201 Rosh *Gittin* 8:8 citing Remah; *Taz EH* 148 sub-para. 2: see *ET* V col. 689 at n.6.

202 '*Ittur*, *ma'amar* 7; *Tur EH* 148 according to *Bet Yosef* there: see *ET* V col. 689 at n.8.

203 Bet Hillel, Mishnah, *Gittin* 79b and Gemara and Rashi there: see *ET* V col. 690 at notes 14-16.

204 *EH* 148:1. Cf. *ET* V 691 at n.30.

205 *Gittin* 26b: see *ET* V col. 691, n.38.

made that it will be generally accepted that its date reflects the actual time of the divorce and that therefore she must have become pregnant with this child when she was no longer married.

However, others[206] argue, on the contrary, that *get yashan*, which, having been illegally delivered to her, allows her to remarry *ab initio*, applies only if the husband handed the *get* directly to her after the seclusion, because if he had had relations with her he would (most probably) be concerned about the possible future damage to a child of his and would give her a new *get*; if, on the other hand, the *get* had left the husband's possession before the seclusion (and was now with an agent waiting to be delivered and the agent gave it to her after the seclusion) she must not remarry with it *ab initio* because had the agent consulted the husband the latter would have ordered the writing of a new *get*.

If, however, he gave the *get* to the agent after the seclusion she may remarry with it initially because in this case also the husband would – if intercourse had taken place – have insisted on a new *get* to protect his (possible) future child from gossip.[207]

Yet others say that there is no difference between his giving the *get* to her directly (after the seclusion) and giving it through an agent (before or after seclusion): she can, *post factum* of the *get* having been given to her, remarry with it *ab initio*.[208]

One authority argues that if the *get* left his hand and this was followed by seclusion before the *get* reached the wife then such a *get* is not just a *get yashan*, it is a *get batel* – totally void – because the seclusion means that he has cancelled both the *get* and the agency unless he first made clear in some way that he wished to divorce with it after the seclusion.[209]

According to these authorities,[210] who understand the rule of *get yashan* as applying even when he handed it to her directly,[211] why is such a *get* not invalid due to being *muqdam*? Some *posqim*[212] say that the law of *muqdam* applies only if the date recorded precedes the true time of writing or of signing but the *get yashan*,

206 Rosh in the name of Remah; *Tur EH* 141 (at *Perishah* n.124) and 148; *SA EH* 148:1 (*Yesh 'Omerim*).

207 *Bet Shemuel EH ibid*., sub-para. 5, as per *ET* V col. 692 at n.40.

208 Rambam, *Gerushin* 3:5, according to *Kesef Mishneh* there.

209 Rambam as understood by *Mishneh LaMelekh*, *Gerushin* 3:5 following *Maggid Mishneh*, *Gerushin* 9:25.This holds true if he told the agent to divorce on his behalf without further comment but if he said that he should hand over the *get after a certain passage of time* the *get* is certainly not cancelled by the seclusion (or intercourse) because he *has* made clear that he does not yet want to divorce – *ET ibid*. n. 42 citing *Kiryat Melekh Rav* (R. Yehudah Navon) on *Gerushin* chapter 3.

210 Cited in notes 206-208.

211 I.e. those who do not accept the position of Rashba – see text at note 205, above.

212 Rambam and Me'iri: see *ET* V col. 692 n.43.

whose date reflects the true time of both writing and signing, is not classified as a *get muqdam*.[213] Others suggest that *get yashan* applies in cases when the *get* was written, signed and delivered on the date recorded therein (so that it is not *muqdam* in any sense) but seclusion took place between the signing and the delivery. Although in such a case the problem of *get yashan* – that it will be said that her *get* preceded her child – is also not applicable, there was a fear that once relations took place before the handing over of the *get* its delivery may be further delayed to the point that the concern for the stigmatisation of the child would become relevant.[214] One opinion[215] suggests that the decree against *get yashan* applies only to a post–dated *get* (*get me'uḥar*) which, according to most *posqim*,[216] may be used *ab initio* and which, again according to most *posqim*, takes effect not when it is handed to the wife but only at the later date recorded in it. If the couple went into seclusion between its delivery and its date it is classified as a *get yashan* and may not be used *ab initio* because people will remember the date of the delivery of the *get* but may not remember the date written in it so that they will believe that she was divorced from the earlier date and, should she become pregnant during that seclusion, that her pregnancy took place after her divorce.[217]

Some authorities maintain that the ruling that a *get yashan* once given (= *bedi'avad*) entitles the wife to marry *ab initio* applies only if there was only seclusion after the writing and signing of the *get* and before its delivery. If, however, there was not only seclusion (such that intercourse is a possibility) but intercourse definitely occurred then even *post factum* it is not a *get*.[218] This ruling has been interpreted to mean that even if she already remarried she must leave her new husband[219] while others argue that it means only that she cannot remarry *ab initio* but if she did she need not leave her new husband.[220] Yet others maintain that this kind of *get yashan* is like any other and she may therefore remarry with it *ab initio* – though it still must not be given to her initially.[221]

213 For the rationale behind this view, see text at n.196, above.

214 *Baḥ*, *Quntres Aḥaron* to *Tur* 148; *Tosefot Yom Tov*, *Gittin* 8:4, as per *ET* V col. 692, n.45.

215 *Peney Yehoshua*, *Gittin* 26b, as per *ET* V col. 693 at n.49.

216 *EH* 127:1. For a list of the *Posqim* maintaining this view see *ET* V col. 695 at n.1.

217 For yet further suggestions for differentiating between *get yashan* and *get muqdam* see *ET* V col. 692 at notes 44 and 47.

218 Rabbenu Tam in *Tosafot Yevamot* 52a and *Gittin* 26b s.v. *Likhshe'akhnisenah*; Rosh, *Yevamot ibid*. 5:4; Rashba, *Yevamot* and *Gittin, ibid.*; Ritva and Ran, *Gittin, ibid*., as per *ET* V col. 693, n.52.

219 Rabbenu Tam as understood by Rashba *Yevamot* and *Gittin, ibid*.: see *ET*, *ibid*., n.54.

220 *Bet Yosef EH* 132; *Bet Shemuel EH* 132 sub-para. 2: see *ET*, *ibid*., n.55.

221 Rashi: *Yevamot ibid*., s.v. *Harey zeh get* and *Gittin, ibid*., s.v. *'Eno get*; Rambam, *Gerushin* 3:6 as understood by *Maggid Mishneh* and *Kesef Mishneh, ibid*. and by Rashba, *Yevamot, ibid*.: see *ET, ibid*., n.56.

Introducing an Enactment of Delayed Divorce in Light of the Above

If we were to try to prevent '*iggun* by delivering a delayed *get* to the wife at the time of the *qiddushin*, would we not fall foul of *get muqdam* or *get yashan* or even of *get batel*?

The case would be one where the *get* is written, signed and delivered to the wife on the same day that it is dated but on the explicit understanding of both the husband and wife that it will take effect only in given future circumstances. Meanwhile, the couple will be living a normal family life where sexual intercourse must be assumed as a certainty.

According to some, there would be a problem of *muqdam* and the *Shulḥan 'Arukh* accepts this opinion.[222] This means that the *get* could not be delivered initially and if it were she could still not remarry, but if she did she would not have to leave her new husband.[223] However, in cases of '*iggun* one could deliver the *get ab initio*.[224]

There would be a problem of *get yashan*[225] and this would mean that the *get* could not be delivered *ab initio* but *post factum* it would permit her remarriage. However, there would be the additional consideration that in this case we would be dealing with a situation not of mere seclusion but of certain sexual intercourse, which means according to some that even if she remarried on the basis of such a *get* she would have to leave her new husband. However, we have already seen that the *Shulḥan 'Arukh* rules that although in this case even if she were given the *get* she would not be allowed to remarry, if she did remarry she would not have to leave her new husband.[226] This is the same ruling as applies to the *get muqdam* discussed above,[227] where the *'Aḥaronim* said that in an '*iggun* situation (for example, when the husband has apostatised and though willing to hand over the *get muqdam* steadfastly refuses to authorise a new *get*) the *bet din* may authorise the delivery of the *get muqdam* even *ab initio*. It can be argued then that the same permission would be granted here in the case of the *get yashan*.

However, there is a difference between the two cases. In our case of a *get* handed to the wife to take effect in the future, there are many *posqim*[228] who say that it is not classified as a *muqdam* at all, and surprise has been expressed[229] that

222 See text at note 198.

223 See notes 184 and 192.

224 See text at note 199.

225 See text at note 202.

226 See text at note 220.

227 See text at note 198.

228 See above, text at note 195.

229 *Get Pashut* cited in *Piṯḥey Teshuvah EH* 127, sub-para. 6.

this lenient view was not represented in the *Shulḥan 'Arukh*; hence, perhaps, the willingness of the *'Aḥaronim* to permit *ab initio* the delivery of such a *get* in a situation of *'iggun*. On the other hand, all *posqim* agree that our case would be subject to the strictures against *get yashan*, so that no-one would permit its initial delivery to the wife and thus it cannot be assumed that the *'Aḥaronim* would permit its *ab initio* delivery even in a case of *'iggun*. However, the situation of *'iggun* nowadays being what it is, one could argue that we are, as regards this area of the *Halakhah*, living in a situation of pressing need (*she'at doḥaq*) wherein that which is permitted only *post factum* (*bedi'avad*) becomes permitted even *ab initio* (*lekhatehillah*).[230]

There is also, according to one understanding of the Rambam, the very serious problem of *get batel*.[231] However, this difficulty is simply averted if the husband makes clear (in front of witnesses) that he does not wish the *get* to take effect until a given time in the future when it will be needed.[232]

A Simple Solution?

One way of avoiding the entire problem of *get yashan* (and, automatically, *get muqdam* and *get batel*) would be to write on the *get* that the date of the actual divorce has been delayed by mutual agreement of the couple. This proposal was

[230] *Responsa Shevut Ya'aqov* III *EH* no. 110 where the further point is made that it is halakhically easier to permit *ab initio* the creation of a situation to solve an urgent halakhic problem than it is to permit the acceptance of a *post-factum* situation in a non-urgent situation. See other sources in *ET* VII col. 417, note 140.

Note also that many authorities permit reliance in an urgent situation upon even one lenient view against a vast stringent majority, even where the prohibition under discussion is biblical and even if it be a question of *'eshet 'ish*: see Abel, "Morgenstern", §15.3.1-4. For practical examples of *she'at hadoḥaq* see: *Bet David* to Mishnah *Parah* 7:6 (leniency in allowing the validity of purification waters either due to a *shortage* thereof or due to the *large financial loss* of declaring defiled the foods contacted by the people who had been cleansed with those waters); *Tosafot*, *Niddah* 6b (leniency regarding ritual contamination of foodstuffs in an urgent situation due to a time of *famine* or the *loss of much pure foods* or the *extremely burdensome* process of redressing the situation by applying *ab initio* standards). That a large financial loss constitutes a *she'at hadoḥaq* is recorded also in *Shakh YD* 242 in *Hanhagat Hora'ah* in his interpretation of the Rashba and the Rema. Similarly, if the *yavam* cannot delay his departure until a *bet din* is arranged, the *ḥalitsah* can go ahead without a *bet din* though there is a biblical commandment that it be performed 'before the elders'. Since the *ḥalitsah* is valid *post factum* without a *bet din* it can, in the above circumstances that are regarded as *she'at hadoḥaq*, be performed even *ab initio* without a *bet din*. Hence we find that Rabbi Yishma'el performed *ḥalitsah* without a *bet din* – see *Responsa Avney Nezer EH* 220:6. If 100 rabbis cannot be found to sign a *heter me'ah rabbanim* some say that this constitutes a *she'at doḥaq* and 30 rabbis suffice – *Responsa Zeqan Aḥaron* II no. 95.

[231] See text at note 209.

[232] See note 209.

made by R. Berkovits in *Tenai BeNissu'in UvGet*,[233] where he points out that, strictly speaking, there is no prohibition, biblical or rabbinic, in inserting a condition into the *get* so long as it is neither spoken nor written before the conclusion of the writing of the *toref* (the section containing names and dates), even if it precedes the signatures of the witnesses.[234] Whereas it is true that the *Rishonim* have written that the custom has been adopted not to write any condition in a *get* even after the *toref*[235] and even on the back of the *get*,[236] this is only a customary stringency due to the fact that some people might not realise the difference between before and after the *toref* or between an acceptable and an unacceptable condition,[237] so that in order to avoid '*iggun* one could presumably permit such a practice.[238]

Besides, the clause delaying the *get* is not really a condition:[239] it does not weaken the *keritut* but merely delays it, so there should be no problem inserting it into the *get*.

Furthermore, since no-one nowadays writes his own *get* and every detail of the proceedings is managed by a *bet din*, there is no fear of misunderstandings leading to the issuing of invalid *gittin*.

233 *TBU*, p.73.

234 *EH* 147:2. The condition, however, must not be one that cancels the effectiveness of the *get* such as "You are permitted to marry anyone *except* …" or "… on condition that you never drink wine *throughout the rest of your life*", for such conditions render the *get* void since they effect a lingering link between the couple which is a failure to create a severance (*keritut*) of their relationship, whereas a *get* has to be *sefer keritut* as in Deuteronomy 21:1 and 3. Note that even acceptable conditions must not be made before the conclusion of the *toref*.

235 *Maggid Mishneh*, *Gerushin* 8:16 (cf. *Kesef Mishneh*, *Gerushin* 8:3). The Wilna Gaon in his gloss to *EH* 147:1, sub-para. 1, understands the *SA* as agreeing with the *Maggid Mishneh*: see *ET* V cols. 673-4, n.656. For further references see there notes 657 and 658.

236 *Teshuvot HaRif*, number 32, as per *ET* V col. 673.

237 See note 234.

238 In *ET* V col. 674, n.654, there is cited a *responsum* of the Rif, number 32, from which it seems that even an "acceptable" condition written after the *toref* or on the back of the *get* is considered a flaw in *keritut* and voids the *get* biblically. However, R. Berkovits points out that in his *Halakhot* in chapter *HaMegaresh* (immediately preceding the second Mishnah) the Rif states that "a condition after the *toref* does not invalidate the *get* – and so is the *halakhah*". His wording in *responsum* 32 is: "… but he is not allowed to write the condition in the *get* itself or beneath it or on its *verso* because if he did write it in the *get* the husband would retain some rights in the *get* itself and therefore, it would not be a *get keritut*." Now if the Rif meant (as *ET* seems to have understood) that inserting the condition in any of the three aforementioned locations (in it, after it or behind it) would biblically invalidate the *get* then he would not have said 'if he did write it in the *get*' but simply 'if he did so'. 'If he did write it in the *get*' implies in the body of the *get* (the *toref*) and the sense is that he may not write it in, after or behind it because if he wrote it *in* the *get* it would be biblically void and therefore he must not write it even after or behind it – as a precaution against the possibility of future error by people not aware of the details of the Law who would come to write it in the *toref*.

239 See *Ketubbot* 86b, *Gittin* 74a, Rambam, *Gerushin* 9:1-5, *Tur* 146, *SA EH* 146:1-2, as per *ET* VI col. 391 at notes 537-541.

In the light of the above, a divorce arranged by means of a delayed *get*, accompanied by the oath *'al da'at rabbim* of the groom never to cancel the *get*, would be halakhically sufficient in a situation of *'iggun*, so long as the husband did not break his oath and cancel the *get* and so long as he does not lose his mind. If, however, he did cancel the *get* and was coerced to the point of *rotseh ani*, the new *get* would still render the wife at least possibly divorced.[240] Furthermore, according to some *posqim*, his declaration of cancellation could simply be ignored and the *get* considered valid on the basis of the view of Rava, which is accepted by most *posqim*[241] (as against that of Abbaye: see *Temurah* 4b), that "Whatever the Merciful One said 'You shall not do' – if he did it, it is not legally effective" (that is, according to those who rule that this doctrine applies even to prohibitions that the individual brought upon himself as with an oath), so that his cancellation could be ignored and the *get* written without his present consent being required.[242] Such a *get* would be at least doubtfully valid. Even according to those who deny its validity[243] it may still be of help (as a *get batel*) *in conjunction with* annulment[244] so that, again, the wife would be possibly divorced.

One might also consider delaying the *get* until a *moment before* he loses his mind or he cancels the *get*. One could add any other time point such as 'a moment before he dies', in order to avoid *ḥalitsah* problems, and conclude: 'whichever happens earliest'. The problem with this, however, is that some *posqim* maintain that such an arrangement is considered *bererah* – because the moment of activation of the *get* cannot be known until after that moment has passed and it is only later – at the moment of death, for example – clarified retrospectively when the *get* took effect.[245] Thus, whereas we could delay the *get* until *after* something happens (the couple become civilly divorced, the husband is absent from the family home for three months, she requests a *get*, an orthodox *bet din* advises divorce)[246] we could

240 *SA EH* 134:5 and *Pitḥey Teshuvah*, *ibid*., 8; *ET* V 706 at n.96. See also above, n.82.

241 *Responsa Bet Shelomoh YD* II no. 181, who states that the majority of the *Rishonim* and of the *Posqim* rule like Rava. See the extensive list of *posqim* in *ET* XXVIII col. 527, note 38.

242 *Pitḥey Teshuvah EH* 157:4, sub-para. 9; *Lev Shelomoh* (of Kelm), no.5, s.v. *Shelishit wa'elakh*; *Noda' BiHudah* II, *EH* no. 129:4 (end); *Shemen Roqe'aḥ EH* no. 60; *Berit 'Avraham EH* no. 121 (beginning), as per *ET* XXVIII, col. 679 at note 1572.

243 *Berit 'Avraham ibid*., sec . 13; '*Oneg Yom Tov* no. 148 (end); *Minḥat Shelomoh* I no. 76; *Galya Masekhet*, *Kuntres 'Aḥaron*, no.4 (end); '*Ezrat Kohen EH* no.62, as per *ET ibid*., 679-80 notes 1575-1579. Obviously, the *get* will be invalid also according to the minority who rule like Abbaye that "Whatever the Merciful One said 'You shall not do' – if he did it, it *is* legally effective." Similarly, according to those who say that even Rava, who says it is *not* legally effective, agrees that where the prohibition is one of transgressing an oath – a prohibition initially of his own making – if he acted against his oath, the act *is* legally effective and the *get would* be annulled.

244 See text after note 110, above.

245 *Ritba* and *Tosafot* cited in *ET* IV col. 226 n.92 and Maharsha cited *ibid*., col. 223 n.70.

246 See note 233, above.

not delay it until *before* something happens. Against this, however, we might argue:

1. Many *posqim* do not regard 'a moment before my death' as *bererah* at all.[247]
2. The majority view amongst the *Posqim* is that the question of *bererah* in the Talmud remains unresolved, so that every case of *bererah* is a *safeq* and consequently, though in matters of Biblical Law we must take the stricter line and never use *bererah* to achieve a lenient ruling, this is not because *bererah* is definitely excluded in matters of Biblical Law but only because *safeq de'Oraita' leḥumra'*.[248] By combining these two arguments we have a *sefeq sefeqa'* which, according to many *posqim*, is sufficient to permit remarriage – in a case of '*iggun* where the husband is missing and may be dead – even in Rabbinic Law. In our case, where the husband is alive, even if the *sefeq sefeqa'* would be insufficient in the face of her *ḥezqat 'issur* it would still be a powerful permissive tool to combine with some other doubt to permit her remarriage.[249]

However, according to all opinions, if the *get* were lost or destroyed before taking effect she would certainly not be divorced even in Biblical Law. Indeed, if such were to occur, it would also be more problematic to apply annulment (as pointed out above[250]), and that is why we need conditional marriage also – marriage based from its inception on the condition that if the wife ever becomes an '*agunah* from this marriage then she does not now agree to be married.

247 Maharshal *Gittin* 25b, *Peney Yehoshua'* *ibid*., *Ketsot HaḤoshen – ḤM* 61, cited in *ET ibid*. See also the discussion in *'Otsar Mefarshey HaTalmud*, *Gittin*, II col. 98 at notes 73-76.

248 *ET* IV 221 at notes 54 and 55.

249 See, *inter alia*, R. Ovadyah Yosef's lengthy discussion in *Yabia'* *'Omer*, VI *EH* 3:9-15 and cf. R. Moshe Zvi Landau, *Sefeqot Melakhim*, chapter 13, *Shalom We'Emet* 65, who cites approvingly the view of the R. Shelomoh Yehudah Tabac, *Responsa Teshurat Shai* (II no.197, s.v. *'Ibra'*), that the *halakhah* accords with R. Aryeh Leib Heller in *Shev Shema'tata'* (4:24) that although *rov/miggo/sefeq sefeqa'* does not overturn a *present ḥezqat mamon* (that is to extract money/property from a *present* owner) it does win out against a *former ḥezqat mammon* (where it is known that the property definitely was his but there is doubt whether it still is his) so where there is a doubt whether or not a woman is divorced, we can no longer say that she has a *present ḥezqat 'issur*, only a *former* one, and *sefeq sefeqa'* is sufficient to overcome that *ḥazaqah*.

250 See note 244, above.

Chapter Four

Coercion

The *Halakhah* recognises a number of stages in the application of pressure upon a husband to divorce his wife. The rule, in biblical law, is that a *get* is valid only if given with the free will of the husband.[251] Nevertheless, the *Halakhah* recognises situations in which he may be forced to agree ("we coerce him until he says, 'I agree.' ")[252] and the *get* given in those circumstances will be valid. These cases are enumerated in the *Shulḥan 'Arukh*[253] and are known as the cases of *kefiyyah*.

The rationale usually given for this anomaly is that of the Rambam, namely that every Jew wishes in his heart of hearts to obey the Sages and it is only his evil inclination that clouds his judgement, as a result of which he refuses to obey the Law which says he must divorce. When the court-ordered flogging makes him say 'I agree' what has really happened is that the pain has made him overcome his evil inclination and enabled him to express his true desire – to obey the Sages by acquiescing to the divorce. So we have not forced him to do what he does not want; on the contrary we have enabled him to do what he really wants![254]

However, *Tosafot*,[255] Rashba[256] and other authorities maintain that the evil inclination argument is not necessary here. Rather, just as one who agrees under duress to sell an item is considered, by virtue of the fact that he has expressed his agreement, to have acted willingly so that the sale is valid, so is it that one who is coerced by the *bet din* to agree to divorce is considered, by virtue of the fact that he has expressed his agreement, to have acted willingly and thus the divorce, also, is valid.[257] The Rambam, however, maintains that whereas in other areas of Torah

251 See p.1, above.

252 Mishnah: '*Arakhin* 5:6, *Gittin* 9:8.

253 '*Even Ha'Ezer* 154.

254 *Yad*, *Gerushin* 2:20. See *Responsa Ḥatam Sofer*, *EH* I no.131(i), s.v. וז"ל.

255 *Bava' Batra'* 48a, s.v. '*Ilema*'.

256 *Qiddushin* 50a.

257 *ET* V col. 699 at notes 18-21. The cases do not seem to be comparable because in the case of the sale the 'unwilling' vendor has received payment and, indeed, if he did not but was coerced to agree to give the article the gift would not be valid so that the husband, who has given the *get* for nothing, is comparable to one forced to give, not to sell, and his acquiescence should be considered void. Nevertheless, since he is anyhow deprived of his wife's company and his marriage is already non-existent (in all but the strictly legal sense) he is losing nothing by giving the divorce and so is akin to one forced to sell (who loses nothing because he receives the value of his property) rather than to one forced to give (who does lose because he is not recompensed for his property). It is also possible that his spiritual gain in obeying the *bet din* is

Law enforced agreements *of the mind* are sufficient, in the case of divorce the enforced agreement must be *of the heart also*, i.e. they must be emotionally validated too. A possible practical difference between these two approaches would be the case of an apostate who is being coerced to divorce.[258] According to *Tosafot* this would not be problematic; according to the Rambam it could be.[259]

There are other situations in which the *Halakhah* says that a husband is legally obliged to divorce but he cannot be compelled.[260] These are known as cases of *ḥiyyuv*.

Sometimes, a *bet din* will say that though he is not legally obliged to divorce there is a moral obligation upon him to do so. Such cases are known as *mitswah*.

Finally, the *dayyanim* might simply advise that a divorce take place. This is known as *hamlatsah*.

A *get* coerced by a *bet din* in any case apart from one of *kefiyyah* is known as a *get me'useh* (*shelo' kadin*), and is invalid.[261] Nevertheless, even where the *Halakhah* disallows coercion, it may still be permissible to 'persuade' the husband by means of indirect pressure, namely by forbidding society to have any dealings with him until he divorces. These measures are known as *harḥaqot deRabbenu Tam*.[262]

Even where coercion is not permitted, if a *bet din* mistakenly compelled the husband to divorce, the *get* would be at least biblically valid according to the Rambam[263] and Rabbi Ovadyah Yosef records[264] that the Rambam's view is shared by the Rosh and that so rule the Maharashdam, the Maharanaḥ and the Radbaz. The ascription of this view to Maharashdam and Maharanah is questioned by

---

the equivalent of the coerced vendor's receipt of payment. See the full discussion in Gertner, *Kefiyyah BeGet*, number 32, pp.127-135; and number 114, pp.457-473.

258 Either because of his apostasy or, according to those who maintain that apostasy is not a cause for coercion, because he falls into the category of coercion for some other reason – see Gertner, *Kefiyyah BeGet*, no.115, pp.473-74.

259 See the full discussion in Gertner, *Kefiyyah BeGet*, number 114, pp.457-473.

260 Whether one can compel a divorce where the Talmud says that 'he shall divorce' rather than 'we coerce him to divorce' is in dispute amongst the *Rishonim* and the accepted practice is not to coerce: *EH* 154:21.

261 *EH* 134:7. See p.**1**, above.

262 *EH* 154:21, in Rema's gloss. The Rema refers only to cases of *ḥiyyuv*; however, it is clear that Rabbenu Tam himself permitted *harḥaqot* even in cases where there was neither *ḥiyyuv* nor even *mitswah* to divorce: see Gertner *ibid*., no.118, pp.475-89. As to the application of the *harḥaqot* nowadays see there paragraph 5 (pp.484-86).

263 *Gerushin* 2:20. See also *ET* V col. 702 at notes 54-57 and the full discussion in Gertner *ibid*., numbers 37-39, pp.146-96 and no.42, pp.202-07.

264 "Kol HaMeqaddesh 'Ada'ta' DeRabbanan Meqaddesh We'Afqe'inho Rabbanan LeQiddushin Mineh", *Torah Shebe'al Peh* (Jerusalem 5721), 96-103.

R. Gertner[265] who, at the same time, cites authorities who point to the Ra'avad, *Ba'al Halakhot Gedolot* and Rashbam as supporting the Rambam's opinion and to Rabbenu Tam and the Mordekhai as being in doubt about the matter.

This means that a marriage ended by a *get* coerced illegally in error by a *bet din* would be in a state of doubt (from the standpoint of Biblical Law) and this doubt could operate together with another doubt to create a *sefeq sefeqa*'[266] to permit the wife's remarriage.[267]

Hence we find that the *Ḥatam Sofer*[268] permitted a *bet din* to apply *kefiyyah* in a case where the husband could not support his wife (due to illness), on the basis of a *sefeq sefeqa*': maybe the *halakhah* is like the Rambam and his school that in such a case we coerce a *get*, and even if the *halakhah* is like other *Rishonim* maybe a *get* mistakenly coerced by a *bet din* is biblically valid. The *Ḥazon 'Ish*[269] objected that a *bet din* acting in such a way would not be considered as having *erred* (as the Rambam writes in *Gerushin* 2:20) but as having *intentionally transgressed* (the ruling of the *Shulḥan 'Arukh* not to coerce in such a case) and the Rambam would then regard the *get* as biblically invalid.[270]

265 *Kefiyyah BeGet*, *ibid*., no.42, pp.202-07.

266 As the lenient side of this doubt seems to be in the minority the other doubt would have to be at least 50-50. See R. Ovadyah Yosef, *Yeḥawweh Da'at* I *Kileley HaHora'ah*, *Kileley Sefeq Sefeqa*' no.11 (p.26a).

267 Whether a *sefeq sefeqa*' is sufficient to permit a woman to remarry when the husband is known to be alive or if three *sefeqot* are required is debated amongst the *Posqim*: – see note 249, above.

268 *Responsa EH* I no.131(i).

269 *EH* 99:1, s.v. *Wehekhah*. See further in Gertner, *Kefiyyah BeGet*, number 42, p.203.

270 The ruling of the *Ḥatam Sofer* here seems also to be in conflict with his own ruling elsewhere (see text before note 279, below) that if *kefiyyah* is applied where there is dissent amongst the *Posqim* as to whether it should be, the *get* thus obtained is not *possibly* invalid but *certainly* invalid, so how can the *get* procured by means of *kefiyyah* in the above case (where the husband could not support his wife) be counted as a possibly valid *get*? According to the last-mentioned ruling of the *Ḥatam Sofer* it should be definitely void!? See, however, *Responsa Ḥatan Sofer* no.59, who remarks that his holy grandfather speaks only where it is impossible to bring the debate to a conclusion, as in the case of the *nikhpeh* where the Rosh says *kofin* and the Moredekhai says *'eyn kofin* and we do not have any authority great enough to decide between them. However, where a clear majority of the *Posqim – rov minyan* and *rov binyan* – rule for *kefiyyah* we may apply it in spite of the minority view, for even the minority must accept the ruling of the majority (whether by biblical or rabbinic decree: see Abel, "Consensus", §§I.2 and I.3). The case of failure of marital support dealt with here lies between the two extremes of definitely void (*nikhpeh*) and definitely valid ('*rov minyan* and *rov binyan*': *Ḥatan Sofer*) and is considered by *Ḥatam Sofer* a *safeq*. See Gertner, *Kefiyyah BeGet*, p.165 s.v. *Hineh*. Note also that *Ḥatan Sofer* says that his grandfather's ruling that a *get* coerced in a case of equally balanced, insoluble halakhic division is certainly void applies only where the side prohibiting coercion also maintains that there is neither *ḥiyyuv* nor *mitswah* to divorce. If, however, they agree that there is at least *ḥiyyuv* or *mitswah* then the *get* coerced in such a case is not definitely void. Similarly, the *Ḥazon Ish* (*EH* 99:1) writes that where the law permits verbal coercion and the *bet din* knowingly transgressed and applied physical coercion it may be that the *get* would be at least biblically valid according to the Rambam (though most

Coercion in Cases of me'is 'alai

In an article in *Diney Yisrael*,[271] M. Shapiro notes that Maharam MeRothenberg, in his younger years, disallowed coercion in cases of *me'is 'alai* but later he reversed his position and permitted it. This is exactly the opposite of what happened with Rabbenu Tam, who initially allowed coercion in cases of revulsion and later in life forbade it.[272]

Yuval Sinai has suggested that the balance of opinion, amongst both *Rishonim* and *'Aḥaronim*, is more in favour of coercion of a *get* in cases of *me'is 'alai* (following the Rambam's opinion) than is generally acknowledged.[273]

R. David Bass, however, in "'*Al Gerushin Wa'Aginut lefi Nequdat Mabbat 'Ortodoqsit*"[274] notes that most *posqim*[275] do not allow *kefiyyah* in cases of *me'is 'alai*. Indeed, R. Shemuel Amar of Morocco (d. 5649/1889) ruled[276] (against a number of the Rabbis and Sages of Fez) that a *get* cannot be coerced even if the husband attempted to murder his wife because the talmudic list of circumstances justifying *kefiyyah* is closed. R. Shemuel directs his readers to an earlier *poseq* who wrote that even if he pursues her with a knife in order to stab her we still do not force him to divorce and we cannot even say that he is obliged to divorce her. This approach is found in the Rosh[277] who forbade the application of coercion in a case where the wife claimed:

> … that her husband is crazy and his stupidity increases day by day so she requests that he divorce her before he becomes totally mad and she would then be an '*agunah*

Rishonim would regard it as biblically void). The *Ḥazon 'Ish* specifies that they acted knowingly against the *Halakhah* because if they had merely erred the *get* would be biblically valid *even if there were no ḥiyyuv nor even mitswah* to divorce: see Gertner, *Kefiyyah BeGet*, p.166 note 111.

271 "Gerushin Begin Me'isah", *Diney Yisrael* II (5731), 117-153. The citation above is taken from pages 140-42.

272 *Yabia' 'Omer*, III *EH* 19:15.

273 Y. Sinai, "Coercion of a *Get* as a Solution for the Problem of *Agunah*", in *The Manchester Conference Volume*, ed. L. Moscovitz (Liverpool: Deborah Charles Publications, 2010; Jewish Law Association Studies XX), 246-261, at 259-60, noting, at n.57, R. Avraham Horovitz's 1975 pamphlet entitled "*Kuntres HaBerurim*", in which he cites R. Avraham Benvenisti (19th century) in his book *Tzel haKesef*, 1:94, §13: "Hence we learn that there are more Rishonim who rule that coercion may be used for divorce where the woman claims *ma'is alai,* than those who rule that there is no coercion," listing 21 such scholars. For the *'Aḥaronim*, see esp. pp.253-255, and a summary of his evidence in B.S. Jackson, *Agunah: The Manchester Analysis* (Liverpool: Deborah Charles Publications, 2011), note 863. See also below, note 374.

274 Internet article – http://www.snunit.k12.il/seder/agunot/view.html.

275 As far as can be presently ascertained.

276 *Responsa Devar Shemuel* 23.

277 *Responsa*, *Kelal* 43:3.

> for ever … he is utterly crazy and she is afraid that he might kill her in his anger because when people anger him he strikes and kills and hurls and kicks and bites … Re'uven counters that 'You knew him beforehand and you considered and accepted. Also, he is not crazy but merely not well–versed in wordly conduct and he will not divorce you unless you return the books or their value and then he will divorce you.' [Reply] I do not see from their claims anything for which it would be fitting to coerce him to divorce because *one cannot add to that which the Sages enumerated in Chapter HaMaddir* (77).…Therefore, she should persuade him to divorce her or she should accept him and be sustained from his properties.

In this vein, we find the *posqim* persistently refusing to apply *kefiyyah* wherever there exists dispute as to whether the case under discussion merits it. R. Bass cites R. Shabbetai Kats, the *Shakh*, who, in *Gevurat 'Anashim*, says as follows.

> In any case where there is a possibility to explain a halakhic source leniently or stringently one must adopt the strict interpretation which would exclude compelled divorce so as to avoid the danger of a coerced *get* which would make the woman's children from another man who is not her husband into *mamzerim*.

Even if the stringent camp opposing *kefiyyah* is a small minority many *posqim* will rule against applying it and R. Bass quotes an explanation of this expounded by R. Mosheh Sofer on the following basis.[278] The logic behind the acceptance of a coerced *get* is that the husband does indeed want in his heart of hearts to obey the words of the Sages, as the Rambam explained. Now that is all very well when all the *Posqim* agree that the situation warrants *kefiyyah*. However, in the case with which the *Ḥatam Sofer* was dealing (one in which the husband had become epileptic) there was a dispute amongst the *Posqim* as to whether coercion could be applied, the Rosh saying that it could and the Mordekhai that it could not. The *Ḥatam Sofer* reasons as follows:

> Even if it is clear in Heaven that the *halakhah* is like the Rosh, since there is the opposing opinion of the *Mordekhai*, and we do not have anyone who can decide between them, if one forced him to divorce she is still a definitely married woman in Biblical Law and not a questionable one. The reason I say this is that a coerced *get*, even when it is enforced according to the Law and he says 'I agree', is nevertheless only fit for the reason that the Sages gave [namely that] it is presumably agreeable to him to fulfil the words of the Sages who said one should compel him to divorce – as the Rambam beautifully explained. However, this is only when it is clear to the husband that the coercion is in accordance with the Law according to every authority [for] if so it is a *mitsvah* [in the husband's situation] to heed the words of the Sages. However, in this case the husband will say, 'Who says it is a *mitsvah* to heed the words of the Rosh, perhaps it is a *mitsvah* to heed the words of the *Mordekhai*? So if that which he said, 'I agree', was coerced and did not issue from

[278] *Responsa Ḥatam Sofer*, III *EH* I no.116.

his heart[279] there does not seem to be even a potential position[280] to coerce a divorce.

However, Rabbi Bass also cites the following from a *responsum* of the *Tsemaḥ Tsedeq*:

> In this matter (of *me'is 'alai*) right is on his (the Rambam's) side for she is indeed not as a captive that she should be made to have relations with someone who is repulsive to her, as it is written:[281] 'Her ways are ways of peace etc.'[282]

He also quotes the famous words of the *Tashbets*[283] who, in a *responsum* concerning a case where a woman's life was made a misery by a cantankerous and miserly husband (who would quarrel with her endlessly and starve her),[284] and who was widely known as such,[285] ruled that the husband could be compelled to divorce. *Tashbets* argues that this may be derived by *qol waḥomer* from the *ba'al polypus* in the Mishnah (*Ketubbot* 77a)[286] especially as we find a *qol waḥomer* similar to this in the *Yerushalmi* (*Ketubbot* 5:7). Then, presumably addressing the Rosh, he writes:

> Now although we find in a *responsum* of the leading *'Aḥaronim zal*[287] that we do not coerce at all in a case such as this, we ourselves are not reed-cutters in the marsh[288] and [when dealing with] something dependent upon logic a judge has only what his eyes see.[289] It is possible that they[290] did not say that[291] about cases [involving] great suffering like this and how very much more so if he starves her.[292] *If she had been their [daughter] they would not have spoken so*. The Rashba *zal* wrote in a *responsum*[293] like us … and it is proper for the *bet din* to rebuke him and to apply to him this [biblical] verse: 'Have you murdered and also taken possession?',[294] for this

279 Because according to the *Mordekhai* he was right.

280 Lit., an 'I would have said' (*hawa' 'amena'*). See however note 270, above.

281 Proverbs 3:17.

282 *Responsa Tsemaḥ Tsedeq* (Lubavitch) 135.

283 II:8.

284 So it was a case of *me'is 'alai* with an *'amatla'*.

285 Hence the *amatla'* was *mevoreret*.

286 This seems to contradict the Rosh and his school who argue that no additions can be made to the justifications for *kefiyyah* mentioned in the Talmud.

287 The reference is almost certainly to the Rosh who would have been referred to as an *'Aḥaron* by the *Tashbets*.

288 A talmudic expression for ignoramuses – *Shabbat* 95a, *Sanhedrin* 33a.

289 *Bava' Batra'* 131a, *Sanhedrin* 6b, *Niddah* 20b.

290 The Rosh and his school.

291 That it is impossible to coerce a divorce even in cases of severe suffering.

292 Where there is an opinion in the Talmud (Rav, *Ketubbot* 77a) that we coerce a divorce and *Tosafot* (*ibid*. 70a, s.v. *Yotsi' weyiten ketubbah*) and a number of *Rishonim* decide accordingly: cf. *ET* VI col. 417, note 901.

293 *Responsa Rashba* I 693.

294 I Kings 21:19.

> [marriage situation] is worse than death, for he is 'like a lion that treads and eats'[295] ... and the *dayyan* who forces her to return to her husband when she rebels, like the law of the Arabs,[296] is to be excommunicated ...[297]

Finally, R. Bass cites a *responsum* of R. Feinstein[298] in which it is stated explicitly that it is possible to apply coercion in a case of insanity *even though this is not mentioned explicitly in the Talmud* [as a cause for coerced divorce].[299] In the course of this *responsum*, R. Feinstein writes that where a husband became afflicted with periods of insanity after the wedding it would be permitted to coerce divorce[300] because 'one cannot dwell with a snake in one cage'[301] and the Talmud accepts the inability of 'dwelling with a snake in one cage' as grounds for coercing a divorce.[302] He then cites, from *Tur EH* 154, the above-mentioned *responsum* of the Rosh which, he says, seems to contradict his position.[303] However, he argues, in the Rosh's case there was no actual insanity; rather, he says,

> … the husband was sane but bad tempered due to his evil nature and the language 'becoming madder day by day'[304] which they[305] wrote means only that due to his anger he acted like an idiot and a madman and therefore one cannot say of him that 'it is impossible to dwell with a snake in one cage' because since he was mentally competent it would have been possible for her to see that he does not come to a situation that [will] anger [him] although it would have been very difficult for her to be so careful. So, since we do not find that we coerce in such a case where it is no more than very troublesome, the Rosh maintains that we do not coerce a divorce….but if he is [really] mad – where we apply the rule that 'a person cannot

295 *Ta'anit* 8a.

296 = Islamic Law (*Shariyah*). See *Ketubbot* 63b for the dispute of Amemar and Mar Zutra. The *halakhah* follows Amemar: see *EH* 77:2, 3.

297 For even those who say we cannot coerce the husband to divorce his wife who claims *me'is 'alai* agree that we cannot coerce her into compliance.

298 *Responsa 'Iggerot Moshe EH* I:80.

299 R. Bass implies that R. Feinstein is disagreeing with the Rosh. However, that cannot be, because in this *responsum* R. Feinstein says that the Rosh would agree with him! It seems to me that the *IM* proves unequivocally from the Talmud that in a case of madness coerced divorce is sanctioned, so coercion in this case is not 'adding to the talmudic list' at all. Hence, the Rosh would have no difficulty agreeing with R. Feinstein's ruling; indeed, he would have to agree.

300 During periods of the husband's remission.

301 I.e., one cannot expect a husband and wife to remain together if one has to be constantly on guard – for whatever reason – against the other. Cf. *ET* I pp.249-50.

302 *Ketubbot* 77a and *Tosafot Ketubbot* 70a s.v. *Yotsi' weyiten ketubbah*.

303 The Rosh's case seems to be one of insanity in the husband yet he ruled that divorce cannot be coerced (even during periods of remission).

304 This is the wording of the *Tur*; in the Rosh the reading is 'and his stupidity increases day by day'.

305 The Rosh and the *Tur*.

> dwell with a snake in one cage' because it is not possible to beware….as he acts irrationally – they would certainly agree that we compel him so long as he is capable of divorcing that is if [and when] he has periods of sanity.

Rabbi Yosef in "Kol HaMeqaddesh 'Ada'ta' DeRabbanan Meqaddesh We'Afqe'inho Rabbanan LeQiddushin Mineh",[306] records that an illegally coerced *get* when enforced by the *Bet Din* is only rabbinically invalid according to the Rambam and the Rosh and adds that so rule the Maharashdam, the Maharanaḥ and the Radbaz.[307] Hence, they say that if she remarried on the basis of such a coerced *get* she need not leave her new husband. We also find in the *responsa* of the Rosh that if a *bet din* coerced a divorce in the case of *me'is 'alai* and she remarried on the basis of this *get* she need not leave her new husband. In addition, R. Feinstein (*IM*, *EH* III 44) and others (Resp. *Tif'eret Zvi*, *EH*, 102 (end); see Gertner, *Kefiyyah BeGet*, p.242 and the discussion there at 232–91; R. Ḥayyim Shelomoh Sha'anan, "'Ofanim Likhfiyat HaGet", *Teḥumin* XI, pp.203-11) have argued that even a *get* coerced *shelo kadin* could be valid on the basis of "*talyueh wezaben zevineh zeviney*" (*Baba Batra* 48) where, for example, the wife claims *me'is alai* (with *amatlah mevoreret*) so that all agree that she is halakhically free to live separately from him, so that by complying with the divorce he loses nothing and in addition gains the right to remarry, which is otherwise forbidden to him (Tosafot, *Ketubbot* 63b, s.v. *'Aval 'amerah*. This is all the more so after the *Ḥerem deRabbenu Gershom*). He is, furthermore, released from payment for support for a wife who is anyhow not available to him. R. Feinstein says that one could not rely on this alone, but it would create a powerful *safeq* which would be fit to join with other arguments for her release. Although R. Gertner questions this ruling, he agrees that if the husband was paid a (modest) sum of money at the time of the coercion, the *get* would be valid (see Gertner, *ibid*., p.290 no.7, p.525 no.7).

Any situation of a woman being refused a *get* when the *bet din* are in favour of divorce, even if it is not a case where all would agree that coercion can be applied, would usually be one of *me'is 'alai* with *'amatlah mevoreret* so that some authorities would rule in favour of coercion. Even according to the majority (who oppose it), the *harḥaqot* can be employed according to many, and even according to those who forbid coercion and *harḥaqot* in such cases and would label the resultant *get* '*me'useh shelo' kadin*', it still may be that the *get* is at least biblically valid, at least if the husband were paid a modest sum. Even if the *get* is invalid, this may be only a rabbinic flaw, and even if it were biblically void it could still function together with the *hafqa'ah* of the tripartite solution according to the

306 *Torah Shebe'al Peh* (Jerusalem 5721), 96-103.

307 *Ibid*., 99, first new paragraph. It is noteworthy that Rabbenu Tam writes in *Sefer HaYashar* (beginning of *siman* 24 = p.40 lines 4-7 in the Jerusalem 5732 ed.) that no-one can prove whether a divorce illegally coerced by a *bet din* is biblically or only rabbinically invalid.

reasoning of the Rosh *vis-à-vis* the Geonic tradition of coercion in cases of *me'is 'alai*.

This would add a fourth *safeq* to bolster the permissibility of the tripartite solution.

Appendix I: The view of Re'ah[308]

The Re'ah refers to betrothal by intercourse when there are no witnesses to the seclusion. He maintains that such witnesses are not required if the couple are living together as man and wife because it would then be public knowledge that they have experienced both seclusion and intercourse.[309]

This opinion of the Re'ah is the basis of the fear expressed by some of the *Posqim* that after having made a condition at *qiddushin* the couple might effect an unconditional *qiddushin* by means of intercourse (to avoid possible retroactive promiscuity) even though no witnesses were ever present at their seclusion or intimacy. R. Berkovits finds this astonishing for the following reasons.

(i) Many *Rishonim* dispute this view – Rambam (*Ishut* 7:23 – see *Magid Mishneh* there), Rashba, Rosh, *Tur*. (The position of Rivash is unclear. Whereas in his *responsum* no. 6 he says that the view of Re'ah should be disregarded, in no. 193 he contradicts this.)

(ii) Re'ah expresses this opinion in the case of a minor who never objected (*lo' me'anoh*)[310] to her (rabbinic) marriage and grew up, becoming an adult (12 years old) with her husband and it could be that his innovative view applies only to that case but not to the case of a man who gave *qiddushin* on condition and then had intercourse without repeating the condition. This is because in the case of the minor her betrothal is in suspense and as she grows into an adult the betrothal grows with her so that when they have their first intercourse of her adulthood the betrothal is thereby recognised by Torah law; there is also a view that the *original* betrothal becomes automatically effective when she reaches her adulthood: *Yevamot* 109b. However, in the case of an adult woman who was betrothed on a condition and then had intercourse (*setam*)[311] without actual witnesses to the seclusion, Re'ah may well agree to the majority view that two witnesses to the seclusion are necessary. This would solve the previously raised problem (i) of an apparent contradiction in Rivash. In *responsum* 6 he rejects outright the opinion of Re'ah *in a case not involving a minor* while in *responsum* 193 he uses it to support the married status of a girl who had been betrothed

[308] See pp.11-12 (B.1) above.

[309] This would only be effective (virtual) testimony – *'anan sahadey* – if the "public" included valid Jewish witnesses: cf., e.g., Rabbi M. Feinstein, *IM*, *EH* I, no.74.

[310] See note 27 above.

[311] See p.18 above.

by her mother in her minority and had now reached adulthood.

(iii) Even if the couple admit to having made betrothal through intercourse it would, according to most *posqim*, achieve nothing without witnesses. The Rashba goes so far as to say that even if the witnesses see them through a window but the couple cannot see the witnesses there is still no betrothal even if both say that they intended their intercourse as *qiddushin*. (See, for example, Ran on Rif to *Gittin* 73a s.v. *Wekhatav HaRashba*'.)

(iv) One can add to this also the consideration that betrothal by intercourse was already rare in the days of *Terumat HaDeshen* (as stated in his *responsum* 209) and how much more so nowadays:[312] *TBU* 24-25 & 46-47.

[312] Cf., however, *ET* II p.71a at notes 8 and 9, from which it appears that the Re'ah's opinion is shared by many *Rishonim*: see the reference there to *Responsa Mishkenot Ya'aqov EH* 109. Cf. also Rabbi S. Daichovsky, "Nissu'im 'Ezraḥiyim", *Teḥumin* II, 252-266, at 257-59; Rabbi Y.A. Henkin, *Perushey Ibra*', *simanim* 3-5; *'Otsar HaPosqim* XI, p.396.

On the other hand, note also the view cited there in Daichovsky (p. 258) – according with the *Terumat HaDeshen* cited above – that no-one nowadays would ever betroth with intercourse and witnesses of seclusion instead of using a ring (קנין בסף) and only Talmudic scholars are even aware that it is theoretically possible to do so. Therefore there is no longer any need to fear that "they may have agreed to use their intercourse as an act of betrothal": cf. *Sha'agat 'Aryeh* quoted in *Responsa Bet Efrayim* end of no.42; *HaGeRash* Kotna, questioner in *Responsa Bet Yitsḥaq EH* 29; *HaRi* Bereish, *Responsa Ḥelqat Ya'aqov* I no.1; Rabbi Ovadyah Yosef, *Responsa Yabia' 'Omer* VI *EH* 1:3 (Jerusalem 5746, p.268 col. 1).

Appendix II

Posqim who Accepted the Practical Possibility of Conditional Marriage as a Solution for the Tragedy of '*Iggun*

Noted *posqim* who were willing to accept *in practice* some type of conditional *nissu'in* to avoid '*iggun* include:

[1] *Rabbi Eliyahu Ḥazzan*,[313] Chief Rabbi of Alexandria 1888-1908, who suggested, somewhat guardedly, the introduction of conditional marriage. His *responsum* was addressed to the French rabbinate and the attempt of the latter to introduce conditional marriage was based on this *responsum* (although this fact is not mentioned in R. Lubetsky's '*Eyn Tenai BeNissu'in*).

The essence of his response, which I have quoted above (p.5; see further Plight (§IV.3)) and as recorded by Freimann (*SQN* 389), reads as follows:

> Perhaps there is hope by means of a condition at the time of *qiddushin* and *nissu'in* [presumably = *ḥuppah*] and at the time of seclusion [presumably = *yiḥud* and *bi'ah*]. I know that this permissive ruling is not generally agreed upon; nevertheless, it is of some help, because those who allow it are fit to be relied on – in the time of pressing need in which we find ourselves – for the rescue of the daughters of Israel and in order not to increase *mamzerim* in Israel.[314]

[2] *The Constantinople Bet Din* issued, in 5684 (=1923/4), *Maḥberet Qiddushin 'al Tenai* in which they presented their proposal for the introduction of conditional marriage. The marriage would be retroactively annulled if the husband left his wife for a prolonged period without her permission or if he refused to accept upon himself a ruling of the *bet din* [regarding divorce] or if he became mentally ill or caught a contagious disease or if the wife required *ḥalitsah* from an obstinate or untraceable levir. In addition, it was proposed that the *bet din* would, in such circumstances, effect annulment of the marriage. The couple would also have to swear an oath that they would never cancel the marriage conditions. However, there was no requirement of a repetition of the conditions at seclusion.[315]

[3] Similarly, *Rabbi Eliyahu Ibn Gigi* of Algiers and

---

313 Born Smyrna 1840. He became a member of Jerusalem Rabbinical College in 1868, Rabbi of Tripoli in 1874 and of Alexandria in 1888. In 1903 he presided over the Orthodox Rabbinic Convention at Cracow. He authored many works. His responsa, *Ta'alumot Lev*, appeared in three volumes: Leghorn 1877, Leghorn 1893 and Alexandria 1902.

314 *Responsa Ta'alumot Lev* III 49, as per *SQN* 389, para. 4.

315 See below, [4] Rabbi David Pipano.

[4] *Rabbi David Pipano*, *Av Bet Din* of Sofia, Bulgaria, lent their support to the proposal of the Constantinople rabbinate for conditional marriage.[316]

Rabbi Pipano, in *Responsa Nose' Ha'Efod*, *responsum* 34,[317] written at the end of *'Adar Rishon* 5684 (1924), examines the arguments of the Sages of Constantinople and agrees with them. This is a very moving *responsum* – as well as being a very learned tract – and its contents are well worth publicising. I present here a summary but with some word-for-word quotations.

He begins by describing the tragedies with which the Sages of Constantinople were grappling. There were cases where husbands had left home to find work and eventually decided that they were better off staying where they had found a job. They thus abandoned the wives of their youth and left them as widows without any support, not even sending them one letter. The abandoned wives wept bitterly at the *bet din* because their children were starving and the whereabouts of their husbands were unknown.

Sometimes the abandonment took place because of family quarrels. The husband fled to another town and lived the 'good' life, perhaps even apostatising, while his wife and children wandered about for food and the *bet din* could do nothing.

In other cases, the problem was one of *ḥalitsah*, where the brother-in-law demanded a sum of money which the widow could not possibly raise and he kept her an '*agunah* for years.

Many other situations arise, says R. Pipano, that one could not even imagine. As a result of this one of two things occurs. If the '*agunah* is a wanton woman she leaves the upright path and if she is decent she either accepts suffocation of her spirit or goes out of her mind, Heaven forfend. That is why the rabbis of Constantinople have proposed conditional marriage. They have published their halakhic arguments in a work called *Maḥberet Qiddushin 'al Tenai* which they have sent to rabbinic authorities across the world to hear their comments "and amongst them they have turned to me to express my humble opinion".

He continues: "Although my knowledge will not tip the scales … nevertheless, there is no greater sin than [inaction] for someone capable [of learning] and of being of help to these women … perhaps I too will be worthy to aid them that the daughters of Israel be not as captives of the sword …"

The conditions proposed by Constantinople were that the marriage would be retroactively annulled if:

1. the husband was absent for more than an agreed period;
2. the wife summoned her husband to *bet din* and the husband would not

316 See Freimann, *SQN* 391, second paragraph.

317 Published at the end of the book *'Avney Ha'Efod* II, Sofia 5688 (1927/8) – *SQN ibid*.

accept the ruling of the *bet din*;

3. the husband disappeared;
4. the wife found herself in need of *ḥalitsah* and unable to receive it because the brother's whereabouts are not known or he refuses to perform *ḥalitsah*;
5. the husband became ill with an infectious/contagious disease (or he had such a disease at the time of the marriage but did not disclose this to the wife); or
6. any other circumstances arose that made it impossible for her to live with him.

If the *bet din* are satisfied that one of these situations has arisen they must do all in their power to acquire a *get* for her from her husband or to arrange a *ḥalitsah* for her with her brother-in-law, but if they cannot then they must declare her free to remarry without a *get* or without *ḥalitsah*.

In the next 3 paragraphs[318] (= section (א)), Rabbi Pipano describes briefly the first arguments of the Constantinople sages built upon *Ketubbot* 73 and mostly agrees with them. He concludes that if one betroths a woman on condition and then weds her without repetition thereof her requirement of a *get* is only rabbinic according to almost all the *Posqim*.

In the following paragraph (= section (ג)), he agrees with Constantinople that a condition repeated at *nissu'in* and *bi'ah* would be effective according to all but Riaz and, he adds, if the groom made clear at the repetition at *bi'ah* that he means his condition to obviate the need for a *get* should the condition be broken, then Riaz also would agree that no *get* is required.[319]

In sections (ד), (ה) and (ו) our author examines the support that the Constantinople rabbinate summoned from the condition of the *'aḥ mumar* and he ultimately agrees with this too.

Section (ז) is devoted to the argument that it is possible nowadays to rely on a condition at the time of betrothal without the need to repeat it at *bi'ah* (or at any other time). Again, Rabbi Pipano is in agreement. He briefly summarises the seven reasons suggested for this leniency:

1. The condition is for the benefit of the woman.

[318] s.v. *Ukhdey*, s.v.*Wa'ani* and s.v. *Welo' 'od*.

[319] Cf. the statement of Berkovits regarding this matter (*TBU* 27): It follows logically from this that if he made clear that he does *not* presume his condition fulfilled and that he realises the possibility of his bride being subject to a vow and therefore he is repeating his condition *so that the intercourse will indeed be illicit if the condition is unfulfilled* then, if indeed it is not fulfilled, no wedding will have taken place and she will not require a *get* to be free from him [even according to Riaz]. See my paper "The Plight of the '*Agunah* and Conditional Marriage", §§IX.42-49, and see the discussion above, pp. 20-23.

2. The Rashba and the Ran maintain that foregoing a non-monetary condition is ineffective.
3. He is particular about maintaining the condition.
4. It is not certain that his intercourse will prove promiscuous.
5. This condition could not be subjected to propitiation.
6. After a number of declarations and announcements it is not logical at all that she would forego the condition.
7. Both bride and groom swear an oath that they shall never forego the condition.[320]

[320] Cf. the following extract from "The Plight of the '*Agunah* and Conditional Marriage":

IX.36. Berkovits responds that the question as to whether a condition made at *qiddushin* would be cancelled at *nissu'in* is relevant only when the various stages of *nissu'in* were carried out *setam* (i.e. without repetition of the condition) but if there was a clear declaration that the procedures were on the same condition as that expressed at the *qiddushin* there is no question of the cancellation at any stage of *nissu'in* nor even of the intercourse being intended as an unconditional act of marriage. Thus is the *halakhah* recorded in *Ḥelqat Meḥoqeq* (*EH* 38:49) in the name of *Maggid Mishneh*, Rosh and *Hagahot Asheri*. The *Bet Shemuel* (*EH* 38:59) adds to these sources *Tosafot*.

IX.37. This repetition of the condition, however, is necessary only in the cases discussed in the Talmud such as "on condition that you are not subject to vows". However, in the case of the condition of Mahari Bruna and the condition that Berkovits proposes, even without repetition after the *qiddushin* the condition will be effective for each stage of the *nissu'in*, including the intercourse, for the following reason.

IX.38. Why, he argues, ever make a condition if you know you are going to forego it later because of the fear of promiscuity? Yet the Talmud says that though the *qiddushin* were on condition that she is not subject to vows, if the *nissu'in* took place without repetition of the condition, we must presume that the couple have, or at least may have, foregone the condition. *Ḥatam Sofer* in *responsum EH* II 68 explains as follows:

> "It makes sense there (in the case of vows) to say that the condition is in suspense until it becomes clear to him whether it has been fulfilled (she has no vows and the marriage stands) or it has been breached (she has vows and the marriage never took place). Therefore, he makes a condition at the *qiddushin* and, although he knows that in the end he will cancel at the *nissu'in*, nevertheless he says, 'Up to the *nissu'in* I shall investigate thoroughly and find out if she is subject to any vows, and anything not clarified by then – this being an unlikely situation – I shall forego and make the marriage unconditional.' However, the condition (made to avoid) the attachment to the apostate levir is one that will not be clarified throughout the lifetime of the husband. If then it was their intention to cancel it at *nissu'in*, why did they make it at all? What point is there in the condition?"

IX.39. Exactly the same argument, says Berkovits, could be made for a condition to free her from becoming an '*agunah* due to her husband's refusing her a *get*: *TBU* 52-3.

IX.40. Furthermore, Berkovits points out that there are additional reasons for saying that even without repeating the condition after *qiddushin* we may assume that they do not intend to forego it. Although the following reasons were given by the earlier *Posqim* only *vis-à-vis* the condition of Mahari Bruna, R. Berkovits argues that they clearly apply with equal force to his own proposed condition.

(i) Nowadays when *qiddushin* and *nissu'in* are performed together there is no reason to think that they mean the condition at *qiddushin* to be cancelled at *nissu'in* as already pointed out in *Responsa Terumat HaDeshen* (end of no. 223) and in *Ḥatam Sofer* (*ibid*., s.v. *We'omnam*).

In section (ח) he deals with the question of the children born in a marriage that is later retroactively annulled being spiritually blemished.

Section (ט) concludes by saying that Rabbi Pipano feels that the Constantinople rabbinate should have set out exactly what conditional arrangements are required and since they have not done so he will now do so. Firstly, he says, the following should be added to the *ketubbah*.

> The aforementioned groom at the time that he betrothed the aforementioned bride in the presence of witnesses made conditions with the aforementioned bride, absolute conditions like the conditions of *Beney Gad* and *Beney Re'uven*, with the condition preceding the declaration stating that he is wedding the aforementioned bride in accordance with these conditions and because of this the aforementioned bride agreed that if the conditions would be fulfilled the betrothal should be effective and if they would not be fulfilled – even one of them – the betrothal should be totally nullified and should have no effect at all and the article used for the betrothal should be a gift.
>
> Thus did the aforementioned groom say to the aforementioned bride in the presence of the witnesses signed below:
>
> > 'If it should ever happen that, in the course of time, I need to journey away from home, I shall ask permission of the bride for the agreed period and I shall be obliged to write to her from wherever I am, telling her where I am and if the time allowed should need to be extended I must ask permission yet again by letter. If, however, I tarry there without her permission more than the period fixed between us … or if it be thus – that there be a quarrel between us and she sues me to judgment before a righteous *bet din* and the *bet din* make me liable in any way and I shall be unwilling and shall disagree to accept the judgment upon myself or if I flee and my whereabouts be unknown then the betrothal shall not be effective but shall be nullified retroactively and she will not need a *get*.
> >
> > 'Furthermore, if I am worthy to have surviving descendants at the time of

---

The latter states clearly (*ibid*., s.v. *Wa'ani*, at the end) that the repetition of the condition at the various stages of *nissu'in* is only a stringency and *is not essential*: *TBU* 48.

(ii) The condition was made for her own future protection, so even if he wished to cancel it she would certainly not do so, as pointed out in *Responsa Me'il Tsedaqah* no.1, and an unconditional betrothal cannot happen without her consent. In the Mishnah's case where he made *qiddushin* on condition (that she is not subject to vows) and made *nissu'in* without repeating the condition we fear that he cancelled the condition because it was in his interest only and she certainly would not object to its cancellation: *TBU* 37.

(iii) There would be no illicit intercourse even if the marriage was retroactively annulled in the case of Mahari Bruna's condition or our condition so that *neither of them need feel any need to cancel it*: *TBU* 32-34.

> my death, the betrothal shall be effective. If, however, it should happen that I die without surviving descendants, Heaven forfend, the betrothal shall not be effective and she will not require *yibbum* or *ḥalitsah*.
>
> 'Also, this marriage is on the understanding that I will be healthy and strong. If, however, an impure situation arises[321] as a result of which I become ill with a contagious or infectious disease or if I was ill in such a way at the start of the marriage but this was not known to her until later or any similar situation in such a way that it is impossible to dwell with her then the betrothal shall not be effective and the money I give to her as betrothal shall be nothing more than a mere gift and she will not require a *get*.'
>
> When the woman comes before the righteous *bet din* seeking her rights, the *bet din* shall investigate the matter thoroughly and if they find that right is on the woman's side they shall do all in their power to obtain a divorce from me or *ḥalitsah* from the levir but if they cannot achieve this they shall permit her to the world without a divorce or *ḥalitsah*.
>
> In all cases, she can claim and take her *ketubbah* payment and additions to the *ketubbah in toto* [????][322] and she will not suffer any loss because of the condition as regards the *ketubbah* or the additions thereunto'.
>
> In our presence – the witnesses signed below – the aforementioned groom and bride swore….that they shall not be allowed or permitted to annul any one of these conditions…. and not to forego any one of them or a part of it.

These are the things that must be written in the *ketubbah*.

At the time of the betrothal the groom shall say to the bride (here rabbi Pipano records the wording to be used at the *qiddushin*):

> With reference to all the conditions which are written in the *ketubbah* – [if] they are fulfilled, behold you are betrothed to me with his ring according to the Law of Moses and Israel and if the aforementioned conditions are not fulfilled, or even one of them or even a part of one of them, then the *qiddushin* shall be cancelled and shall not take effect at all and you will not need a divorce from me nor [will you need] *ḥalitsah* and the wedding ring will be a [mere] gift and all the acts of intercourse that I commit with you shall be on this understanding.

Rabbi Pipano then informs us that he could have simplified the wording of the condition for the groom but this would have lead him into areas of *maḥloqet HaPosqim* so he preferred to keep to the straight and narrow.

He concludes with the following paragraph:

> Finally, let me bless you 'Be strong and may your heart be firm' because you have set your mind to save the daughters of Israel from captivity and from mishap. May A-mighty G-d grant you strength and good health to arrive at the conclusion of the

321 Illness.

322 I could not decipher the enclosed.

> matter. This is the gift of a poor man who has offered his sacrifice from that with which G-d has graced me. Whomever He chooses He will bring near to him according to His will.
>
> Thus says the servant who prays to his Creator: 'May He heal him from his sickness and restore him to his position; may his innards be filled to contemplate His Torah and to create *novellae*.'
>
> Being the insignificant,
> David son of Avraham Pipano
> Pure Sefaradi.

In the paragraph following the signature there is a brief discussion of a theoretical halakhic point. This in no way affects Rabbi Pipano's theoretical and practical support of the Constantinople proposal.

There now follows a lengthy paragraph by the *magiah* (proof-reader?) (who is not identified), as follows (italics here added for emphasis):

> In truth, the rabbis of Constantinople did a great thing by enacting conditional marriage but this is only an enactment for the future (and even this plan has not yet been put into action). What, however, have these sages achieved with their enactment for the *several thousands and tens of thousands* of chained women who are now in a sad and depressing situation being left with 'nakedness and destitution'? The results are fearful and terrifying for amongst these '*agunot* are wanton women and decent women. As to the wanton, some of them *convert to Christianity* and some *proceed to debauchery*, offering themselves to anyone. The decent ones either *bear a life of pain* or *commit suicide*. Thus, this problem, *which has been tearing apart the world of Judaism for some years*, is not completely solved by means of conditional marriage.
>
> The truth is that if we delve into the spirit and the profundity of our Holy Torah we shall see clearly that it is a law of life. 'And he shall live through them – and not die through them.' We can see in the fundamental structure of the Talmud progressiveness and adaptation to the variable and changing conditions of life. There are in the Talmud a considerable number of progressive ideas and even an inclination to reform, especially in the area of '*iggun* where they were lenient even with one witness and 'a witness [reporting] from a witness' and even a manservant and maidservant and a gentile speaking in his innocence etc. In a number of cases they made annulment of marriage on the grounds that anyone who marries does so in accordance with the will of the Sages. In the interests of wanton women and of decent women: *Ketubbot* 3a. Because 'he acted unjustly etc.': *Yevamot* 110a. Similarly in a number of places in the Talmud – see *Bava' Batra'* 48b, *Yevamot* 90b, *Gittin* 33a and 73a. Some of these deal with a nullified *get* and some with no *get* at all. A number of these cases the *Posqim* accepted as *halakhah* …
>
> We also find in the Talmud that the Sages have the authority to abrogate a law

of the Torah even permitting a prohibition involving an action, particularly[323] when there is good reason to do so – see *Yevamot* 89; *Tosafot Bava*' *Metsi*'*a*' 20, s.v. *Shover*; *Bava*' *Batra*' 48b and *Tosafot* there; *Tosafot Yevamot* 110 s.v. *Lefikhakh*. All the aforementioned points apply in our case.

'*In the interests of wanton women and of decent women*' we have explained above.

'*Because he acted unjustly*' – are there any people acting more unjustly than these men who flee to distant towns and leave their wives chained all their lives without any means of sustaining themselves while they satisfy their instinct by embracing gentile women?

'*Due to the emergency of the times*' – has there ever been a time of greater indecency than the contemporary period, particularly when some husbands exploit the Law and demand enormous sums to divorce their wives or [when surviving brothers demand vast sums] to agree to *ḥalitsah* with their sisters-in-law. Is there a desecration of the Law greater than this?

I know that a number of the *Posqim*, *Rishonim* and *'Aḥaronim*, built up several distinctions, and distinctions upon distinctions, regarding all the aforementioned talmudic sources but I do not wish to write at length. I wish only to stress that if the Sages of the Talmud were living at this time they would certainly institute several enactments in order to release from the chains of '*iggun* these thousands and tens of thousands of miserable women. The fact that they made no such enactments in their time is because the situation was not so horrific as it is today when due to great wars the world has changed dramatically and indecency and cruelty have struck roots in the heart of mankind. There is no compassion! There are no ethics or humanity! Therefore, my Masters! Rabbis of Israel and the Diaspora! Long enough have you sat and watched in indifference and apathy. In these unfortunate times a great responsibility and obligation weighs heavily upon us. It behoves you to assemble, several rabbis from all lands, in one centre to arrange counsel and to pass enactments in order to remove this stumbling block from the midst of our people. For that which the *posqim* have written – that only the Sages of the Talmud like Rav Ami and Rav Assi, and none beside them, are qualified to institute enactments like these – is not logical for, on the contrary, 'Yiftaḥ in his generation is like Shemuel in his generation'. Furthermore, we see that humanity is developing every day so that if we shall succeed in this important business then not only will we wipe away the bitter tears of these women who scream and weep but we shall also seal the mouths which speak terrible things against our Holy Torah, for many Jews and non-Jews speak – and justifiably so – 'Is this the Torah of which they say that it is a Law of life and righteousness and equity etc?' Therefore, it is our duty to try with every possible effort to put an end to these matters and to set up the Law upon her pedestal, to return the crown of the Torah to her former glory and to place it in the lofty heights fit for her. Then shall we have sanctified the Name of Heaven in public.

[323] Surely this should read 'but *only* when there is good reason': see Abel, "Morgenstern", §9.3.1.

[5] *Rabbi Zvi Makovsky* in 5687 (1926/7) published a paper titled *Mipney Tiqqun Ha'Olam*[324] in which he proposed conditional marriage not as a communal enactment but only for specific cases where it is clear from the start that the woman is likely to become '*agunah* because of the obvious irreligiosity of the husband (or levir). The couple must swear on the public mind that they will never cancel the condition and they should make the condition in the presence of the rabbi also a short while before the seclusion.[325]

[6] Also in 5687, *Rabbi Shemuel Avigdor Abramsohn*, in America, proposed a solution similar to Rabbi Makovsky's. This proposal included an oath taken before a *bet din* in which the husband swears that he would never make a new (unconditional) marriage with his wife and, that should he break his oath and marry her (unconditionally) the *qiddushin* will not be effective.[326]

[7] *Rabbi Benzion Meir Ḥai Uzziel*[327] proposed[328] making the marriage conditional on the continuing acquiescence of the local *bet din*, the *bet din* of the locality/country and the *bet din* of the Chief Rabbinate in Jerusalem, who would thus be empowered to retroactively annul the marriage in cases of '*iggun*.

[8] *Rabbi Mosheh Schochet* proposed[329] in 1933 that a debate take place at a gathering of leading halakhic authorities about the introduction of conditional *qiddushin* and *nissu'in* so that should a situation of '*iggun* arise there would be no need for a *get*. Rabbi Schochet explains: "For it is certain that there is a definite assumption (אומדנא דמוכח) that she did not marry on such an understanding" and therefore even if no explicit condition was made at the time of the marriage [the marriage would be retroactively annulled].

[9] In 1936, *Rabbi David HaKohen Sakali*[330] advocated in a *responsum*[331] the

[324] Appended to the collection *Sha'arey Torah*, Warsaw, Year 17, '*Iyyar* 5687, as per *SQN* 392, para. 10.

[325] See *Responsa Yeḥawweh Da'at*, Jerusalem 5695, sections 1-17, as per *SQN ibid*.

[326] *Sefer Torey Zahav*, New York 5687, II pp.8-17, as per *SQN* 392-3, para. 11.

[327] 1880-1953. Sefaradi Chief Rabbi of Israel 1939-1953. At age 20 he founded a *yeshivah* for Sefaradim – *Maḥaziqey Torah*. In 1911 he became *ḥakham bashi* of Jaffa and district where he worked closely with Rav Kook. In 1921 he was Chief Rabbi of Salonika, in 1923 of Tel Aviv and in 1939 of the Land of Israel. In Jerusalem he founded *Yeshivat Sha'ar Tsiyon*. He wrote a number of works amongst which were his responsa *Mishpetey 'Uzzi'el* which were published finally in four volumes (previously in three) in 1947-64.

[328] *Responsa Mishpetey Uzziel EH* nos. 45 and 46. See also *SQN* 391-2, para. 9. Cf. the lengthy synopsis of these *responsa* in *HKT*, Section C.

[329] *Responsa 'Ohel Moshe* (Jerusalem 5663) no.2, as per *SQN* 393, para. 12.

[330] *Rosh Bet Din* in Oran, Algeria.

introduction of conditional marriage basing himself on the condition of Mahari Bruna. Most interesting is R. Sakali's following point.

> There is no need nowadays to be concerned about the foregoing of the condition or about 'a man would not make his intercourse promiscuous' because our custom is that he does not make *qiddushin* or *nissu'in* until they are joined as a couple by the Almero (= according to the Law of the Land) so that she is singularly his and this is called marriage in the Secular Law. From the point of view of Jewish Law her status at that time is that of a concubine. If so, even if the *nissu'in* were to be annulled retroactively because of the condition [being breached] his acts of intercourse would not be [retrospectively] promiscuous because the couple would still be joined by the authority of the secular marriage so that she is singularly his like a concubine and even more than a concubine because since she is married to him according to the Law of the Land she is not allowed to enter into a sexual relationship with anyone besides him. Even if [one would argue] that because of the [breaching of the] condition his acts of intercourse are [rendered] promiscuous even so it is better that such be the case rather than the greater tragedy than this – that of the multiplication of *mamzerim* in Israel.

[10] *Rabbi Yosef Eliyahu Henkin* proposed[332] a delayed *get* combined with a condition which would take effect if, for any reason, the *get* proved halakhically invalid. He argues that if the *Gedolim* agree, a *bet din* dealing solely with this matter be set up in Jerusalem and every marriage be effected … according to the Law of Mosheh and Israel *and according to the conditions of the enactment of the [Jerusalem] Bet Din [for Marriage]…*

This, R. Henkin argues, removes all problems of detailing, doubling and repeating the condition and also all the *get*-related problems of *bererah* and concerns over 'intercourse for the purpose of unconditional marriage' because where there is a general enactment of the contemporary sages all such concerns are overridden, as we see from the Talmud itself in its application of the rule that *kol hameqaddesh ada'ta' derabbanan meqaddesh*.

The proposal ran as follows.

> At the time of the *qiddushin* and the *ḥuppah* the husband shall order the writing of a *get* that will take effect after the husband's last intercourse with his wife if, after that, he dies without surviving descendants or he becomes insane and remains so for three years or he leaves her an '*agunah* for three years whether through unavoidable circumstances or willingly and the *Bet Din* of Jerusalem before whom the claims shall be brought will recognise that they are true. So it shall be if the claim is that he

---

331 *Responsa BeShuv David* no.2 = *Responsa Qiryat Ḥanah David* II, p.159, as per *SQN* p.393.

332 *Perushey Ibra* (5:25).

is not fit for matrimony or that he has disgusting blemishes such as the various types of leprosy *r"l*. In all these cases the *get* shall take effect after the final intercourse if and when the *Bet Din* set up for the purpose clarifies that the particular case before it is included in the enactment.

The *get* shall be written in *meshita*' script under the auspices of the supervisor of the *qiddushin* and in a very curtailed version – as enacted by the *Bet Din*. It also should not be called a *get* but a *sefer petur* (document of release) by enactment of the *Bet Din*. The groom shall deliver it to her before witnesses and she shall place it in an area belonging to her and under her auspices.

In addition to this they shall enact that all Jewish marriages supervised by a rabbi be on the condition that if the aforementioned circumstances of '*iggun* come about and the *get* is no longer in existence or is void according to the *Halakhah* then the *qiddushin* shall be retroactively annulled and all the acts of intercourse from the *qiddushin* onwards shall be promiscuous. The *Bet Din* shall place a severe ban upon the husband and wife that they shall not intend nor agree that the acts of intercourse should be for *qiddushin* [which would] not [be] in accordance with the aforementioned condition.

The *Bet Din* shall publish documents of conditions of the enactment of the *Bet Din* of all Israel of such and such a year and at the time of the *qiddushin* there shall be delivered together with the *qiddushin* [the] document of conditions. They shall publicise the conditions in books and in newspapers and in synagogues and in study-halls so that it will not be necessary to speak of the matter at the time of the marriage. A record signed by witnesses shall be kept of every *qiddushin* performed by a rabbi in accordance with all the regulations of the enactment and they shall inform the greatest *bet din* in the community or the country thereof.

They shall set the period of the enactment at 50 years and thereafter if the *Bet Din* finds that there is no need for it they shall nullify it even if the *Bet Din* be inferior to the previous one.

Sometime after publishing this proposal Rabbi Henkin was shown a copy of Rabbi Lubetsky's '*Eyn Tenai BeNissu'in* (*ETB*), as a result of which he withdrew it and when the second edition of *Perushey Ibra* was published he arranged to have the words *hadri bi* printed alongside the text of the proposal.[333] Rabbi Berkovits in *Tenai BeNissu'in UvGet*[334] expresses his admiration for the humility of Rabbi Henkin's retraction but maintains that it was based on a mis-reading of *ETB*, which was in fact aimed only at the French condition and did not forbid any condition. On the other hand, Rabbis Gertner and Karlinski in their study in *Yeshurun*[335] point to a letter sent by R. Ḥayyim Ozer Grodzynsky to R. Hillman, *Av Bet Din* of London, in which the former writes of his astonishment at hearing of the Constantinople

333 Gertner and Karlinski, *ETB*, part 3, p.746, first new paragraph.

334 *TBU* 170.

335 "'Eyn Tenai BeNissu'in", *Yeshurun* 10 (5762), 711-750 (= part 3), at pp.749-50. See Appendix III, at note 348.

proposal,[336] and from which it is apparent that R. Grodzynsky understood the opposition recorded in R. Lubetsky's *ETB* as being directed against any type of condition.

The relevant section of the letter reads as follows.

> I have already made known to His High-ranking Torah Honour that I have in my possession a composition from all the contemporary *Gedolim* dating from 5667 who ruled publicly that one should not make *in any manner* an enactment of a global condition in marriage. When some French rabbis wanted at that time to introduce such an enactment all the leading rabbis of all countries publicly proclaimed, some briefly some at length, that Heaven forfend that they do such a thing and that the children born would be possible *mamzerim* with whom it would be impossible to marry …

Now this ("one should not make *in any manner* an enactment of a global condition in marriage") shows that Rabbi Grodzynsky understood that the declarations in *ETB* did indeed outlaw *any* conditional *nissu'in* and that they were not aimed only at the French proposals.

However, whereas it is clear from this that Rabbi Grodzynsky himself was opposed to *any* type of conditional marriage and understood that *ETB* also maintained this stance, it is difficult to see any proof of this in the text of *ETB*. Indeed, R. Berkovits has argued[337] that all the evidence in *ETB* is to the contrary.

It is also important to note that the public declaration of the Russian and Polish rabbinate (which is signed, amongst many others, by Rabbi Grodzynsky) in *ETB* apparently accepted that even the French condition, though not to be used, would, if put into practice, work [at least possibly] according to most *Posqim*.[338]

336 See above, Appendix II, [2].

337 *TBU* 166-171.

338 This is also noted by R. Gertner and R. Karlinski in their *ETB*, part 3, p.694, note 68 (in a reference to *ETB*), where it is remarked that there was a surprising difference between the opinion of the French condition as expressed in the private letters of Rabbi David Karliner, Rabbi Ḥayyim 'Ozer Grodzynski and others, and that expressed in their public protest (i.e. the public protest of the Russian and Polish rabbinate). Whereas in the former communications they stated that a woman who leaves her husband without a *get* on the basis of the French condition is a *definite* adulteress and her children from the second husband are *definite mamzerim*, in the latter they say only that according to the *halakhah derived from a profound examination of the Law as it is* "she is an adulteress *according to several (kammah) posqim*" (not *kol* – all – *posqim* nor *rov* – most – *posqim*) and her children from the second husband will be forever forbidden to marry into the congregation of Israel. This is repeated further on: "… and the woman who remarries without a *get* by means of this condition is a *possible* adulteress (*safeq 'eshet 'ish*) and the children will be excluded eternally from marrying into the Congregation according to all opinions (i.e. either biblically, as certain *mamzerim* or rabbinically, as possible *mamzerim*)." This implies that when viewed from a strictly halakhic perspective ('the *halakhah* derived from a profound examination of the Law as it is') – leaving aside matters of policy, ethics and practicality – the French condition would have [at least possibly] worked according to most of the *posqim*.

We may note also that Rabbi Grodzynski did not even say that it is *forbidden* to institute any global condition in marriage but that "one *should not*" do so. This implies that it *is* possible to formulate a condition that would be *halakhically effective* and *halakhically permitted for use* though still *practically proscribed* as a matter of policy. Compare to this the observation of Rabbi Ovadyah Yosef in *Yabia' 'Omer* (IX *OḤ* 1:2) that from the wording of the *SAOḤ* 2:6 (It is forbidden (*'asur lelekh*) to walk with an erect gait and one should not walk (*welo yelekh*) bareheaded) one can derive that it is *not* forbidden to walk about with an uncovered head.[339]

[11] *Rabbi Shelomoh HaKohen Itsban* (1881-1949), *Responsa Ma'alot LiShelomoh*, *EH* no. 2. In the final paragraph of this responsum he refers (though without references) to the fact that the author of *Nofet Tsufim*, who was one of the *gedolim*, also agreed to conditional marriage.

[12] *Rabbi Dr. Eliezer Berkovits*, argued for conditional marriage in the first chapter of his work, *Tenai BeNissu'in UvGet*,[340] which is devoted to demonstrating the halakhic, moral and practical acceptability of conditional marriage.

[13] *Rabbi Dr. Yeḥiel Ya'aqov Weinberg*, whose approbation to *TBU* was, in spite of claims to the contrary, never withdrawn,[341] expressed his sadness and pain that the *Gedolim* did not agree to his[342] proposal for the solution of '*iggun*.[343]

We have also seen[344] that *Rabbi A.Y. Kook* agreed in theory with Rabbi Abramsohn (see above, [6]) and that *Rabbi Moshe Feinstein* agreed in theory with Rabbi Berkovits.

339 I have a vague recollection of a similar observation in the *Mishnah Berurah* on some statement of the Rema but cannot pinpoint it at present.

340 See *TBU* in bibliography.

341 Gertner and Karlinski, *ETB*, part 3, p.748, s.v *Le'or kol ha'amur*. Rabbis Gertner and Karlinski come to the conclusion that it seems extremely difficult to accept the statements that Rabbi M. M. Kasher in his article attributes to Rabbi Y. Y. Weinberg. It rather seems that Rabbi Weinberg supported Rabbi Berkovits to the end and never changed his mind at any point.

342 'His' proposal in this context means Rabbi Weinberg's but presumably ultimately refers to Rabbi Berkovits's.

343 This information was contained in a post-card sent by R. Weinberg to R. Kasher and discovered after the latter's death amongst his writings – R. Gertner and Karlinski, *ETB*, part 3, p, 748 at note 121.

344 See above, text at note 98 and p.43.

Appendix III

Response to Rabbis Gertner and Karlinski

In a threefold series of articles titled "'Eyn Tenai BeNissu'in",[345] Rabbis Zevi Gertner and Bezalel Karlinski revisited the question of conditional marriage. In the latter section of the third article (pp.736-750) they deal with the contribution of Rabbi Weinberg and Rabbi Berkovits to the debate. Elsewhere, I made a number of observations on this series[346] and include below those most relevant to the present publication. The page numbers are those of the original article in *Yeshurun*.

Page 743, first paragaph. Note is here taken of the fact that Rabbi Weinberg in his introduction to Berkovits's *Tenai BeNissu'in UvGet* argues that the objections to conditional marriage voiced by the *Gedolim* of the previous generation in '*Eyn Tenai BeNissu'in* were mainly of an ethical rather than a legal nature. In addition, the cases of '*iggun* with their disastrous consequences were on the increase. Therefore, the possibility of some kind of conditional marriage should be revisited by the *Gedoley haDor*.

Comment: In my copy of *TBU*, in the last paragraph of the first page of the introduction and in the following paragraph which appears on the second page of the introduction, I found the two points of difference between the former and later generations to be as follows.

1. The situation is now much worse than it was then (this is the second difference mentioned by R. Gertner and R. Karlinski).
2. The objections in *ETB* were mainly aimed at the French condition from which R. Berkovits's condition is essentially different. As far as I can see, he does not say, as Gertner and Karlinski state, that the objections in *ETB* were mainly of an ethical nature.

Page 747, note 117. This footnote informs us that Rabbi Eliyahu Jung passed a copy of *TBU* to one of the *Gedoley HaPosqim* in the USA requesting an opinion. The *Gadol* replied that from a purely halakhic perspective he is not opposed to the idea but it is difficult for him to agree to it in practice.

345 *Yeshurun*: 8 (5761) 678-717 (= part 1), 9 (5761) 669-710 (= part 2), 10 (5762) 711-750 (= part 3).

346 "Comments on "'Eyn Tenai BeNissu'in" by R. Zevi Gertner and R. Bezalel Karlinski" (Working Papers of the Agunah Research Unit no.13, November 2008), available at http://www.mucjs.org/Gertner.pdf

Comment: For my comment on this citation see "Further support for R. Berkovits's proposal", p.**43** above.

On page 748 s.v. *Le'or kol ha'amur*, Rabbis Gertner and Karlinski come to the conclusion that it seems extremely difficult to accept the statements that Rabbi M.M. Kasher in his article attributes to Rabbi Y.Y. Weinberg.

It rather seems that Rabbi Weinberg supported Rabbi Berkovits to the end and never changed his mind at any point. This, of course, accords with Berkovits's position.

Page 749. At the end of note 122, the authors agree to Berkovits's argument[347] that *LeDor 'Aḥaron* did not understand *ETB* as forbidding *any kind* of conditional marriage.

Only one contributor to *LeDor 'Aḥaron* – Rabbi Yosef Kanowitz – understood that *ETB* had in fact forbidden any form of condition in marriage and "Rabbi Berkovits disproves his words at length".

Pages 749-50. In this concluding piece, s.v. *'Akhen*, the authors accept that Rabbi Weinberg and Rabbi Berkovits were right in saying that their proposal was not the same as that of the French rabbinate but nevertheless, they maintain, the Berkovits proposal cannot be accepted even in theory[348] and how much more so in practice because Rabbi Henkin and Rabbi Kasher were right in saying that the opposition to the French condition would apply to any global enactment of *any kind* of condition. In the next paragraph, s.v. *Wedavar zeh*, they prove this claim from a letter sent by Rabbi Ḥayyim 'Ozer Grodzynski to Rabbi Shemuel Yitsḥaq Hillman of London.[349]

347 *TBU* 168-70.

348 I do not know how it is possible for Rabbis Gertner and Karlinski to say that Rabbi Berkovits's condition cannot be accepted *even in theory* when they themselves cite an American *Gadol* (in fact, Rabbi Feinstein) as having said that 'from a purely halakhic perspective he is not opposed to the idea': see my comment in text at note 105, above.

349 See the discussion of this above, text at notes 333-339.

Appendix IV

Historical Changes in Orthodox Practice

As the number of cases of '*agunah* increases and tragedy is added to tragedy, the desperate call for a solution becomes more and more irresistible. Of course, no enactment in this area can take place without the agreement of the *Gedoley haDor*. It is their consideration of the halakhic and meta-halakhic issues that we need and without it nothing can be done.

It may be that we will have to wait until a situation develops in which they consider such an enactment essential as the only way of avoiding a spiritual catastrophe ח"ו even worse than the possible adverse consequences of conditional marriage.

This is exactly what happened in the case of formal Torah education for girls – something that was unheard of until relatively recently. Its introduction was met with determined opposition until it became apparent that we were being faced by a spiritual holocaust and leading sages began to lend it their support. Nowadays, a girl who has *not* studied Torah in a seminary will find it hard to find a suitable *shiddukh*! Similarly, I remember in my formative years in *yeshivah* the derision heaped upon *bat-mitswah* celebrations (then commonly accepted in Reform Judaism). Today, such celebrations are expected even in ultra-orthodox circles.

Until about 1800, *Yeshivah* study for boys was limited to only the most promising young men. In 18th century Wilna perhaps *1 boy in 2000* attended a *yeshivah* and, initially, when approached by Rabbi Ḥayyim Volozhin, Rabbi Eliyahu, Ga'on of Vilna, opposed the expansion of the *yeshivah* system. Over the last 200 years things have changed beyond recognition and today – due to the very different times in which we live – it is considered essential for every boy to attend *yeshivah* for a minimum of 3 years full-time study. A similar story could be told of another modern invention of orthodoxy – also initially strongly opposed in some quarters – the *kollel*, today viewed favourably in all communities.

Another change that has taken place in the last two hundred years is the adoption of the wig by married women instead of the scarf – or some similar head-covering. The change was condemned by the leading rabbinic authorities at the time and even today Rabbi Ovadyah Yosef[350] has written vehemently against it, citing classical *'Aḥaronim* who recorded that it was first introduced by "the *apiqorsim*" and ruling that divorce would be preferable to a marriage in which the wife goes out in a wig. Nevertheless, the change seems to be here to stay.

[350] *Yabia' 'Omer* V *EH* 5.

Further changes in ultra-orthodox practice

In Gertner and Karlinski's '*Eyn Tenai BeNissu'in*,[351] reference is made to Rabbi Louis Epstein's argument that if the Sages of different generations found halakhic solutions to the problems thrown up by:

(i) Release of Debts (*Shemittat Kesafim*) – *Prozbul*
(ii) *Shabbat* Transportation (*Hotsa'ah*) – '*Eruv*
(iii) Loan Interest (*Ribbit*) – *Shetar* '*Isqa*'
(iv) Possession of *Ḥamets* on *Pesaḥ* (*Bal Yimatse*') – *Mekhirat Ḥamets*,

then how is it possible that for the '*Agunah* no resolution can be found?

The authors disparagingly summarise these arguments of Epstein as being the equivalent of saying that "we must subject the requirements of the Torah to the requirements of 'reality and righteousness'."

I cannot understand this criticism. It seems to me that numbers (i), (iii) and (iv) are all good examples of the Sages easing Biblical Law because the changed reality of life had made this necessary.

(i) The *Prozbul* was enacted, as the Talmud says,[352] because with the approach of *Shemittah* people were refusing loans to the poor (a new reality) for fear of not getting back their money, thus transgressing the commandment in Deuteronomy 15:9-11 (impugning the principles of righteousness). It is still used regularly today.[353]

(iii) *Heter* '*Isqa*' has its beginnings in the amoraic period in Babylon,[354] where commercial reality necessitated the circumvention of the prohibition of interest which had been generally applicable in a mainly agricultural society but was increasingly unworkable in a fiscal economy based on trade and industry.

It developed over the centuries to the point where there came into being a standard document – *shetar* '*isqa*' – to cover any transaction where there might be a problem of biblical or rabbinic *ribbit*.[355]

351 Part 2, p.670, note 2 = GK, para. 12.

352 *Gittin* 36a.

353 The possible transgressions, recorded in the context of Deuteronomy15:7-11, involved in failing to lend to the poor man with a genuine need, total nine – five negatives and four positives! See further in the introduction to Rabbi Y. M. Poupko (the *Ḥafets Ḥayyim*), '*Ahavat Ḥesed* (Warsaw 1888), pp.9-12.

354 Cf., *inter alia*, *Bava' Metsi'a*' 68a-b, 104b-105a.

355 Cf. *Naḥalat Shiv'ah* 40, *Terumat HaDeshen* 302. See Hillel Gamoran, "From R. Judah bar Ilai to the *Heter Iska*", in *Studies in Mediaeval Halakhah in Honour of Stephen M. Passamaneck* (Liverpool 2007; Jewish Law Association Studies XVII), 157-67. Cf. R. Ya'aqov Yeshayah Blau, *Berit Yehudah* (Jerusalem 5736), chapter 40 (pp.624-638).

Every bank in Israel today (as far as I know) has a *heter isqa*'.[356] It is also used for any investments or deals between two Jews which would otherwise touch upon the prohibition of paying or taking interest.[357] Rabbi David Feldman writes in his footnotes to the *Qitsur Shulḥan 'Arukh*:[358] "Nowadays it (the banking system) is something without which one cannot exist as the entire basis of business depends on it … and there are Jews amongst the owners. Therefore, *there is an obligation upon us to produce some kind of permissive arrangement* …" (emphasis supplied).[359]

(iv) *Mekhirat Ḥamets*[360] also has its sources in the Talmud, where it begins as one possible way of disposing of *ḥamets* before the advent of the festival.[361] It later developed into a sale with the understanding that the gentile would sell back the *ḥamets* after the festival.[362] In both these sales, the money corresponding to the full worth of the *ḥamets* was paid by the gentile to the Jew and the *ḥamets* was transferred from the Jew's domain to the gentile's.

The sale was later extended[363] to cover cases such as that of the Jewish shopkeeper who found himself left with stocks of whiskey and other *ḥamets* goods that he could not possibly sell or consume before the advent of *Pesaḥ*, which he could also not afford to destroy *and which it would be exceedingly burdensome to physically remove from its place*. This 'weaker' type of official, rather than actual, sale was 'strengthened' by the introduction of a document detailing the legal minutiae of the sale.

356 I understand that Rabbi Y.S. Elyashiv arranged a global application of *heter* '*isqa*' with the entire banking community of Israel.

357 Interest on loans – in the absence of *heter* '*isqa*' – involves many transgressions. See Exodus 22:24, Leviticus 25:35-38, Deuteronomy 23:20-21, *Bava*' *Metsi*'*a*' 5:11. See also Rashi to II Kings 4:1. There are also many rabbinic additions to the prohibition known collectively as '*avaq ribbit* – see, e.g., *Bava*' *Metsi*'*a*' 5:2 and 64b. Cf. *ET* I cols. 100-101. See also the midrash cited by *Tosafot* (*Sotah* 5a s.v. *Kol* '*adam* and *Bava*' *Metsi*'*a*' 70b s.v. *Tashikh*) which denies a place in the World to Come (= the Resurrection, see *Sanhedrin* 90a) to one who transgresses the prohibition of *ribbit*. The Tosafists take this midrash as a literal, normative statement and therefore ask why one who takes *ribbit* is not included in the list in the Mishnah (*Sanhedrin* 10:1 or 11:1) of those who have no portion in the World to Come. Cf. Rabbi Y.Y. Blau, *Berit Yehudah* (Jerusalem 5736), 1:1 who records this as undisputed *halakhah* and cites a number of classical *posqim* as sources.

358 Manchester-New York 5711, 65:28.

359 Although the *heter* '*isqa*' would permit the lending of even a small amount of money on interest even to a poor man in dire need (where the ethical objections that applied in the biblical period are still relevant), its use for such purposes is strongly frowned upon: see the observations of Rabbi Yisrael Meir Poupko in '*Ahavat Ḥesed*, part 2, chapter 15.

360 For a succinct summary of the history of the *Mekhirah* see Rabbi S.Y. Zevin, *HaMo*'*adim BaHalakhah*, *Pesaḥ* 4 (Tel Aviv 5715), pp.245-55.

361 Cf. *Pesaḥim* 2:1

362 Cf. Tosefta *Pesaḥim* 2:6, 7.

363 Cf. *Baḥ*, *Tur* '*Oraḥ Ḥayyim* 448.

In more recent times it has become the practice for *everyone* to sell before *Pesaḥ* any *ḥamets* in his possession. This is done to avoid loss but also to avoid inadvertent transgression and is usually arranged by the local *bet din* which each individual in the community appoints as his agent for the sale. This new arrangement also avoids the possibility of errors in the formulation of the *shetar mekhirah*.

Whereas there was some opposition to the 'sale on the understanding of return' and the 'sale without removal from the premises', the opposition to the communal sale was powerful and widespread. Nevertheless, it is now universally accepted, and even encouraged, as a way of avoiding loss and of avoiding any possible transgression.[364]

Are not all of these good examples of subjecting the requirements of the Torah to the requirements of 'reality and righteousness'? Indeed, might it not be better said that the requirements of reality and righteousness are also requirements of the Torah? After all,

(i) "The Lo-rd is good to all and his mercies are upon all his works",[365]
(ii) "Her ways are ways of pleasantness and all her paths are peace",[366]
(iii) "The Torah had pity on the property of Israel",[367]
(iv) "The Torah was not given to the ministering angels"[368] (*et al*)

are all concepts used in the Talmud and the *Posqim* as part of the halakhic process to justify lenient interpretation and application of the *Halakhah*.[369]

364 The possible transgressions involved in retaining *ḥamets* on *Pesaḥ* are recorded in Exodus 12:15 and 19, 13:7; Deuteronomy 16:4.

365 Psalms 145:9.

366 Proverbs 3:17.

367 *Rosh HaShanah* 27a.

368 *Berakhot* 25b.

369 See, for example, Rambam's ruling (*Melakhim* 10:12), in accordance with Tosefta *Gittin* 3:18 (cf. *Gittin* 61a), that charity must be given even to the poor of idolatrous nations (although this will sometimes mean that there is less available for Jewish charities: *Perishah*, *Ḥoshen Mishpat* 249:2). Rambam bases this upon (i) and (ii). The Talmud in *Sukkah* 32b dismisses the possibility that the *hadas* may be the oleander rather than the myrtle on the basis of (ii) and on the same basis the Talmud in *Pesaḥim* 39a dismisses the suggestion that the bitter herbs eaten with the *matsah* may be the oleander.

Number (iii) is cited in Yerushalmi *Terumot* 8:4, *Pesaḥim* 1:8 and Rashbats, *Zohar HaRaqiya'*, *shoresh alef*, as the source for relying on the more lenient opinion where a loss would otherwise be sustained. The Rema often takes this line in his glosses to *Yoreh De'ah*.

Number (iv) is cited in *Berakhot* 25b to permit 'his heel to see his nakedness'; in *Yoma* 30a to permit 'excrement invisible even when sitting'; in *Qiddushin* 54a to explain the permission for the priests to remain clothed in their kohanic garments for a while after they finish the service – which they have to because they cannot remove them instantaneously; and in *Me'ilah* 14b to explain why Temple structures were always completed before their dedication – because the workers were bound occasionally to benefit in one way or another from the materials with which they were working.

Of course, the action taken upon any of these principles must be justifiable within the parameters of the halakhic process and it is precisely this that various *posqim* have attempted in the area of global solutions to the '*Agunah* tragedy.[370] The proposals have so far failed to convince the majority of the *Gedolim* and as a result all such proposals have been shelved, but it seems to me that the need for a global solution in this area is greater even than the need in the cases of *Prozbul*, '*Isqa*' and *Mekhirat Ḥamets* where the problem was one of livelihood whereas in cases of '*Agunah* it is a problem of life itself – in that women are incarcerated eternally in an invisible prison and their lives are ruined. In addition, countless (kosher) children remain unborn or, where the women cannot or will not accept the situation, there result numerous cases of adultery and numerous *mamzerim* are born. Also, the grave prohibitions being committed by some of the wives and, in the cases of *get*-refusal, by the husbands, are as severe as, and even more severe than, those avoided by *Prozbul*, *Heter* '*Isqa*' and *Mekhirat Ḥamets*.[371] The fact that this particular effort at a solution emanated from the Conservative movement, with whose religious philosophy Rabbi Gertner and Rabbi Karlinski – and Rabbi Abel – disagree, is irrelevant to the validity of the effort itself.

My criticism of these arguments of Epstein is two-fold – one because of what he left out and the second because of what he left in. First, what he left in: The '*eruv* argument is, in my opinion, a non-starter because, unlike the other three rabbinic enactments which release a biblical prohibition, it was not introduced by the Sages as a way of avoiding the difficulties imposed by the biblical prohibition of transportation on *Shabbat*. Wherever carrying on *Shabbat* is proscribed by Biblical Law an '*eruv* is ineffective. The '*eruv* must rather be understood as part of the additional rabbinic *Shabbat* regulations (*shevutim*) of *hotsa'ah* which were enacted initially *only in the absence of an* '*eruv*. Thus not only does '*eruv* not come to ease the burden of biblical regulation; it does not even come to ease the burden of prior rabbinic regulation. It was an enactment contemporary with the *shevutim* of *hotsa'ah* so that the rabbis were in effect saying, "In addition to the biblical areas where transportation is forbidden on *Shabbat* we are adding the following areas

---

See also *Responsa Radbaz* III 1052 (627), who writes that according to the verse "Her ways are ways of pleasantness…" it must be that "the laws of our Torah agree with reason and logic … and it is therefore unthinkable that a person is legally obligated to agree to lose a hand or a foot in order to save the life of another. See other examples in *ET* VII cols. 712-724.

370 For noted *posqim* who have been willing to accept *in practice* some type of conditional *nissu'in* to avoid '*iggun* see above, Appendix II.

371 Adultery: Exodus 20:13, Leviticus 20:10; *Mamzerut*: Deuteronomy 23:3, *Ḥagigah* 1:7, *Yevamot* 4:13 et al. For the sins of the recalcitrant husbands see note 376. There is, however, a stringency in *ribbit* not found even in adultery – see text at note 380.

where it shall be forbidden *unless there is an* '*eruv*."[372]

Regarding what R. Epstein left out, the following examples are worthy of consideration:

1. All the cases in the Talmud where the Sages apply coercion or annulment, thereby evading Biblical Law, in the interest of the biblical demand for justice.[373] According to some, this includes coercion in a case of the *moredet me'is* '*alai*.[374] According to those who understand the coercion in the latter case to be an enactment of the Sabora'im/Ge'onim,[375] it is an evasion of both Biblical and Talmudic divorce law by the post-talmudic authorities in the interests of biblical and talmudic demands for justice.[376]

2. Another, post-talmudic, example of a global, halakhic solution to the problem of women's suffering in matters of marriage and divorce (as far as it goes) is the *ḥerem* of Rabbenu Gershom, which was a prime example of subjecting the requirements of the Torah to the requirements of reality and righteousness or, more accurately, striking a balance between the competing demands of the Torah – the demands for the sanctity of marriage – and the demands for righteousness in interpersonal behaviour.

3. The enactments[377] that entitled unmarried daughters, in the presence of a son or sons, to inherit 1/10 of their father's estate and that awarded them, until marriage, rights of sustenance from their father's estate, thus relegating the son(s), in the case of a meagre inheritance, to the status of paupers. This is especially noteworthy in that the laws

372 One could raise a similar objection to the argument from *Prozbul*, which, according to the *halakhah* as recorded in *Yad* (*Shemittah* 9:10), *Tur* (*Ḥoshen Mishpat* 67) and *Shulḥan* '*Arukh* (*Ḥoshen Mishpat* 67:1) following Abbai (*Gittin* 36a), did not operate when *Shemittah* was biblically applicable. Nevertheless, I have raised no such objection because according to Rashi's understanding of Rava (*Gittin* 36b s.v. *Rava*' '*amar*, see also *Tosafot ibid*. 36a s.v. *Mi* '*ikka*' *midi* at the end) *Prozbul* did operate even when *Shemittah* was biblically in force.

373 See *ET* II pp.137-140, s.v. '*Afqe*'*inho*.

374 Rambam and his school: see the discussion in Rabbi Ovadyah Yosef, *Yabia*' '*Omer*, III, *EH*, 18, 19 and 20; Dayyan E. Y. Waldenberg, *Tsits Eliezer* V:26; Rabbi Y. Herzog, *Heikhal Yitsḥaq EH* I:2.

375 See *Responsa Rosh* 42:1, *Responsa Rashba* cited in Mahariq, *shoresh* 101: *ET* XVII col. 379 s.v. *Benose*' '*ishah* '*al* '*ishto* and col. 382 s.v. *Begerushin be*'*al korkhah*.

376 The unjustified withholding of a *get* can involve many serious transgressions. Depending on the circumstances, any or all of the following may apply: Leviticus: 19:13 (second negative), 19:14 (second negative), 19:17 (first negative), 19:18 (2 negatives and 1 positive), 22:32 et al.

377 *Ketubbot* 68a.

of inheritance are described in the Torah as *ḥuqat mishpat* and are thus considered as monetary matters involving prohibition (*mamon sheyesh bo 'issur*) so that, as Rambam rules, they cannot be subject to any type of condition or alteration as they would be if they were pure *mamon*.[378]

4. Besides these, there are countless examples of abrogation of Biblical Law by rabbinic enactments, in the spiritual and material interests of Israel.[379]

It is possible that R. Epstein does use these arguments in the course of his work (which I have not read) but no mention is made of this by R. Gertner and R. Karlinski.

Of course, most of these changes did not touch upon the minefield of adultery and bastardy but they still demonstrate how strictly held ideological severity and long-entrenched custom have perforce been tampered with and tempered, even turned on their head, when circumstances have impelled Jewish society in directions it might have preferred not to travel.

One should perhaps point out that the *heter* '*isqa*' permits even biblical *ribbit* which would, without the *heter*, exclude the perpetrator from the Resurrection of the Dead[380] – a punishment worse than the death penalty of an adulteress or the status of bastardy, as is apparent from *Sanhedrin* 107a where the Talmud describes the attempts made to publicly humiliate King David because of his sin against Bat Sheva. His enemies would ask him, "He who has relations with a married woman – which death-penalty does he suffer?" To this he would respond, "He who has relations with a married woman – his death is by strangulation and he has a portion in the World to Come but he who shames his fellow in public has no portion in the World to Come." From the Talmud there (90a) it is clear that the World to Come refers to the Resurrection so that we can deduce from this that the Talmud regards being debarred from the Resurrection as a far worse punishment than the death penalty and, presumably, bastardy. If that is a correct deduction one can argue that if the evasion of the prohibition of *ribbit* was successfully attempted then *qol waḥomer* there is no reason why such an attempt not be made to evade the need for a *get* in irresolvable situations of '*iggun*. The force of circumstances was considered sufficient to justify action in the case of *ribbit* and that, as Rabbi

[378] For the same reason they should be beyond the scope of *Dina' DeMalkhuta'* – see *Responsa of Rabbi Aqiva Eiger*, *mahadura' tinyana'*, no.8.

[379] See *ET* XXV col. 646 – col. 648, s.v. '*Af mishum hefsed mammon*.

[380] See note 357, above.

Weinberg wrote,[381] remains the question: Is the situation of '*iggun* grave enough to justify (halakhically acceptable) tampering with marriage also?

[381] Last but one paragraph of introduction to *Tenai BeNissu'in UvGet*.

Selected Bibliography

Citations of Bible, Mishnah, Talmud, *Yad*, *Tur*, *Shulḥan ʻArukh* and the standard commentaries thereon which appear in the Rabbinic Bibles and the larger editions of the Mishnah, Talmud and above-mentioned Codes are not included in this bibliography; similarly with all works cited through secondary sources such as *'Encyclopedia Talmudit*, *'Otsar Mefareshey HaTalmud* etc. unless I have also consulted those works directly.

NB: A composite Index of the primary (halakhic) sources cited in this and the other books in this series will appear on the web site of the Agunah Research Unit, when ready. To request notification of its availability, e-mail Bernard Jackson at bsj@legaltheory.demon.co.uk

Abel, Y., "'*Eyn Tenai BeNissu'in*" by R. Zevi Gertner and R. Bezalel Karlinski" (Working Papers of the Agunah Research Unit no.13, November 2008): http://www.mucjs.org/Gertner.pdf

Abel, Y., "*Hafqaʻah, Kefiyyah, Tena'im*" (Working Papers of the Agunah Research Unit no.12, June 2008): http://www.mucjs.org/HKT.pdf

Abel, Y., "*Halakhah* – Majority, Seniority, Finality and Consensus" (Working Papers of the Agunah Research Unit no.7, June 2008): http://www.mucjs.org/Consensus.pdf

Abel, Y., "The Plight of the '*Agunah* and Conditional Marriage" (Working Papers of the Agunah Research Unit no.4, June 2008): http://www.mucjs.org/MELILAH/2005/1.pdf

Abramsohn, S.A., *Torey Zahav*, New York 5687.

Atlan, G., *Les Juifs et le divorce*, Bern 2002.

Ashkenazi, B., *Shittah Mequbbetset* (4 vols.), New York 5721.

Bass, D., "'*Al HaGerushin waʻAginut lefi Nequdat Mabat 'Ortodqsit*", Internet article - http://www.snuint.k12.il/seder/agunot/view.html

Berkovits, E., *Tenai BeNissu'in UvGet*, Jerusalem 1966.

Blau, Y.Y., *Berit Yehudah*, Jerusalem 5736.

Bornstein, A., *She'elot UTshuvot 'Avney Nezer* (4 vols.), Jerusalem 5766.

Corinaldi, Ḥ, *Bet David,* Amsterdam, 1738-1739.

Daichovsky, S., "Nissu'in 'Ezraḥiyim", *Teḥumin* II, 252-66.

Duran, S., *Teshuvot Shimʻon bar Tsemaḥ* (= *Tashbets*, 2 vols.), Lemberg 5651.

Duran, S., *Zohar HaRaqia*ʻ, Jerusalem 5747.

Eiger, A., *Teshuvot Rabbi Aqiva Eiger*, Israel n.d.

Elon, M., *HaMishpat Ha'Ivri* (2 vols.) Jerusalem 5738.
Emden, Y., *Sefer She'elat Ya'avets*, Lemberg 5644.
'Encyclopediah Talmudit (29 vols., in progress), Jerusalem 5717-5771.
Epstein, Y.M., '*Arokh HaShulḥan* (8 vols.), Tel Aviv n.d.
Feinstein, M., *Sefer 'Iggerot Moshe* (8 vols.), New York 5719-5742 (vols. 1-6), Bene Beraq 5745 (vol. 7), Jerusalem 5756 (vol. 8).
Feldman, D., Commentary to S. Ganzfried's *Qitsur Shulḥan 'Arukh*, Manchester and New York 5711.
Freimann, A., *Seder Qiddushin WeNissu'in*, Jerusalem 1964.
Gamoran, H., "From R. Yehudah bar Ilai to the *Heter Iska*" in *Studies in Mediaeval Halakhah in Honour of Stephen M. Passamaneck* (Liverpool 2007; Jewish Law Association Studies XVII), 157-67.
Gertner, Z., *Kefiyyah BeGet*, Jerusalem 5758.
Gertner Z. and B. Karlinski, " *'Eyn Tenai BeNissu'in*", *Yeshurun*: 8 (5761) 678-717 (= part 1), 9 (5761) 669-710 (part 2), 10 (5762) 711-750 (= part 3).
Goldberg, Z.N., "*Hafqa'at Qiddushin 'Enah Pitaron la'Aginut*", *Teḥumin* (22), 158-160.
Goldberg, Z.N., " *'Eyn Hafqa'at Qiddushin lelo' Get*" (*Teguvah*), *Teḥumin* (23) 165-168.
Heller, A.L. HaKohen, *Shev Shema'tata'*, London 5737.
Hameiri, M., '*Ezrat Nashim*, *Sefer Shelishi*, London 5715.
Henkin, Y.E., *Perushey 'Ibra'*, n.p. n.d.
Herzog, Y., *She'elot UTshuvot Hekhal Yitsḥaq*, Vol. I: *'Even Ha'Ezer* A, Jerusalem 5720; Vol. II: *'Even Ha'Ezer* B, Jerusalem 5727; Vol. III: *'Oraḥ Ḥayyim*, Jerusalem 5732.
Hoffmann, D.Z., *Sefer Melammed Leho'il*, New York 5714.
Ibn Abi Zimra, D., *She'elot UTshuvot Radbaz* (2 vols.), Israel 5732.
Ibn Adret, Shelomoh, *Ḥiddushey HaRashba'*, New York 5721.
Ibn Adret, Shelomoh, *She'elot UTshuvot HaRashba'* (5 vols.), Jerusalem 5750.
Isserlein, Y., *She'elot UTshuvot Terumat HaDeshen* (2 vols.), Jerusalem 5751.
Itsban, S., *Sefer Ma'alot LiShelomoh*, Jerusalem 5745.
Kasher, M. M., "Concerning Conditional Marriage" (Heb.), *Noam* 11 (1969), 338-53.
Karelits, A.Y., *Ḥazon 'Ish* (7 vols.), Bene Beraq 5726-34.
Landau M. Z., *Sefeqot Melakhim*, n.p. 5765.
Landau, Y., *She'elot UTshuvot Noda' BiHudah* (2 vols.), New York 5733.
Lau, D., "Hafqa'at Qiddushin Lemafrea' Beyamenu", *Teḥumin* 17, 251-71.
Lubetsky, Y., " *'Eyn Tenai BeNissu'in*", Wilna 1930.
Me'iri, Menaḥem ha-, *Bet HaBeḥirah – Ketubbot,* Jerusalem 5707 (this seems to be an error for 5727 = 1968).

Mosheh ben Maimon, *Teshuvot HaRambam* (ed. Blau, 3 vols.), Jerusalem 5746.
Mosheh ben Naḥman, *Ḥiddushey Ramban* (2 vols.), New York 5724.
'Otsar Mefareshey HaTalmud (15 vols., in progress), Jerusalem 5733-69.
Padua, M., *She'elot UTshuvot Maharam Padua*, Jerusalem 5740.
Pipano, D., *Sefer Nose' Ha'Efod*, published in his *Sefer 'Avney Ha'Efod,* Sofia 5688-1927, Vol.II, pp.166-326.
Poupco, Y.M., *'Ahavat Ḥesed*, Warsaw 5648.
Poupco, Y.M., *Mishnah Berurah* (6 vols.), New York 5712.
Riskin, S., "Hafqa'at Qiddushin – Pitaron la'Aginut", *Teḥumin* (23), 158-60.
Riskin, S., "*Hafka'at Kiddushin*: Towards Solving the Agunah Problem in Our Time", *Tradition* (36:4) Winter 2002, 1-36.
Riskin, S., "Response", *Tradition* (36:4) Winter 2002, 44-53.
Schick, M., *She'elot UTshuvot Maharam Shiq* (2 vols.), Israel 5732.
Schwartz, N., *She'elot UTshuvot Bet Naftali*, New York 5766.
Segal, S. (HaLevi), *Naḥalat Shiv'ah* (3 vols.), Beney Beraq 5766.
Shapiro, M., *Between the Yeshivah World and Modern Orthodoxy*: *The Life and Works of Rabbi Jehiel Jacob Weinberg 1884-1966*, London 1999.
Shapiro, M., "*Gerushin Begin Me'isah*", *Diney Yisrael* 2 (5731), 117-53.
Shochetman, E., "Hafqa'at Qiddushin – Derekh 'Efsharit LeFitron Ba'yat Me'ukevot HaGet?", *Shenaton HaMishpat Ha'Ivri* 20 (5755-5757), 349-97.
Sinai, Y., "Coercion of a *Get* as a Solution for the problem of Agunah", in *The Manchester Conference Volume*, ed. L. Moscovitz (Liverpool: Deborah Charles Publications, 2010; Jewish Law Association Studies XX), 246-261.
Sofer, A. (ed.), *Teshuvot Ḥakhmey Provincia* (the Sages of Provence), Jerusalem 1967.
Tam, Y., *She'elot UTshuvot Sefer HaYashar leRabbenu Tam*, Jerusalem 5732.
Toledano, Y.M., *Sefer Yam HaGadol*, Cairo 5691.
Uzziel, B.M.Ḥ, *She'eltot UTshuvot Mishpetey 'Uzzi'el*, Jerusalem 5755, 8 vols.
Waldenberg, E. Y., *She'elot UTshuvot Tsits 'Eli'ezer* (10 vols.), Jerusalem 5745-5756.
Walkin, A., *She'elot UTshuvot Zeqan 'Aharon*, New York 5737.
Warhaftig, I., "Tenai Beqiddushin weNissu'in", *Mishpatim* 1 (5725), 203-10.
Weinberg, Y.Y., *She'elot UTshuvot Seridey 'Esh* (2 vols.), Jerusalem 5763.
Westreich, A., "Annulment of Marriage (*Hafka'at Kiddushin*): Re-examination of an Old Debate" (Working Papers of the Agunah Research Unit no.11, June 2008): http:www.mucjs.org/Annulment.pdf
Wieder, J., ''*Hafka'at Kiddushin*: A Rebuttal'', *Tradition* (36:4) Winter 2002, 37-43.
Wieder, J., ''*Hafka'at Kiddushin*: Rejoinder'', *Tradition* (37:1) Spring 2003, 61-78.

Yitsḥaq of Corbeil, *Sefer Mitsvot Qatan*, Israel 5728.
Yosef, O., "Kol HaMeqaddesh 'Ada'ta' DeRabbanan Meqaddesh We'Afqe'inho Rabbanan LeQiddushin Mineh", *Torah Shebe'al Peh* (Jerusalem 5721), 96-103.
Yosef, O., *She'elot UTshuvot Yabia' 'Omer* (10 vols.), Jerusalem 5746-5764.
Yosef, O., *She'elot UTshuvot Yeḥawweh Da'at* (6 vols.), Jerusalem 5737-5744.
Zevin, S. Y., *HaMo'adim BaHalakhah*, Tel Aviv 5715.

Alphabetical list of Hebrew books
traditionally known and cited by the name of the work
rather than that of the author:

'Ahavat Ḥesed	see Poupco
'Arokh HaShulḥan	see Epstein
Berit Yehudah	see Blau
Bet HaBeḥirah	see Me'iri
Ḥazon 'Ish	see Karelits
Ḥiddushey Ramban	see Mosheh ben Naḥman
Ḥiddushey Rashba'	see Ibn Adret
Mishnah Berurah	see Poupco
Sefeqot Melakhim	see Landau, M. Z.
Sefer Mitsvot Qatan	see Yitsḥaq of Corbeil
Shev Shema'tata'	see Heller
Shittah Mequbetset	see Ashkenazi
Torey Zahav	see Abramsohn
Zohar HaRaqia'	see Duran

Responsa:

'Avney Nezer	see Bornstein
Bet 'Efrayim	see Margoliot
Bet Naftali	see Schwartz
Ḥakhmey Provincia (Sages of Provence)	see Sofer, A.(ed.)
Hekhal Yitsḥaq	see Herzog

'Iggerot Mosheh	see Feinstein
Ma'alot LiShelomoh	see Itsban
Maharam Padua	see Padua
Maharam Shiq	see Schick
Melammed LeHo'il	see Hoffmann
Mishpetey 'Uzzi'el	see Uzziel
Naḥalat Shiv'ah	see Segal
Noda' BiHudah	see Landau, Y.
Nose' Ha'Efod	see Pipano
Rabbi 'Aqiva' Eiger	see Eiger
Radbaz	see Ibn Abi Zimra
(Ha)Rambam	see Mosheh ben Maimon
(Ha)Rashba	see Ibn Adret
Sefer HaYashar LeRabbenu Tam	see Tam
Seridey 'Esh	see Weinberg
She'elat Ya'avets	see Emden
Tashbets	see Duran
Terumat HaDeshen	see Isserlein
Tsits 'Eli'ezer	see Waldenberg
Yabia' 'Omer	see Yosef
Yam HaGadol	see Toledano
Yeḥawweh Da'at	see Yosef
Zeqan 'Aharon	see Walkin