

The Plight of the 'Agunah and Conditional Marriage'

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Abstract: The debate over conditional marriage as a possible solution to the problem of 'iggun receives relatively little attention from contemporary halakhic authorities. The issue is assumed to have been "put to sleep" by the opposition to the French and Turkish proposals of the early 20th century, as voiced in the *responsa* collected in 'Eyn Tenai Be-Nissu'in (1930) and despite the response to those arguments by R. Eliezer Berkovits in his *Tenai Be-Nissu'in Uv-Get* (1966). This paper provides a detailed summary and review of the arguments in those publications (which are not universally accessible). An analysis of further sources relevant to conditional marriage is being prepared, and will appear in a separate working paper.

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Bibliography:

Yehudah Lubetsky, *'Eyn Tenai Be-Nissu'in (ETB)*, Wilna 1930.

Abraham Hayyim Freiman, *Seder Qiddushin We-Nissu'in (SQN)*, Jerusalem 1964.

Eliezer Berkovits, *Tenai Be-Nissu'in Uv-Get (TBU)*, Jerusalem 1966.

Tehumin

I. An outline of the problem

I.1. Once a Jewish couple have been married in accordance with Orthodox Jewish law – in the ceremony known as *qiddushin* (see II.3) – 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*.

I.2. 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.

I.3. 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 Ha-Ḥazaqah, 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*.

I.4. 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.

I.5. Even in those cases where the Talmud permits forcing the husband to agree to the divorce (see *'Even ha-'Ezer (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.

I.6. 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.

It is the last of these proposals that I address in this article.

II. The formula for conditional *qiddushin/nissu'in*

II.1. 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 *Gedoley ha-Dor*, the leading sages of the Orthodox Rabbinate.

II.2. 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 simple and ample solution. It is not, however, as simple as that.

II.3. The problem arises when 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 (*huppah*, *yihud* and *bi'ah* = canopy, seclusion and intercourse) – as will always be the case with a condition to avoid '*iggun* – because the Talmud says (*Yevamot* 107a et al.) as a general rule, '*eyn tenai be-nissu'in*: there is no condition in *nissu'in*. (The *qiddushin* forbid the bride to every man; the *nissu'in* permit her to the groom.)

II.4. 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, IX 50 & 53). 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

II.5. 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-*Shulhan 'Arukh*) authorities where a conditional *qiddushin* **and *nissu'in*** is accepted and that is the case of the apostate brother.

III. The apostate brother

III.1. 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.

III.2. 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.

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.H. Uzziel, *Responsa Mishpetey 'Uzziel* EH 44 and similarly Rabbi Eliyahu Hazzan, *Resp. Ta'alumot Lev* EH I.5.

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 Ha-Shulḥan, EH 157:15-17.

IV Extension of the condition to all marriages

IV.1. A number of attempts have been made to expand the application of conditions to all marriages to obviate the tragedy of 'iggun. I shall attempt to describe these proposals, the opposition they aroused, the differences drawn by the opponents between conditions to avoid the need for *halitsah* and conditions to avoid the need for *get*, and suggested responses to the opposition.

The following paragraphs (up to VIII.4 inclusive) are based on *ETB* pp. 2-14 and G. Atlan, *Les Juifs et le divorce*, Bern 2002, 211-18.

IV.2. Divorce in France was unknown until the introduction of civil divorce on July 29 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 Hazzan, Chief Rabbi of Alexandria 1888-1908, who suggested, somewhat guardedly, the introduction of conditional marriage.

IV.3. The essence of his response, as recorded by Freiman (*SQN* 389), reads as follows.

“Perhaps there is hope by means of a condition at the time of *qiddushin* and *nissu'in* [presumably = *huppah*] and at the time of seclusion [presumably = *yit'ud* 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).

IV.4. Rabbi Hazzan also sent a copy of this *responsum* to Rabbi Hayyim Bijirano – Sage of the Sefaradim in Bucharest who had also been asked by his community to find a solution for 'iggun (*ibid.*, 48).

IV.5. In 1887 the French rabbinate decided to accept the suggestion of Rabbi Hazzan and to introduce a conditional clause into every Jewish marriage in France stating: “If the State judges should divorce us and I will not give you a divorce according to the Law of Moses and Israel, this betrothal shall not be effective”.³

IV.6. Rabbi Yehudah 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 Hazzan.

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 Freiman (*SQN*, 389, para. 4) — see Lubetsky, *ETB*, p. 5, col. 1, top.

V. Objections to the French proposal

V.1. Rabbi Lubetsky immediately dismissed the suggested condition saying that it was **halakhically unacceptable** and **practically impossible**. One halakhic objection was that it constituted “a condition against the Torah” since the Torah recognises only a *get* given of the husband’s free will (as above, I.3), thus empowering him to withhold divorce from his wife, whereas this condition removes that power from him. In any such case the rule (Mishnah *Ketubbot* 9:1) is *Kol ha-matneh ‘al mah shekatuv ba-Torah tena’o batel [u-ma’aseh qayyam]*, “[If] anyone makes a condition against that which is written in the Torah his condition is void [but the act (to which the condition pertains) remains unconditionally valid.]” Thus in this case the marriage would remain in force even if there were a civil divorce and the husband refused to give a *get*.

V.2. A second halakhic objection was that a condition made at *qiddushin* may be cancelled at *nissu’in* — as explained above (cf. II 3&4) and it is only in the case of the apostate brother that a condition was allowed (cf. III), because in that case the parties will not mind if the marriage is retroactively annulled, since there are no children who would become tainted as progeny of a concubine,⁴ and also since the husband will have died before the condition takes effect and we may assume that he does not care **during his life** that his marriage may be retroactively changed into concubinage **after his death**; thus no need will be felt to forego the condition. Furthermore, she knows for sure that should circumstances of *halitsah* arise she would certainly be left an ‘*agunah*. Thus she, in the interests of her own safety, would never forego the condition even if he wanted to cancel it.

V.3. The practical problem was that, as an additional assurance that they are determined to abide by the condition throughout the *nissu’in*, the condition must be repeated before two valid witnesses at each stage of *nissu’in* – even at the first intercourse (where the witnesses would have to hear the condition being repeated while they stand outside the bedroom). Clearly, said Lubetsky, in contemporary France that would be impossible.

V.4. Nevertheless, in 1893, Rabbi Zadoq Kahn, Chief Rabbi of France, urged the ultra-Orthodox rabbinate to look again at the possibility of conditional marriage and it was decided to lay the matter before Rabbi Yitshaq Elhanan Spektor, *Av Bet Din* of Kovno and a leading halakhic authority. On 4 Sivan 5653 (1893) an answer was penned by Rabbi Spektor stating briefly that the proposal of conditional marriage was, according to *Halakhah*, out of the question besides the fact that it would lead to numerous disasters. Rabbi Spektor explained that due to extreme weakness he could not enter into halakhic debate: just suffice it to say Heaven forbid that such tampering with marriage take place.

VI. A combined proposal: conditional annulment and communal annulment

VI.1. After the receipt of this *responsum* the matter was laid to rest throughout the lifetime of Rabbi Kahn, but after his passing in 1906, when the French rabbinate assembled in his final honour, they also met to discuss improvements in the application of Jewish law. These improvements included the introduction of conditional marriage (based on the enactment of Mahari Bruna – see above, III 2) together with a communal enactment of retroactive annulment (based on a *responsum* of Rashba, I 1206).

VI.2. This time the condition made no mention of *get*, but stated: “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.” Thus the woman may go and remarry with *huppah* and *qiddushin*.⁵

VII Sustained objections

⁴ A spouse without *qiddushin* with whom intercourse is illicit according to Rambam and his school – see below, IX.55.

⁵ I suspect that the reference to *get* was removed in an attempt to obviate the objection, pointed out earlier by Lubetsky (V.1), of the stipulation of a condition against the Torah. This appears to be the background to the confusion, sometimes encountered in the literature, concerning the wording of the French proposal.

VII.1. At this juncture Rabbi Lubetsky showed to the Chief Rabbi in Paris the *responsum* of Rabbi Spektor (from 1893, see V 4) together with a copy of the questions raised by Lubetsky against the suggested condition in 1887 (see V 1-3). The Chief Rabbi responded that the rabbinic assembly had passed the matter on to two learned rabbis – Rabbi Yosef Lehmann, head of the Rabbinical Seminary and Rabbi Emanuel Weill – and that he would also deliver to them Lubetsky’s communication.

VII.2. Lubetsky furthermore wrote to these two rabbis that Rashba had long ago ruled that the post-talmudic sages do not possess the power of annulment, and that a condition in *nissu’in* as opposed to *qiddushin* was possible only in the case of an apostate levir (see above V.2). He added that if the said rabbis did not want to accept his word they should not hastily implement their enactment but should rather submit the question to the *Gedoley ha-Dor*, especially those residing close to France.

VII.3. On 8 Iyyar 5667⁶ (1907) Rabbi Lubetsky wrote a long letter to Rabbi Lehmann⁷ in which he first excuses his interference in “a quarrel not mine” (cf. Proverbs 26:17) on the grounds that in the area of marriage and divorce all Israel may be personally affected. For example, if there is any fault in the proposals of the rabbinate to end Jewish marriages a child could be born who is halakhically a *mamzer* and one of Lubetsky’s descendants might marry such an individual.

VII.4. He then proceeds to question whether the rabbinate’s concern is justified. Suppose, for example, we introduce an enactment that after a State divorce no rabbi shall arrange for the husband *qiddushin* and *huppah* until he has delivered a *get* for his wife and that he must not claim from her even that which he has a halakhic right to claim until the *get* is delivered – is not that enough?⁸

VII.5. He also argues that the rabbinate’s proposals put the husband at the mercy of an unscrupulous wife who, should she wish to leave her husband for another man, will find it easy to persuade the court that she has a bad husband and obtain a State divorce. She can then look forward to the immediate retroactive dissolution of her marriage and her freedom to marry whomever she wishes.⁹ We must think of justice to the husband, argues Lubetsky, not only the wife.

VII.6. The remainder of the letter deals with halakhic considerations under the following headings: *Hillul Ha-Shem*, *hafqa’ah*, *hefker bet-din*, *matneh ‘al mah she-katuv ba-Torah*, *’eyn tenai be-nissu’in* and the differences between conditional marriage as a general rule (as in the French proposals) and in the case of the apostate (or missing or dumb or insane) levir.¹⁰

VII.7. Lubetsky then points out that a new enactment touching upon so grave an area needs the approbation of the *Gedoley ha-Dor*, not just the combined authority of a few individual rabbis, and that means rabbis capable of issuing halakhic rulings — not those, he comments, who are merely called rabbis but in truth are no more than preachers and synagogue directors — and such rabbis who are really capable of *hora’ah* are very few in France. He himself, though having responded to halakhic queries for some thirty years and having earned the approbation thereupon of Rabbi Zadoq Kahn, would never have considered himself worthy of issuing a ruling on any enactment affecting marriage or divorce even if he considered the enactment halakhically acceptable; he would have turned the matter over to the *Gedoley ha-Dor*.

VII.8. Indeed, Lubetsky tells us that when Baron Edmund de Rothschild founded Jewish settlements in

⁶ The text of *ETB* says 5668 which is clearly an error.

⁷ *ETB* 5-10.

⁸ See below, IX.13.

⁹ This argument is sourced by Lubetsky in the Talmud – *Gittin* 88b and *Bava’ Batra’* 48a – “...so that every woman will not go and attach herself to a gentile and free herself from her husband”.

¹⁰ All of these points which are relevant to conditions will be reviewed later, as will Berkovits’s response to them.

The Plight of the 'Agunah and Conditional Marriage

'*Erets Yisra'el*, he (Lubetsky) was asked by Rabbi M. Erlinger in the presence of Rabbi Zadoq Kahn about the contemporary application of the *halakhah* of *shevi'it*, and he responded that he could not answer a question of such general import but would put the matter to the *Gedolim*. How much more so should this be the case in matters touching marriage and divorce.

VII.9. "Therefore", concludes Lubetsky, "choose some of the *Gedoley ha-Dor* and if they agree with you who will dare to challenge it. .. However, let our heart be not arrogant in deciding this law nor let us be hasty to do it alone especially as a famous contemporary *ga'on* (Rabbi Spektor) has written that it (the French rabbinate's proposal) is impossible according to the *Halakhah* ..."

VII.10. On 19 Iyyar, 5667 (1907) Rabbi Lehmann replied with a most cordial letter in which it was made clear that there was no intention on the part of the rabbinate of hasty action and no action would be taken to tackle the 'agunah problem without consultation with Rabbi Lubetsky and his colleagues. Lehmann went so far as to write to Lubetsky, "... and you will be unto us for eyes and you will show us the way on which we should walk".¹¹ He further promised that after he finished his work of setting out the details of the condition clearly in French he would place them before Rabbi Lubetsky in the hope of obtaining his approbation. Thus it seemed certain that Lubetsky's advice had been accepted.

VIII. The battle is joined

VIII.1. How astonished, then, were Rabbi Lubetsky and his colleagues to read in the French Jewish periodical *L'Univers Israelite*, no. 40, of the meeting of the general assembly of the members of the association of the French rabbinate (12 June 1907), at which they declared their intention of going ahead with their proposals to obviate problems of *halitsah* and *get* by means of a condition to be attached to every Jewish marriage (*tenai be-nissu'in*).

VIII.2. Lubetsky and his associates felt they had to act. They recognised that anyone can make a mistake and even the greatest sages have been known to err. However, the pitfall is, they declared,¹² the natural desire to perpetuate one's opinion and to be unable to rescind it even in the face of proof to the contrary. There was, however, no chance of "proof to the contrary" being ascertained at this assembly of the rabbinate, because all that happened was that the two appointed rabbis put forward their view briefly before 35 members, all of whom nodded their agreement and judgement was thus reached without discussion or deliberation. Such decision-making might be acceptable in political diplomacy, where the will of the assembled is the law, but in halakhic deliberation the will of the rabbis is irrelevant and even if all agree to a decision that is against the *Halakhah* they have achieved nothing. The requirement is that all should freely debate and deliberate so as to clarify what the teaching of the Talmud and *Posqim* is on the subject under discussion.

VIII.3. Hence, it was decided to turn to the *Gedoley ha-Dor* with the conviction that if the French rabbinate see that all the *Gedolim* dispute their view they will back down, for surely they will not transgress the explicit ruling in the Torah: "One should incline [the judgement] after the majority"¹³ ... and even if the majority are lesser scholars and the minority greater than them, the law follows the majority.¹⁴ Rabbi Lubetsky and his associate Rabbi Weitskopf then penned a letter to the *Gedolim* in which they related all that had occurred, together with the reasons why they considered the proposals halakhically unacceptable.

VIII.4. All the *Gedolim* were strongly opposed to the proposals, and Lubetsky is keen to point out that

¹¹ Cf. Numbers 10:31 and Exodus 18:20.

¹² *ETB* 10.

¹³ Exodus 23:2. Cf. Mishnah 'Eduyot 1:5. Talmud: *Sanhedrin* 2a, *Hullin* 11a, *Yerushalmi Sanhedrin* 4:2.

¹⁴ This does not command a consensus amongst the *Posqim*. See the sources quoted in *Encyclopedia Talmudit* IX col. 258.

this was true not only of those whose learning was confined to “the four ells of the *Halakhah*” but also of those who had benefited from a higher general education as had the rabbis of the French rabbinate.

VIII.5. Rabbi Lubetsky collected the responsa of the “*Haredi*” Rabbis who had opposed the French proposals in a pamphlet titled *'Eyn Tenai Be-Nissu'in* (1908) but did not publish it at the time, since the French rabbinate dropped the proposal in the light of these opinions, communicated to them privately. However, in 1928 and 1929, Rabbi Yosef Shapotshnick of London published two works (*H'erut 'Olam*, London 5688 (1928) and *Liqro La-'Asirim Deror* London, 5689 (1929)), in which he declared his intention to solve the *'agunah* problem by a combination of condition and annulment, and he opened an “international office” for this purpose. He even went so far as to forge the signatures of leading rabbis to promote his work (*SQN* 390). As a result, it was decided that *'Eyn Tenai Be-Nissu'in*, which had been kept until then in the library of Rabbi Hayyim Ozer Grodzynski of Wilna, must be published. At Rabbi Grodzynski's request, the job was done by Rabbi Aharon Dov Alter Waranowski who published *'Eyn Tenai Be-Nissu'in* in Wilna in 1930 (*ETB* VI). This was widely regarded as having “put to sleep” the idea of solving the problem of the *'agunah* through conditional marriage. However, in 1966, Rabbi Dr. Eliezer Berkovits published *Tenai Be-Nissu'in Uv-Get*, in which he reviewed the objections in Lubetsky, and insisted that they did not inhibit a differently drafted condition, for example one which made it clear that the condition took effect only when the husband refused to grant the *get* in the face of a request/order of a *bet din* to do so.

VIII.6. *ETB* (pp. 15-56) contains a long list of letters and protests issued by the leading halakhic sages of Europe, Russia, the Land of Israel, England and America. Some of these are general rejections or condemnations without argumentation but most do summon various halakhic and other arguments to make their point. Often the same point is made by many scholars, sometimes a particular sage will raise a point unique to himself. I shall now attempt to summarise the various objections to the French proposals and the responses to those objections by Berkovits. In each case I shall identify the authors of the argument and the page of *ETB* on which the particular argument is made by each author for example: *ETB*, Lubetsky 1. The page in Berkovits appears, for example, as *TBU* 1. The explanations and comments in the footnotes are my own.

IX. Objections (Lubetsky in *'Eyn Tenai Be-Nissu'in*) and responses (Berkovits in *Tenai Be-Nissu'in Uv-Get*)

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 Lubetsky's *'Eyn Tenai Be-Nissu'in* are of three types (cf. *TBU*, 57): ethical and policy-driven, legal (halakhic) and practical.

A. Ethical and policy-driven arguments

Objections: Undermining Jewish Marriage?

IX.1. Introducing such a condition on a general basis is close to destroying the institution of *qiddushin*, *get*, *yibbum* and *halitsah*. 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].

IX.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 *halitsah*) the Orthodox got rid of surreptitiously and this *Hillul 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]

IX.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 *halitsah* 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 shebe-lev 'enam devarim*.¹⁵

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

IX.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 Noahide 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.¹⁶

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

IX.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. Ha-Kohen 30, Tenenbaum 32, Zilberstein 38, Schwartz 42]

Responses

IX.6. 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.

IX.7. Berkovits argues that none of these concerns (above, paras. 1-5) is relevant to his condition according to which the State alone achieves nothing – their 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.¹⁷ Therefore, adultery will still be a serious matter

¹⁵ Unexpressed intentions — “We really want civil marriage not true *qiddushin*” — are of no legal consequence. Here, where the true intention is obvious, 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.

¹⁶ Civil marriage, concubinage and Noahide marriage are, halakhically, three names for the same thing.

¹⁷ Note that 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 ha-ra'uy* (one could also describe the required behaviour as *ke-hogen*). By this, I think he means cases where there is a moral

because the marriage will only be retroactively annulled if a *bet din* says he should give a divorce **and** he refuses to do – a rare 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).¹⁸ 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 because 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.

Objection: 'Wife-Swapping'

IX.8. 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 from returning to her husband if she was married to another and her second marriage had ended in divorce or widowhood (Deut. 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.¹⁹ 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 apply). Though legal, such conduct would be highly immoral. [*ETB*, Rabbis: P. L. Horowitz 27, Zilberstein 38, Schwartz 42]

Response

IX.9. 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*.**)

Objection: Connivance of Religious Authorities in a Sin?

IX.10. 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 Yitshaq 'Aramah²⁰ 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

obligation to give a *get* (a sort of *ḥiyyuv be-diney 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*).

¹⁸ 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 Ha-Shem* 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.

¹⁹ For an early ascription of such behaviour to the peoples of the biblical period see the midrash quoted in Rashi to Genesis 10:14.

²⁰ C. 1420-1494.

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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

IX.11. 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 (see below, para. 97), that according to the *Halakhah* a condition of this nature at *qiddushin* and *nissu'in* is theoretically possible, one can certainly not maintain such a stance [of refusing to act].

IX.12. 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.

IX.13. In our many sins, our generation is not like theirs. For example, in *ETB* (5) one of the rabbis²¹ 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 *huppah* 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!

IX.14. 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 Hayyim 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"!

IX.15. 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 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*.

IX.16. 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":²² *TBU* 69.

Objection: Thinking of Divorce at the Time of Marriage

IX.17. Rabbi Pinhas Ha-Levi 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"²³ he should already be thinking of how to be rid of her: *ETB* 27.

Response

²¹ Rabbi Lubetsky.

²² I.e., taken from their parents and brought up without halakhic Jewish observance – cf. *Shabbat* 68b.

²³ Cf. Malachi 2:14.

IX.18. Begging the forgiveness of His Honour, responds Berkovits, to the poverty of my understanding, he 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.

IX.19. 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

Objections: Conditions Cancelled at Bi'ah

IX.20. A condition at betrothal may become subsequently cancelled at a later stage of the marriage process (*huppah*, *yihud*, *bi'ah* – see II 3). This is because the couple will (or may) forego the condition so that the *qiddushin* become retroactively unconditionally valid²⁴ or because they will (or may) use the act of intercourse to create an unconditional *qiddushin*.²⁵ 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 *qiddushin*: *Bet Shemuel*, *EH* 31:9, sub-para. 22, quoting Re'ah (see Appendix, at end). 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. Ha-Kohen 22, Y. Y. Rabinowitz 24, Vinter 25, Tovish 26, Horowitz 27, Epstein 33, Danishevsky 34-5, Zilberstein 38, Shapira 40]

IX.21. This is not a problem in the case discussed by Mahari Bruna – the case of the apostate brother²⁶ – 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]

IX.22.²⁷ The *Naḥalat Shiv'ah* (*NS*) states 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 annulment²⁸ and that is why Mahari Bruna's condition is acceptable.²⁹

[*ETB*, Rabbi Lubetsky 30, footnote]

²⁴ Rif, Rambam, *Tosafot*, *SAEH* 38:35. See *TBU* 23.

²⁵ Rashi, Ramban, Rashba, Rosh, *Tur* – see *TBU* *ibid*.

²⁶ See s.III, p.4 above.

²⁷ In this paragraph, the distinction between during life and after death is attributed by Lubetsky to a classical authority – Rabbi Shemuel ben David Ha-Levi, author of *Naḥalat Shiv'ah*.

²⁸ Thus he will feel no need to cancel his condition.

²⁹ 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*.

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IX.23. 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 brother condition i.e. it would not only have to be made at *qiddushin* but also at *huppah* and again at *yi'ud* 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 rabim*³⁰ that they will never forego the condition. [ETB, Rabbi Lubetsky 4; Hungarian protest 49]

IX.24. 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]

Responses

Response to paragraphs 20 & 21.

IX.25. The concern for retroactive illicit intercourse is relevant in the cases in the Talmud and *Shulhan 'Arukh*³¹ 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. 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 or the act of intercourse functions as an unconditional *qiddushin*.³²

IX.26. 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**; thus, there is no reason for him to forego his condition.³³ Rav Landsofer (quoted in *Me'il Tsedaqah* no. 1) quotes the *Bah* 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 Ha-Bayit* (at the end of *Bet Me'ir*), sec. 6.³⁴

IX.27. The last mentioned brings indisputable proof from the Rosh (*Qiddushin, Ha-'Ish Meqaddesh 8* — and Berkovits adds Rabbenu Yeroḥam (*netiv 22: 5, 8*) in the name of *Tosafoṭ*) that even where there is no married status whatsoever (even rabbinically) and **no get or even me'un**³⁵ **is required** – for example a

³⁰ 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*.

³¹ *Ketubbot 72b-74a, EH 38:35*.

³² See above, notes 24 and 25.

³³ And it need not, therefore, be repeated after *qiddushin*.

³⁴ See also *Responsa Bet Naftali 45 (i) s.v. uve'emet* and *Noda' BiHudah II Even Ha'EzerH 27* (at the end).

³⁵ 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

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 *Shulhan '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.)

IX.28. 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 promiscuity and where there is no promiscuity there can be no taint on the children.

IX.29. Indeed, 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 as he obviously cannot stop a situation requiring *halitsah* 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 32-4*.

IX.30. More than this we find in *Tosafot*, chapter *Hashole'ah*, regarding the principle of annulment (*Gittin 33a s.v. We-'afqe' inhu rabbanan*), that Rabbi Shemuel asks how we can ever make an adulterous married woman liable to the death-penalty since the warning³⁶ is a *hatra'at safeq*³⁷ for perhaps he will (at some future time) send her a *get* (through an agent) and cancel it.³⁸

IX.31. 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 *hazaqah* (presumed status) that she has now – that of a married woman.

IX.32. 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 is it, too, with Berkovits's condition, the annulment of the marriage is not in her hands but it 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

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.

³⁶ This must be given immediately prior to the sin; without it (almost) no death penalty can be carried out.

³⁷ I.e. “a doubt-bound warning” which, according to some views in the Talmud, is not valid.

³⁸ Rabbi Shemuel means that he might do this without informing his wife or the agent, in which case the *get* is invalid in Torah 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**. 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.

married woman as regards every aspect of the law: *TBU* 58-9 & 70.³⁹

Response to paragraph 22.

IX.33. Rabbi Berkovits expresses astonishment that *NS* 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 *NS* as we shall see on examining his words. In *NS* 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 promiscuous⁴⁰ 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*.⁴¹ 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 *NS* would not agree to any condition that would retroactively dissolve a marriage during the lifetime of the husband.

IX.34. However, Berkovits continues, such a stance requires understanding. In *Noda' Bi-Yehudah 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 may cancel it at *nissu'in*). It seems that the questioner had seen this distinction in *NS* and he asks what difference it makes, since when the marriage is annulled it will surely always result in retroactive illicit intercourse? 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!

IX.35. The answer, says Berkovits, seems obvious. *NS* writes explicitly that when the 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 case where the marriage is undone retroactively **during his life** he is referring to the other case under discussion – the case of vows and blemishes mentioned in the Talmud (*Ketubbot* 72b-74a) — for it is only these two cases that he examines.⁴² *NS* 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 **want to live together as man and wife – if possible for all their lives** – and so they actually do. That cannot possibly be regarded as promiscuity: *TBU* 53-4; 60.

³⁹ 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 Berkovits would be vindicated by each one of them.

⁴⁰ And therefore we fear that he will cancel the condition at *nissu'in*.

⁴¹ 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, paragraph 21.

⁴² 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 would regret that he had ever been intimate with her as the entire relationship was under false pretences as mentioned above in paragraph 25. We therefore fear that the condition will be foregone at *nissu'in*.

Response to paragraphs 23 & 24

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 *Magid 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?⁴³ 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 68⁴⁴ 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, 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 ha-Deshen* (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.

⁴³ Or for any other reason. Obviously, according to Berkovits’s earlier argument (paras. 26-32) 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.

⁴⁴ See also *Bet Shemuel* EH 157:6.

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(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* 32-4.⁴⁵

IX.41. Rabbi Aqiva Eiger⁴⁶ 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"³⁰ 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.⁴⁷ 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 presumption that he would never transgress his oath, neither at any stage of *nissu'in* nor at any act of intercourse.⁴⁸

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

IX.42. Some authorities say that even a condition repeated at *huppah*, *yiḥud* and before *bi'ah* may be cancelled **during** the act of intercourse [*Shiltey ha-Gibborim*⁴⁹ (*SHG*) quoting Riaz,⁵⁰ *Ketubbot*, *Pereq Ha-Maddir*].

[*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*⁵¹

IX.43. Not only is this opinion of *SHG* contradicted by *Tosafot* and *Rosh* but it can be shown that Rif and

⁴⁵ As explained above, paras. 26-32.

⁴⁶ 1761-1837, Germany.

⁴⁷ A far more serious offence than promiscuous intercourse.

⁴⁸ Berkovits's point here is in addition to the arguments raised in paras. 26-32 and 37-40, 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 Berkovits's condition.

⁴⁹ R. Yehoshu'a Boaz, late 15th-early 16th cent.

⁵⁰ R. Yeshayahu Aḥaron Zal of Trani, Italy, end 13th cent.

⁵¹ 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 Berkovits condition where the relationship would be considered licit even when viewed retrospectively after retroactive annulment (see above, paras. 26-32) 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, 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.

Rambam also disagree with it.⁵² 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, 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*).⁵³ *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*.⁵⁴

IX.44. 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 certainty weighed against the apparent certainty that he stands by his condition⁵⁵ is sufficient to create a doubt – a possibility that he meant his intercourse as a betrothal.

IX.45. One could argue against this that the Rosh also explains the situation like Rashi (*TBU* *ibid.*), yet the *Helqat Mehoqeq* 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 zenu'*⁵⁶ 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 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.

IX.46. Rashi, however, maintains that he would always be determined that his intercourse be not

⁵² In *TBU* 45 & 62 Berkovits adds also Rabbenu Yeroham. 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 the an opinion like that of Riaz in the name of the *Geoney Sefarad* and rejects it.

⁵³ 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 so that a future foregoing of the condition would not reinstate it. The same cannot be said of a condition dependent on some future contingency. Therefore, to avoid the danger of some future foregoing of the condition the groom would need to insist on his condition now and state that he **does not depend the status of his marriage on any future mindset that he might develop**. Rabbi Berkovits, says Warhaftig, should have made this point.

⁵⁴ 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 Ran that once the groom has, post-*qiddushin*, confirmed his condition, he can no longer forego it.

⁵⁵ Since he just said that his intercourse is governed by it!

⁵⁶ A person would not make his intercourse promiscuous — when he could make it legitimate.

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*.

IX.47. 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 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.⁵⁷ Once this has happened it is impossible to undo it, much though he might like to as explained above.⁵⁸

IX.48. One may relate this to the question raised in the Talmud⁵⁹ regarding the concept of retroactive annulment, namely that while annulment is understandable if he betrothed with money (for then the Sages can operate *hefker bet din* and retroactively sequester 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.

IX.49. 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* will have taken place and she will not require a *get* to be free from him: *TBU* 25-7, 61-2.⁶⁰

⁵⁷ And not because he has changed his mind at the last moment and opted for *qiddushin* by intercourse.

⁵⁸ Berkovits's interpretation cannot be right because if this were *SHG*'s meaning the condition would still stand because 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 n.15). 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!

⁵⁹ *Yevamot* 90b, *Ketubbot* 3a, *Gittin* 33a, *Bava' Batra'*, 48b et al.

⁶⁰ This interpretation of *SHG* is possible only according to 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*.

Objection: Even Irreligious Jews Intend a Definite Married Status

IX.50. Will they⁶¹ 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 for *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. Ha-Kohen 30; Hungarian protest 49]

Response

IX.51. 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 it has been shown (paras. 26-32) that there would be no such promiscuity in the case of Mahari Bruna's or 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.⁶² This oath can be made just once at the *qiddushin*.⁶³

IX.52. 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.

IX.53. 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 status, for a definite relationship, something which is still desired even by the irreligious⁶⁴ 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.

IX.54. Berkovits points out that this argument is valid in the case of the Talmud's condition⁶⁵ or the French proposal,⁶⁶ 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"?⁶⁷ TBU 46, 49, 63-4.

Objection: Concubinage?

⁶¹ The "orthodox non-observant" Jews of contemporary France.

⁶² See above, para. 23 at note 30.

⁶³ See above, para. 41.

⁶⁴ I do not think this is any longer true among non-observant Jews in modern, secular societies.

⁶⁵ See above, para. 25.

⁶⁶ See above, IV 5 and VI 2.

⁶⁷ It seems to me that 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. Berkovits does not address this. To me it seems that Rabbi Meir Simḥah's perspective on concubinage *vis-à-vis* Mahari Bruna's condition (see paras. 55-58) provides an adequate solution.

IX.55. Rabbi Meir Simḥah *Ha-Kohen* 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 Reubenites⁶⁸ (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 governed by the condition) stands and if the condition is not fulfilled the marriage is dissolved, **but** 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.⁶⁹ 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...” (Deut. 24:1) = by means of *qiddushin* (*Qiddushin* 1:1) and
- (ii) “There shall be no harlot...” (Deut. 23:18).⁷⁰

IX.56. Hence, one who lives with a woman in concubinage transgresses a positive and a negative commandment according to Rambam. How, then, can concubinage be permitted to a king?⁷¹ 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, does not divorce 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?⁷²

IX.57. Rabbi Meir Simḥah explains that the objection to concubinage is the ease which it creates for a woman to have many husbands in succession including returning to a former husband (contrary to Deut. 24:4). 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)).⁷³

IX.58. 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 *halitsah* arise for his wife then he is not now marrying her. Thus only if her husband died childless⁷⁴ does she become retroactively a 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

⁶⁸ 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.

⁶⁹ It seems that Rabbi Meir Simḥah had before him the 1907 version that does not mention his giving a *get* – see above, VI 2. See also *TBU* 165-66.

⁷⁰ This means that the state of concubinage, according to Rambam, is one of promiscuity.

⁷¹ The kings of the Davidic dynasty were subject to the law like anyone else. See, *inter alia*, II Sam. 12:1-25, *Mishnah Sanhedrin* 2:2 and Rambam comm., Gemara *Sanhedrin* 19a.

⁷² See above, III 2.

⁷³ Although he never touched Avishag, Adoniyah’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.

⁷⁴ And he never divorced her and he predeceased her and his problematic brother.

promiscuous and the aforementioned positive and negative commandments would not have been transgressed.

IX.59. 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.

IX.60. Rabbi Meir Simḥah adds that even if the marriage and condition would be valid,⁷⁵ 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 considered as creating a promiscuous relationship forbidden by the Torah.

[ETB, Rabbi Meir Simḥah *Ha-Kohen* 30]

IX.61. 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.

IX.62. 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.

IX.63. Now we have a principle in the *Halakhah* known as *rov* (the majority rule)⁷⁶ 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.

IX.64. However, the law states that we may not *lekhatehillah* (*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.⁷⁷ If so, in both of the above cases of conditional marriage we should forbid the insertion of a condition because that is *lekhatehillah* entering into a situation in which we are relying on *rov*.

⁷⁵ This would be the case according to the definition of the difference between *bererah* and *tenai* posited by Rambam or *Tosafot* (cf. para. 55) according to which the French condition would not be classified as *bererah*.

⁷⁶ This is derived from *'aharey 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 *Hullin* 11a. For the operation of the majority rule even in the case of indefinite numbers (as in the above argument of Rabbi Hoffmann) see *Hullin* loc. cit.

⁷⁷ 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 (= *lekhatehillah*) 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. *Shulhan 'Arukh Yoreh De'ah* 109:1. Whether refraining from relying on the majority rule and, consequently, refraining from eating the meat in such a 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 R. Ovadiah Yosef, *Yabia' Omer* VI *Yoreh De'ah* 7:2.

IX.65. There is, however, one further consideration. In *she'at deḥaq* (a situation of urgency, pressing need) we may do *lekhatehillah* that which is normally acceptable only *bedi'avad*.

IX.66. Hence the difference between the two cases of conditional marriage becomes apparent. The case of the apostate brother is *she'at deḥaq* 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 deḥaq* we may *lekhatehillah* do that which is normally permitted only *bedi'avad* – i.e. rely on the majority.

IX.67. However, the French rabbinate want to employ a condition in **every** marriage even though there is no *she'at deḥaq* and that means relying *lekhatehillah* 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 *lekhatehillah* do that which is permitted only *bedi'avad* – i.e. rely on the majority. [ETB, Rabbi David Zvi Hoffmann (17)]

Response

IX.68. 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*'⁷⁸ thus it cannot be considered concubinage. The same can be said of Berkovits's condition.

IX.69. 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) which renders the marriage concubinage retroactively (his second argument). As in neither case is the *bet din* involved the retroactive annulment of the marriage is virtually automatic and such a loose bond can rightly be retrospectively viewed, on annulment, as concubinage: *TBU* 59 & 70.⁷⁹

Objection: The Condition Contradicts Torah Law

IX.70. 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.⁸⁰

⁷⁸ For details of this sacrifice see *ET* II 274b – 277a. See above, paras. 26-32 for further, more potent arguments in this direction.

⁷⁹ It is noteworthy that Rabbi Hoffmann's only reason for permitting the apostate brother condition is the reliance on the majority in an emergency. 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 Berkovits condition. 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 nothing short of an emergency. Regarding Rabbi Meir Simḥah's arguments based upon Ramban's understanding of the concepts of *bererah* and conditions, which Berkovits describes as "very powerful" (*TBU* 65), I must register my surprise that 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.

⁸⁰ See above, I 3.

Therefore, according to the rule recorded in the Mishnah:⁸¹ "...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 Lubetsky 8 and Danishevsky 36]

IX.71. 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 Torah⁸² 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 vendor⁸³ 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.⁸⁴

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

Response

IX.72. The above argument in *ETB* is taken from Rabbi Meir Posner (1735-1807) who says, at the beginning of section 38 of his *Bet Meir*, 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 Meir* 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.

IX.73. The *Bet Meir* is himself most uncertain and does not conclude that his view is 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 Meir* and tried to explain the words of Rashba in such a way that they should not contradict the suggestion of the *Bet Meir*.⁸⁵

IX.74. Berkovits thinks that the *Bet Meir* 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 has no rights to distribute the gifts therefrom to whichever priest he wants. In (i) he wants the

⁸¹ *Ketubbot* 9:1: *Kol ha-mathneh 'al mah she-katuv ba-Torah tena'o batel [u-ma'aseh qayyam]*.

⁸² 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 below, note 84. See also *Isaiah* 4:1 and commentaries.

⁸³ See *Yoreh De'ah* 61:29 based on *Hullin* 134a and *Tosafot* there, s.v. *Huts*, second answer.

⁸⁴ 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, VI 2.

⁸⁵ See the citation at the end of para. 70.

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marriage but without one part of marriage that the Torah imposed: food, clothing and conjugal rights.⁸⁶ 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.⁸⁷

IX.75. 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.⁸⁸ True, it may be that when it comes to giving the divorce he 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.

IX.76. 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 we-dilma shani 'onsa' de-nafshey me-'onsa' de-'ahariney* as Rashi explains there s.v. *shani 'onsa' de-nafsheh*: "He needs money and due to that he sells⁸⁹ 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)".⁹⁰ 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*.

Objection: " 'Eyn Tenai Be-Nissu'in

IX.77. If we allow such a condition (at *qiddushin* and *nissu'in*) we will have to explain 'eyn tenai be-nissu'in (there is no condition at *nissu'in*) like *Tosafot: 'eyn regilut le-hatnot be-nissu'in* (it is not **usual** to make a condition at *nissu'in*⁹¹), but 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

IX.78. Berkovits cannot understand this. Surely if we interpret 'eyn tenai be-nissu'in as *Tosafot* suggest, it

⁸⁶ 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 (Zuckerman 339:25-26). 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.

⁸⁷ 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".

⁸⁸ 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 *Shulhan 'Arukh* 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 *EH*: 134:5, 154:23 and *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.

⁸⁹ I.e. he is forced by his financial needs to sell.

⁹⁰ I.e. the acquisition by the buyer is legally valid.

⁹¹ As opposed to *qiddushin*.

is not a law (there is no [valid] condition in *nissu'in*) but merely an observation on social conduct (there is not [usually] a condition in *nissu'in*). If the social ethos changes – so be it! In talmudic times people 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*.

Objection: Lack of Experience

IX.79. If Rabbenu Yehiel 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 he dies she is retroactively divorced and does not require *halitsah* and if he recovers she is not divorced and can return to him.⁹² 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 *halitsah*, 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

IX.80. Berkovits expresses astonishment at this. Rabbenu Yehiel 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. Berkovits is sure that Rabbi Shapira did not see the enactment of Rabbenu Yehiel as it appears in its source in the glosses on the *Semaq*.⁹³ This is the statement of the gloss on the *Semaq* in section 184: "...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.⁹⁴ So my teacher, Rabbenu Yehiel, 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 *Shulhan 'Arukh EH 145:9* in the gloss of Rema.

IX.81. 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 Yehiel 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 our proposal: *TBU 67-8*.

⁹² 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.

⁹³ *Semaq = Sefer Mitsvot Qatan* by Rabbi Yitshaq of Corbeil, a pupil of Rabbenu Ye5iel of Paris, glossed by Rabbi Perets ben Eliyah of Corbeil.

⁹⁴ Because a husband cannot give a *get* after his death. The latter section of this quotation in Berkovits is inaccurate; I have translated directly from the text of *Hagahot Semaq*.

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Objection: The Distinction between Mahari Bruna's Condition and Berkovits's

IX.82. The following opinion is not brought in *ETB* but in the first volume of Rabbi Yosef Rosen's work *Tsafenat Pa'ne'ah*, as reported by 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.

IX.83. “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 the domain of the Ritual and can only cease with the death of the husband or with divorce).

IX.84. The commandment of *yibum/halitsah* 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.

IX.85. This is the meaning of 'eyn tenai be-nissu'in: a condition in *nissu'in* is impossible during the husband's lifetime.”

This, 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:

IX.86. I know that I am not even “as the skin of a garlic”⁹⁵ 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”.⁹⁶

IX.87. 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.

IX.88. 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 *Ha-Madir*.⁹⁷

⁹⁵ Cf. *Bekhorot* 58a.

⁹⁶ Cf. *Berakhot* 62a.

⁹⁷ *Ketubbot* 73a.

This is not in accordance with the *Gaon* Rabbi Yosef Rosen.⁹⁸

IX.89. Also from that discussion in *Ha-Maddir* Berkovits has a difficulty with Rabbi Rosen's innovative interpretation. According to Rabbi Rosen's understanding of 'eyn tenai be-nissu'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 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 be-nissu'in.

IX.90. 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 be-nissu'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 be-nissu'in means that it is **impossible** for such a condition to have any validity.

IX.91. From the aforementioned Rashba⁹⁹ also it is clear that a condition can be effective in *nissu'in*.

IX.92. 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* 60-61.¹⁰⁰

C. Practical considerations

Objection: Creation of 'Doubtful Marriages'

IX.93. 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

IX.94. 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 wanted a new husband, by simply obtaining a civil divorce¹⁰¹ so she would be automatically retroactively unmarried and could leave for her new

⁹⁸ 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.

⁹⁹ See above, para. 73.

¹⁰⁰ It was also rejected in Responsa *Devar Avraham* (III 29), *Seridey Esh* (III 22), and *Hekhal Yitshaq* (II EH 30). Cf. Rabbi S. Dichovsky, "*Nissu'im 'Ezrah'im*", *Teḥumin* II, 252-66, pp. 257 & 260.

¹⁰¹ 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.

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husband.¹⁰² 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.

Objection: Fear of Mistakes

IX.95. The employment of conditions requires great expertise but today every young student is *mesadder qiddushin* (oversees betrothals).
[*ETB*, Rabbi Hoffmann 17]

IX.96. 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 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.¹⁰³
[*ETB*, Rabbi Shapira 40]

IX.97. 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

¹⁰² 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 the Berkovits condition, so she presumably would not be tempted to receive *qiddushin* from anyone else before her present marriage is halakhically terminated.

¹⁰³ 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 'Igrot Mosheh*, *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 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 (*humrat 'eshet 'ish*) even beyond the point of '*avad zikhro* since some percentage of doubt remains though 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 le-she'urin* (in this case, time-limits). However, since some doubt, however small, always remains, they forbade her remarriage so as not to enter the problematic area of arbitrary limits. According to this, Rabbi Shapiro's comparison fails because the possibility of error by the *mesadder qiddushin* is insubstantial **from the start**.

with such matters though they have no right to be.¹⁰⁴ (Letter dated 3 *Tevet* 5686 published at the beginning of *Torey Zahav* by Rabbi S. A. Abramson, New York 5687): *TBU* 68.

Response

IX.98. 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.

X Berkovits's Conclusion

X.1. 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.

X.2. “As we have already seen,¹⁰⁵ 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*.

X.3. “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.

X.4. “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.

X.5. “On the basis of all the above I venture to suggest, with awe and reverence, that our fathers have left us space¹⁰⁶ to open up again this serious question and 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.

XI. What did Berkovits achieve?

XI.1. 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 Be-Nissu'in Uv-Get* revisited the matter conducting a broad and profound examination of the talmudic and rabbinic texts relevant to three questions – conditional marriage (chapter 1, the subject of my paper), written authorisation at the time of the *qiddushin* for the writing of a *get* should it become necessary in the future (chapters 2 and 3) and

¹⁰⁴ Cf. *Qiddushin* 13a, *EH* 49:3.

¹⁰⁵ See above, IX.26-32 & 68.

¹⁰⁶ Cf. *Hullin* 7a.

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communal annulment of marriage (chapter 4). On pages 57 – 71 of his work he responds in detail to all the arguments in *ETB*.

XI.2. 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 Lubetsky) was aimed at the French proposals which, Berkovits agrees, were halakhically and ethically wanting. There was never any ban issued against **any** condition in *nissu'in*, *per se*. In addition, he argues, the situation had become so severe that action could no longer be avoided.

XI.3. Although he does not say so, it seems to me that the three approaches to the problem in *TBU* were meant not as alternatives but as a combined three-fold approach creating a "triple-doubt" effect. If, after all the arguments and proofs, there exists any residual doubt about the halakhic efficacy of the Berkovits – or some similar – condition, we can rely on a *get*, prepared from the time of the *qiddushin*. Should there be doubt about that too, we can rely on the operation of retroactive communal annulment which also has its supporters amongst the *Gedoley Ha-Posqim* (see footnote 110).

Support for Berkovits

XI.4. In the introductory remarks to *TBU* which are described as a *haqdamah* (introduction) but amount to a *haskamah* (approbation), *Ha-Gaon* Rabbi Yehiel Ya'aqov Weinberg *zts"l* refers to our author as "*Ha-Rav Ha-Gaon* 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 'aharonim amongst contemporary authors** (emphasis added)."

XI.5. 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 Lubetsky. He has only revisited the problem because the situation has worsened: the number of chained wives and the number of these who remarry without a *get* and go on to have more children, has greatly increased. Furthermore, the opposition of the *Gedoley ha-Dor* was aimed mainly at the French rabbinate's proposed condition which made the civil courts the decisive factor whereas Berkovits's condition removes the reliance on the gentile authorities from the condition and makes the conduct of the husband the main factor.

XI.6. 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*?"

XI.7. Of course, this does not mean that Rabbi Weinberg agreed in practice to the immediate implementation of Berkovits's conclusions but that he agreed that the material was worthy of the close attention of the *Gedoley ha-Dor*. As Marc Shapiro observes (*Between the Yeshiva World and Modern Orthodoxy: The Life and Works of Rabbi Jehiel Jacob Weinberg 1884-1966* (London 1999), 190-91), "Although he may have had some specific objections to 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?

XI.8. Rabbi Menahem Mendel Kasher, in answer to a request from Rabbi Dov Katz, of the Office of Religion of the State of Israel, published a *responsum* ('Concerning Conditional Marriage' (Heb.), *Noam*

11 (1969), 338-53) in which he analysed in detail Dr. 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 *Le-Dor 'Aharon (LA)*, 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 Berkovits. (See below, the comments on this by Marc Shapiro.)

XI.9. It is interesting to note, however, that Dr. 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 *LA* 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 matter requires further investigation.

XI.10. Marc 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 Berkovits's book, published a letter from Weinberg in which the latter expressed regret over writing this approbation. Despite Berkovits's claim that this letter was a forgery, Kasher never produced the original. (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. 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 Berkovits's book, in which, by the way, he refuses to mention Berkovits's name, referring to him instead as 'a certain rabbi'. (Soon after 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 Berkovits (a copy of Weinberg's original letter is in my possession). According to Berkovits, Kasher refused to publish the work without this approbation (interview with 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 Berkovits's proposal

XI.11. 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 Berkovits, R. Moshe Feinstein expressed theoretical approval of Berkovits's position". I have since seen in R. Zevi Gertner and R. Bezalel Karlinsky, "'*En Tenai beNissu'in*", *Yeshurun* X (5762), 711-750, on p. 747,

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footnote 117, that Rabbi Eliyahu Jung passed a copy of 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. Was this *Gadol* Rabbi Moshe Feinstein?

XI.12. The late Dayan Berkovits, Dayan of the Federation of Jewish Synagogues (and a nephew of Eliezer Berkovits), wrote in a paper delivered at the London Conference of the International Council of Jewish Women in Sept. 1988:¹⁰⁷ "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 Be-Nissu'in Uv-Get* (Conditional Clauses in Marriage and Divorce Agreements, Jerusalem, 1968, in Hebrew), in which, rather than attempting to import alien concepts into the Jewish structure, he analysed the structure of a Jewish marriage and attempted to put forward a proposal, based on solid 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, 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."

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 action in this area can be taken without the agreement of the *Gedoley ha-Dor*. It is their consideration of the halakhic and meta-halakhic issues that we need, for without it nothing can be done. (Yehudah Abel)

Appendix: The view of the Re'ah (see above, IX 20).

1. 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.¹⁰⁸

2. 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. 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'ano*)¹⁰⁹ 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;

¹⁰⁷ 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@man.ac.uk.

¹⁰⁸ This would only be effective (virtual) testimony – '*anan sahadey* – if the "public" included valid Jewish witnesses – cf. e.g. Rabbi M. Feinstein, '*Igrot Mosheh*, EH I, no. 74, p. 173 col. b.

¹⁰⁹ See above, note 34.

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*)¹¹⁰ 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 **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 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. *ve-khatav ha-Rashba*).

(iv) One can add to this also the consideration that betrothal by intercourse was already rare in the days of *Terumat ha-Deshen* (as stated in his *responsum* 209) and how much more so nowadays:¹¹¹ *TBU* 46-47.

¹¹⁰ See above, IX.36.

¹¹¹ See Dichovsky, *Nissu'im 'Ezrahiyim* (cited above, n. 99), p. 258, where the view is quoted that no-one nowadays would ever betroth with intercourse and witnesses of seclusion instead of using a ring (*qinyan kesef*) 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 *qiddushin*” – cf. *Sha'agat 'Aryeh* quoted in *Responsa Bet Efrayim* end of no. 42; Ha-GeRash Kotna, questioner in *Responsa Bet Yitshaq EH* 29; Ha-Ri Bereish, *Responsa Helqat Ya'aqov* I no. 1; Rabbi Ovadyah Yosef, *Responsa Yabia' 'Omer* VI *EH* 1:3, p.268 col.1.