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Rabbi Morgenstern's Agunah Solution

1.0 Introduction

1.1 On August 28 1998, the *Jewish Week* carried an advertisement describing the procedures adopted by the *Bet Din for Problems of 'Agunot* operated by Rabbi Emanuel Rackman and Rabbi Mosheh Morgenstern. Rabbi Morgenstern has published a work: *HATOROT AGUNOT — SEXUAL Freedom from a Dead Marriage — in accordance with Halakhah — Jewish Law. The War against The Jews*, in which he has attempted to justify the methodology of this *bet din*. Presented here are observations on parts of this work which were completed in September 2006 in the Centre for Jewish Studies at the University of Manchester.

1.2 This work appeared in two volumes bearing neither date nor place of publication. There is no table of contents (though one is advertised!) and no index. The book's pagination reverts to page 1 time and time again creating difficulties in the location of quotations therefrom. It contains apparently irrelevant material dealing with the Holocaust and some extremely bitter criticism of Rabbi Morgenstern's opponents and the "*Ḥaredi*" rabbinate to which they belong. The sources quoted for the thesis that **every** Agunah today can be released halakhically from her marriage without a *get* do not always say what is claimed; sometimes, I have, frankly, not been able to find them where they are said to be. Occasionally no reference at all is given for extravagant claims in the name, for example, of Rabbi Mosheh Feinstein. However, it must be said that there are a number of valid points in this work and I shall note these and attempt to evaluate them.

1.3 I present here a number of examples of Rabbi Morgenstern's sources and the arguments he deduces from them followed by my own comments.

1.4 *Spelling and transliteration*: When quoting from this work, I have corrected spelling and typographical errors in the original. I have also modified the transliteration and made it consistent. However, in the title of the book and the titles of its chapters I have let all spelling and transliteration stand.

1.5 It is impossible to find one's way around this publication without some kind of "index" of the chaotic system of page numbering. The following notes, I hope, will be of help.

1.5.1 The edition of Rabbi Yeḥiel Ya'aqov Weinberg's *Seridey 'Esh* referred to repeatedly by Morgenstern throughout *Hatorot Agunot* is that of Mossad Harav Kook, Jerusalem 2003. A fundamental rearrangement of these *responsa* was made in another Jerusalem 2003 edition in two volumes published by The Committee for the Publication of the Writings of Rabbi Ye5i'el Ya'aqov Weinberg *zatsal*. This latter publication includes, on pages 746-749, tables of cross-reference for the two editions. All references in this paper to *Seridey 'Esh* are to the Mossad HaRav Kook edition (originally published in the lifetime of the author: volume I in 5721, volume II in 5722 and volume III in 5726). Where I have given a bracketed, alternative reference this is to the 'Committee' publication. For example, *Seridey 'Esh* III:25 (I:90) = volume III *responsum* 25 in the Mossad HaRav Kook edition and volume I *responsum* 90 in the 'Committee' edition.

1.5.2 ***Hatorot Agunot*** **Volume I** (though not marked as such!) contains the following page enumerations:

A. Title-page and introductory material: 1-21.
B. Prologue: 1-20.
C. Sexual freedom (1): 1-55.
D. Sexual Freedom (2): 1-123. This last section is divided into chapters:

Chapter 1 (actually referred to as Volume 1 Shroshim roots): 1-23
Chapter 2 Mamzarus: 24-44
Chapter 3 Wise men — chochomim — have the power to uproot Torah laws: 45-51.
Chapter 4 (untitled): 52-63.
Chapter 5 Rational for Kfiya: 64-79.
Chapter 6 (untitled and beginning in the middle of a page!): 79-90.
Chapter 7 No need for pre-existing conditions: 91-97. 98 is blank.
Chapter 8 Hatoras Agunos: 99-103.
Chapter 9 Coercion: 104-106.
Chapter 10 Irreligious on part of one of the spouses: 107-115.
Chapter 11 Other strategies used to annul marriages: 116-123.

1.5.3 The contents of **volume II** (see p. 60) are numbered as follows –

A. Title-page and Chapter 12 Proposed prenuptial agreements: 1-52. (There is no p.2.)
B. Chapter 13 Agunah rabbi is right rejoinder to Dayan Berkowitz: 1-35.
C. Chapter 14 Curing domestic abuse: annulling marriages: 1-2.
D. Chapter 15a Reclaiming the hundreds of thousands of Jews who have intermarried: 1-6.
E. Chapter 15b Conversions, marriages, divorces and annulments by non-Orthodox rabbis: 1-22.
F. Chapter 16 The war against the Jews — Israel's war for survival: 1-7.
G. Chapter 17 The war against the Jews conducted by our critics and other similar minded individuals: 1-3.
H. Chapter 17b The crisis of confidence and trust in orthodox rabbis: (a)1-4 & (b)1-13.
I. Chapter 17c New guidelines of Bet Din of America: 1-3.
J. Chapter 17d Commercialization of Orthodoxy: 1-4.
K. Chapter 17e Zoken Mamre: 1-3.
L. Chapter 17f Independence of rabbinical authorities: 1-3.
M. Chapter 18 Removing the stigma: 1-13.
N. Chapter 19 Mous alai: 1-9.

1.5.4 Accordingly, I shall quote as follows.

I D 77 = Volume I, section D, page 77.

2.0 **I B 9**

2.1 Morgenstern: It is here stated that the Rashba on *Yevamot* 46 states that קאּ עבדינן של יחוּתייהוּ is entirely a rabbinic enactment.

2.2 Comments: I did not find this statement there but it is to be found in **Rashba on *Gittin* 88**. The fact is that some authorities view של יחוּתייהוּ as Torah law while others adopt the view of Rashba. Yet a third view maintains a Torah basis for this concept while arguing that **the Torah handed over to the Sages** the decision as to the areas of law in which it should be applied.[1]

3.0 **I C 54**

3.1 Morgenstern: "All doubts in law and facts are resolved in favour of the Agunah. Even minority views in law in favour of annulment can be relied on" — (i) *Taz*: (a) *'Even Ha-'Ezer* (*EH*), 17:15 & (b) *Yoreh De'ah* (*YD*) 293:4 (ii) Rabbi Mosheh Feinstein.

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1 *Encyclopediah Talmudit* (*ET*) III pp.161b-162a. The concept of the Torah "handing over" the law to the Sages is not unique to של יחוּתייהוּ. It is met with also in the laws of *ḥol ha-mo'ed*: *ET* XIII cols. 107-110.

3.2 Comments:

3.2.1 (i)(a) **The *Taz* in *EH* 17, sub-para. 15,** does indeed quote authorities who were willing to rely on 'one *poseq*' when all hope of releasing an '*agunah* was otherwise lost but this does not apply to doubts regarding the **facts** such as the case of *mayim she'eyn lahem sof* where highly unlikely possibilities must be taken into account — at least *ab initio* — as stated explicitly in the Talmud.

Even with regard to doubts in law the Rema there in *EH* rules stringently against relying upon minority opinions so that one cannot base a decision for leniency on this *Taz*. Nevertheless, it could possibly be used in a case where other doubts are present to contribute towards a double or triple doubt as Rabbi Morgenstern states elsewhere (ID (2) 94).

3.2.2 (i)(b) The ***Taz* in *Yoreh De'ah* 293** is referring to the problem of *Ḥadash* so some would argue that nothing can be deduced from there for questions of '*arayot*, which are treated so much more strictly. However, considering that in insoluble cases of '*iggun* the accepted approach is to revert to the usual halakhic practice of following *Shulḥan 'Arukh* and *rov posqim* this *Taz* would be relevant. However, he says no more here than what we already know from his comments in *EH*.[2]

(iii) No source is given for **Rabbi Feinstein**!

4.0 **I D 7**

4.1 Morgenstern: Dead marriages can be annulled where the husband will not give a *get* and annulment can also be employed to save a child from *mamzerut*. *Responsa*: (i) Maharsham[3] I:9, (ii) *'Or Zarua'*[4] 761 (quoting Rabbenu Simḥah), (iii) *Bet 'Av*[5] book 7, chapter 27.

4.2 Comments:

4.2.1 (i) The **Maharsham** in *responsum* I:9 did indeed say that it is possible to save the *mamzer* using *bittul get*. This is based on the Talmud (*Gittin* 33a, *Yevamot* 90b) which describes a scenario of a husband who sent his wife a *get* by means of an agent and later annulled the *get* before it reached his wife's hand without informing her or the agent, so that the *get* which the wife receives is invalidated in Torah law, though she will not know this, and may well therefore remarry on the strength of what is, in fact, a worthless document. In such a case, the Talmud states, the Sages forbade the cancellation of the *get* and, if the husband did cancel it, used their authority to **retroactively annul** the marriage (אפקעינהו רבנן לקדושין מיניה) so that the wife is, in spite of the *get* being voided, anyhow legally free to remarry. According to Rabban Shim'on ben Gamliel this is true even if he cancelled it in the presence of a *bet din* but according to Rabbi, according to whom the *halakhah* is fixed, if he cancelled it before a *bet din*, though he is forbidden to do so, it would be cancelled. If he cancelled it in front of two people there is a divergence in the Talmud as to the *get*'s validity according to Rabbi. But if he did so in front of one person everyone agrees that Rabbi also regards the cancellation as ineffective and the *get* (though cancelled in Torah law) as valid by rabbinic decree and this is the *halakhah*. The Maharsham therefore said that in a case of *mamzerut* due to adultery we could create this scenario, so that it would come about that when she conceived this child from the second husband she was not **married** to her first husband but had merely been his partner (= פילגש).

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2 For further comments on this opinion of the *Taz* and contradictory views of other *posqim* see below §§15.2.1-15.3.4

3 By Rabbi Shalom Mordekhai Shwadron (1835-1911).

4 By Rabbi Simḥah of Speyer (12th century).

5 By Rabbi Avraham Aharon Yudlovich (19th-20th centuries).

Hence there would not have been an act of adultery and the child would not be a *mamzer*. The Maharsham could not employ this solution in the particular case he was dealing with because the husband had already given his wife a *get*.[6]

However, Rabbi Morgenstern does not mention that this approach of Maharsham was criticised by Rabbi Shelomoh Zalman Auerbach. The latter points out, *inter alia*, that *Tosafot* in *Gittin* (32a s.v. *Mahu de-tema' 'iglai milta'*) — quoted by Rabbi Aqiva Eiger in his glosses to the Mishnah (*Gittin* 4:2, no. 39) — understand the annulment in this case as non-retroactive according to Rabbi (see gloss of Rabbi Aqiva Eiger ibid. for the reasoning behind this) and as an example of the power of the Sages to override, in some cases, the laws of the Torah (יש כח ביד חכמים לעקור דבר מן התורה) in this case by abruptly ending a marriage without a (valid) divorce from the husband. If so, the re-enactment of the talmudic scenario promulgated by the Maharsham would not be effective in saving the *mamzer* because, though the annulment would indeed be achieved, it would only operate **from the time of the delivery of the (invalid) *get*** so that at the time of the conception of the child through intercourse with the second man she would still have been a married women and the conceived child would thus still be a *mamzer*.

Rabbi Morgenstern also failed to report that the Maharsham confined this suggestion of his to the realm of halakhic theory — להלכה ולא למעשה and that the suggestion was made only in cases where the wife acted innocently, as in the case discussed in that *responsum* where she had remarried with the permission of a *bet din* which later proved to have been based on an error.

4.2.2 Regarding (i) **Rabbenu Simḥah in *'Or Zarua'* 761**: Rabbi Morgenstern claims that in this case because the husband became blind in both eyes one year after the beginning of the marriage, this amounted to a *miqaḥ ta'ut* triggering annulment of the marriage. What this *responsum* actually says is that if the blindness was there **before** the marriage then the wife, on discovering the fault, can claim *miqah ta'ut* and the marriage will be declared retroactively annulled. If, however, it is a case of נולדו[7] — the blindness came about afterwards — there is no *miqaḥ ta'ut*. It is then a question of whether we apply coercion for so serious a blemish as total blindness. Rabbenu Simḥah says that we do but he does not say that annulment can replace coercion when the latter cannot be applied. Rabbi Morgenstern's claim must therefore be rejected.

4.2.3 (iii) ***Bet 'Av*, book 7, chapter 27**. I have not yet managed to obtain the full text of this *responsum* but it is clear from the final lines thereof[8] that the case was one where the wife became aware after the marriage of a serious blemish that had existed at the time of the wedding as a result of which, the author rules, the marriage must be considered a *miqah ta'ut* and the wife is therefore free to remarry without a *get*. Again, there is no question here of annulment and again Rabbi Morgenstern's claim cannot be substantiated.

5.0 I D 29-30

5.1 Morgenstern here claims that in every one of his cases there are 20-30 doubts and that due to these doubts it is impossible that the child from the second relationship is a *mamzer*. His sources are:

(i) *Yabia' 'Omer* VII 6
(ii) *'Igrot Mosheh EH* IV 20
(iii) Rema *EH* 17:58 (end)

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6 Nevertheless, he did attempt to invalidate the *get* so that annulment could still be employed with the writing and delivery of a new divorce but in the end he had to admit defeat.

7 See Mishnah *Ketubot* 7:9, 77a.

8 Which I found in Aviad Hacohen, *The Tears of the Oppressed*, Jersey City NJ, 2004, appendix, p. 84, top col. 1.

(iv) *Pitḥey Teshuvah* 17:175
(v) *Ḥokhmat Shelomoh* 17:58
(vi) Rema *EH* 178:3
(vii) *Bet Shemuel* 178:4
(viii) *Pithey Tesuvah* ibid.

He then adds that the woman is therefore permitted to return to her husband or marry the new man the rabbis previously ruled she could live with even if they erred and refers us to

(ix) *Yabia' 'Omer* III 7:16.

He emphatically concludes that when the woman is not in violation of any law the child is not a *mamzer*, referring us to

(x) *'Oneg Yom Tov* II chapter 121.

5.2 Comments: It would have been helpful if Rabbi Morgenstern had set out clearly what these 30 doubts are, at least 20 of which were found in **every case** with which he has dealt. We could then have judged whether they qualify as doubts according to the *Halakhah*. Even if all his multiple sources supported (which they do not) his claim that where there are a number of valid halakhic doubts (two would be sufficient) the child is not a *mamzer* that would be irrelevant because the question is whether the doubts that Rabbi Morgenstern relies on are halakhically acceptable to create a *sefeq sefeqa'* so as to remove the blemish of *mamzerut* and none of these sources tell us the answer to that.

5.2.1 (i):*Yabia' 'Omer* VII 6 should read ***Yabia' 'Omer* VII *EH* 6**. In this *responsum*, Rabbi Yosef discusses *sefeq sefeqa'* at length (with regard to removing the blemish of bastardy) concluding that so long as one doubt is *shaqul* (= evenly balanced i.e. 50-50) the other need not be, so a minority opinion can qualify as the second doubt in a *sefeq sefeqa'*. He also points out that although a father is believed to say that his child is a *mamzer/et* a mother is not.[9] Hence, as above, this informs us that a double doubt solves the problem of *mamzerut* but it tells nothing about the doubts employed by Rabbi Morgenstern.

5.2.2 (ii): In ***'Igrot Mosheh EH* IV 20**, Rabbi Feinstein, also engaged in releasing a child from the status of bastardy, refers to the *halakhah* that the claim of a mother that she had been previously married with valid *qiddushin* and then remarried without a *get* is not sufficient to make her children *mamzerim*. He also states that the relatives of the alleged first husband cannot testify to the fact of his previous marriage to her either (in that case) because of their being religiously unfit to testify or because of their close relatedness, i.e. each one of them was either *pasul* or *qarov*. This *responsum* does not even refer to *safeq* at all!

5.2.3 (iii): The **Rema** in ***EH* 17:58 (end)** does not mention anything about *mamzerim* or about doubts. He says only that a mistaken court ruling declaring the first marriage halakhically invalid makes her subsequent marriage an *'ones* (accidental transgression) so she can return to her first husband. See below, **I D 34-5** (i) on p. 8.

5.2.4 (iv): This should read ***Pitḥey Teshuvah EḤ* sub-para. 17:175**. It refers to the Rema's ruling that if she was compelled to marry the second man or the *bet din* mistakenly declared the first marriage invalid and she married the second man on the basis of the *bet din*'s mistaken decision,

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[9] The father's statement is accepted *vis-à-vis* his son and himself but not as regards his wife. For example, if he stated that the child born to his wife is not his son this would both render the son a *mamzer* and forbid the father to have further relations with his wife whom he has in fact declared a forbidden item (*ḥatikhah de-issura'*) for himself. The wife, however, is regarded in law as totally innocent, since there is no valid evidence against her, so she could, even in a case where the husband had named the third party, marry the man with whom her husband accused her of having committed adultery. It should be noted that once a father has recognized his son — in word or deed — he is no longer believed to declare him illegitimate.

in either of these cases the second liaison is considered *'ones* and she may return to her first husband. On this, the *Pithey Teshuvah* comments that Rabbi Aqiva Eiger has noted that from the Rashba it seems that she can remain with the second husband if the first dies or divorces her. Rema, however, does not agree with this and the *Pithey Teshuvah* suggests reasons for Rema's opinion. There is not a word here about *mamzerim* or doubts.

5.2.5 (v): This should read ***Ḥokhmat Shelomoh EḤ* 17:58**. Again, there is no mention here of doubts or *mamzerim*. See further below, §6.2.5.

5.2.6 (vi): **Rema *EH* 178:3** says that if a wife thought she was copulating with her husband and it was in fact someone else she is considered a subject of compulsion (*'anusah*) and she may return to her husband. He does not discuss the problem of *mamzerim* nor does he mention doubts.

5.2.7 (vii): The correct reference is ***Bet Shemuel EḤ* 178 sub-para. 4** where reference is made to Rema 178:3, who says that if she committed adultery and claimed that she thought it was permitted to do so she is forbidden to return to her husband. The *Bet Shemuel* asks: the *halakhah* is that one who is in ignorance of the law (*'omer muttar* — one who says "It's permitted.") is considered an inadvertent transgressor (*shoggeg*) so why cannot she, having committed adultery inadvertently, be allowed to return to her husband? He answers that in the relevant biblical text (Numbers 5:12) it does not say "and she commit a trespass against the L-rd" which, admittedly, in this case, she would not have done (because *'omer muttar shoggeg*) but it says rather "and she commit a trespass against him (her husband)", which she has done. Although there was no intention to sin against G-d there was the intention to wrong her husband. She may have thought that G-d is not concerned about such matters but she could not possibly have imagined that her husband does not care! See *Responsa Mahariq* 167. *Bet Shemuel* adds two more cases: (a) If a married woman agreed to an adulterous union as the only method to save lives (acting like Esther who **willingly** went to Aḥashwerosh in order to save the entire community of Israel from genocide) she is forbidden to her husband — *Responsa* of Mahariq 167. [In the actual case of Esther herself, the Talmud,[10] though regarding her act as absolutely righteous and, indeed, obligatory, accepts that she was subsequently forbidden to Mordekhai, her uncle and husband.] (b) If a married woman thought the ring of the marriage ceremony did not effect *qiddushin* and she consequently had relations with another, she cannot return to her husband.

Again, there is not a word here about doubts or *mamzerim*.

5.2.8 (viii): Morgenstern refers to ***Pithey Teshuvah* ibid.** I presume that this means the *Pithey Teshuvah* on the same section of Rema as referred to in *Bet Shemuel* 178 sub-para. 4 (Morgenstern's immediately previous reference, i.e. (vii) above). If this is correct, the reference is to ***Pithey Teshuvah EH* 178 sub-para. 8**. Here, it is stated that if a married woman was forced into sexual relations with a gentile potentate even if she was forced to aid his transgression by bringing him upon herself, in which case the law says that she should give her life to avoid the crime — תהרג ואל תעבור — even so she is permitted to return to her husband. Again, there is no mention of doubts or *mamzerim*.

5.2.9 (ix): His claim that "the woman is therefore permitted to return to her husband or marry the new man the rabbis previously ruled she could live with even if they erred" is said to be supported by ***Yabia' 'Omer* III 7:16**. I presume that this means III ***EH*** 7:16. On consulting paragraph 16 in *responsum* 7, I found that Rabbi Yosef makes only one statement remotely connected to Morgenstern's subject: If a married woman had relations with a man with crushed testicles

[10] *Megillah* 15a. See also there in *Tosafot* s.v. *Ke-shem*.

(*shaḥuf*) of whom it was known that he had problems with erection,[11] even if the possibility was 50-50 (an exactly balanced doubt — ספק שקול) that he had had an erectile liaison with her, we should not suspend her "former status of permissibility" (חזקת היתר) to her husband and we must therefore permit her continuing living with him. All this tells us is that a ספק שקול is not sufficient to overturn a חזקת היתר. There is no mention of her being allowed to marry the second man (nor of multiple doubts or *mamzerim*).

5.2.10 (x): Finally, he underlines, for emphasis, that when the woman is not in violation of any law the child is not a *mamzer*, referring us to ***Responsa 'Oneg Yom Tov* II chapter 121**. This *responsum* refers to the law that states that even if she were forcibly violated the child is a *mamzer*.[12] The *'Oneg Yom Tov* asks what the law would be in a case where the *bet din* would have sanctioned the adulterous act, for example, if both parties were under threat of death should they refuse to copulate in private, according to Rabbi Yishmael[13] who maintains that martyrdom is not required to avoid the private commission of adultery or incest. Even according to the accepted *halakhah*, that does not accord with Rabbi Yishmael and which demands the sacrifice of one's life in order to avoid the transgression of any prohibition of adultery and incest even in private, the same question could arise in a case where neither he nor she perform any act and remain passive throughout — as described in *Tosafot* in *Yevamot*[14]- in which case the *bet din* would sanction their compliance in order to save their lives. In either of these cases would the child be a *mamzer*? True, the mistaken ruling of a *bet din* permitting her to have sexual relations with another man does not save the child born from that liaison from being a *mamzer* but here the *bet din*'s permissive ruling would be correct.The author concludes that the child would nevertheless be a *mamzer*.

In this case, both parties are being compelled by threat of death to partake in an adulterous union and their submission to the compulsion is in full accord with the law of the Torah as correctly conveyed to them by the *bet din*, yet nevertheless any child born from this union would be a *mamzer*. Thus this *responsum* proves exactly the opposite of Morgenstern's claim!

6.0 **I D 34-5**

6.1 Morgenstern: If a woman followed the mistaken advice of the rabbinical court she has committed no sin and her children cannot be *mamzerim*: (i) Rema, *EH*, 17:58; (ii) *Responsa* of Rashba 1178; (iii) *Bet Shemuel*, *EH* 17, 172; (iv) *Pithey Teshuvah EH* 17, 178; (v) *Ḥokhmat Shelomoh EH* 17, 58.

6.2 Comments:

6.2.1 (i): The **Rema *EH*, 17:58** does not mention anything about *mamzerim*. He says only that the mistaken court ruling declaring the first marriage halakhically invalid makes her subsequent marriage an *'ones* (accidental transgression) so she can return to her first husband.[15]

6.2.2 (ii): **Rashba 1178**. The reference should read **I:1178** and is anyhow incorrect. In the gloss to

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11 This follows the view that a non-erectile encounter would not forbid her to her husband.

12 Rambam, *Yad, 'Issurey Bi'ah* 15:1. See below, §§7.0-7.2.2.

13 *'Avodah Zarah* 27b.

14 53b s.v. *'En 'ones* (beginning of chapter *Ha-Ba' 'al Yevimto*).

15 The *Taz* (sub-para. 71) cannot see the difference between this and the case where the *bet din* err in fact, allowing her to remarry when two valid witnesses testify that her husband is dead and the evidence proves to be false. The law there is that she must leave both husbands. Surely, asks the *Taz*, that is no less an *'ones* than this case where the *bet din* err in law and declare valid *qiddushin* invalid!? His question is answered in *Pitḥey Teshuvah* there: *EH* 17, sub-para. 174.

Rema (*EH* 17:58) it is given as I:1188 and that, too, is incorrect. The correct reference is given in *Bet Yosef* at the end of *Tur EH* 17 as **I:1189**. There is a similar *responsum* in I:10. This *responsum* refers to the marriages of Mikhal daughter of Shaul and is the source of the Rema's ruling regarding a court erring in law when handing down their decision. It says no more than the Rema says in his gloss to the *Shulhan 'Arukh*.

6.2.3 (iii): ***Bet Shemuel EH* 17, sub-para. 172** simply quotes the *responsum* of Rashba in I:10 or I:1189 to demonstrate how the law in the Rema is deduced from Mikhal *bat* Shaul and adds nothing thereunto.

6.2.4 (iv): ***Pithey Teshuvah EH* 17, sub-para. 178** does not seem to exist. It should read **174**. This is again a quotation of the *responsum* of Rashba but with the addition of the opinion of the Ri (on *EH* 17, letter ?) that Rashba's leniency is valid only for the greatest *bet din* and Rema is therefore mistaken in applying it to any *bet din*. He also mentions that the *Noda' Bi-Hudah* II end of no.131 says that the Rashba refers only to error of law, not fact (see note 15).

6.2.5 (v): ***Ḥokhmat Shelomoh EH* 17, sub-para. 58**. All that happens here is that Rabbi Shelomoh Kluger points to the question of the *Taz* against the Rema (see n.15) and says that he (Rabbi Kluger) answers it in his commentary on *EH*. So Rashba and Rema here are right and they do not contradict the rulings in *EH* 17:56. There is no mention here of *mamzerim*.

7.0 **I D 37**

7.1 The Rambam writes in *'Issurey Bi'ah* 15:1

אשת איש שנבעלה לאחר, בין ברצון בין באונס, בין בשוגג בין במזיד, הולד ממזר

On this Morgenstern says that the Rambam will agree that if she did it on the authority of a *bet din* who erred the child is *kasher*, because permission from a *bet din* to remarry is an annulment of the former wedding. He quotes as his sources for this: (i) Redaq II Samuel 3:14 and (ii) *Responsa* of Maharsham 1:9.

7.2 Comments: It is inconceivable that Rambam would fail to mention so important and innovative an exception anywhere in his code or *responsa*. As to Morgenstern's sources:

7.2.1 (i): **The Redaq in II Samuel 3:14** says nothing and merely refers us to **I Samuel 25:43** where he presents answers — of the Talmud and of his own — to explain how Mikhal could marry David, Palti and then David again. Redaq does not touch upon the question of *mamzerut* nor does he even remotely suggest that a ruling of a *bet din* permitting remarriage constitutes an annulment of the first marriage.

7.2.2 (ii): ***Responsa* of Maharsham 1:9**. This *responsum* proves **exactly the opposite of Morgenstern's claim**. A woman had been waiting 12 years for news of her husband who had disappeared. Her husband's brother then appeared bringing with him a letter from his mother stating that his brother, this woman's husband, had died without children and he (the surviving brother) also had heard definite news of his brother's death and had come to give *halitsah* to the widow. They relied on his testimony and he gave her *halitsah* in accordance with the ruling of *Maharashdam* and *Be'er Hetev* at the beginning of *EH* 158,[16] that the brother is believed to give her *ḥalitsah*. The woman then received a document of permission to remarry from the *bet din*. In addition, she received a document from the government rabbi in charge of registration, stating that a man with the name and surname of her husband was known to have died. Subsequently she remarried and is now pregnant. However, it has been discovered that her husband lent his

[16] Sub-para. 1. *Be'er Hetev* there quotes the *responsum* of Maharashdam *EH* 75.

passport to someone else and it was the one who had borrowed the passport who had died; her husband is still alive. The law is clear — she must leave both men. The first husband has already divorced her and the second one also will do so. The problem is the child — yet to be born to the second husband. If the child is declared a *mamzer* the parents will give him over to a gentile orphanage and he will be converted to Christianity or the mother will kill herself. Her first husband was not of clear mind and was on a number of occasions in a mental institution. Even now, his mental faculties are weak. Some say that he was like that even before his marriage but it is impossible to clarify this.

This is clearly a case where the woman was in error and acted on the ruling of a *bet din*, as Maharsham states clearly in this *responsum* (lines 13-14, s.v. *we'ayyen*). Yet in the end, in spite of the most strenuous intellectual efforts, Maharsham concludes that he cannot find any way of releasing the child from *mamzerut*.

8.0 **I D 45**

8.1 Morgenstern: If witnesses forgot the date of the marriage, there is no marriage. *Yabia' 'Omer*, III *EH* 8:20.

8.2 Comments: Rabbi Yosef in ***Yabia' 'Omer,* III *EH* 8:20** speaks of a case where she denies the fact of the marriage and two witnesses testify to its having taken place. Such testimony, should it be accepted, would forbid her remarriage. In such a dispute, "investigation" (חקירה) into the testimony is required. This includes asking them the date[17] of the wedding and their failure to answer would invalidate the testimony.[18]

Rabbi Yosef then quotes the following *sefeq sefeqa'* from Mahari Abulafia in *Responsa Peney Yitsḥaq* II no. 12: Some authorities rule that testimony affecting marriage, i.e. *gittin* and *qiddushin*, requires *derishah wa-ḥaqirah* exactly like capital cases **even if the woman does not dispute their evidence** (so in the case under discussion the inability of either witness to testify to the date of the wedding would render the testimony invalid) and even if we accept the view of those authorities who maintain that testimony of *gittin* and *qiddushin* is akin to that of fiscal law (where the requirement of *derishah wa-ḥaqirah* is dispensed with[19]) nevertheless, perhaps the law accords with the majority of the *Posqim* who say that even in financial cases even though one **need** not pose questions of date or time, if one did so and one of the witnesses could not answer, the testimony is invalidated. The same argument can be found in a *responsum* of Rabbi Shalom Mosheh Ḥai Gagin in the work **וישב יוסף**[20] *EH* no. 3, p. 30 col. 4. Rabbi Yosef concludes: "Although some question this *sefeq sefeqa'* if there is any other *safeq*, such as whether the witnesses were fit for testimony, one can be lenient in a case of *'iggun"*.

Here, Morgenstern is correct only if the woman **disputes the fact of her former marriage** and there is **some other reason** for leniency as is clear from the final sentence quoted from Rabbi Yosef's *responsum*.

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17 The seven investigations (*ḥaqirot*) consist of six related to date and time and one concerning location. This aids clarification of the truth and also makes the testimony, as it must be, subject to contradiction of its witnesses (*hazamah*): עדות שאתה יכול להזימה. See Deut. 13:15 and *ET* VII col. 638 at notes 4 and 5. For *hazamah*, see *ET* VIII cols. 609-13.

18 *Mordekhai* quoted in *Bet Yosef, EH* 42 and *ḤM* 30 and Rashba quoted in *Bet Yosef, EH* 46 — unlike Meiri (end of *Yevamot*) who says that *derishah wa-ḥaqirah* are not required in this case.

19 Although in all such cases the alleged debtor must be in conflict with the witnesses for if not his concurrence would constitute confession which is always sufficient in monetary matters and would render the witnesses irrelevant.

20 I do not know if this is *Wa-yashov Yosef* (Bereshit 50:14) or *Wa-Yeshev Yosef* (Bereshit 50:22) and, accordinhgly, whether the author is Rabbi Yosef Schwarz or Rabbi Yosef Burgel.

9.0 **I D 50**

9.1 Morgenstern: Any *bet din* can uproot Torah law as a *hora'at sha'ah:* (i) Rambam, [*Yad*], *Mamrim*, 2:4, 9; (ii) *Seridey 'Esh* I no. 32 (p. 62) based on Radbaz I no. 120; (iii) *Seridey 'Esh* II 8; (iv) *'Arokh Ha-Shulhan, EH*, 2:14.

Comments

9.2.1 (i): The wording of **Rambam in *Mamrim* 2:4** is as follows.

> "If the *bet din* sees fit to strengthen the Law and to protect it in order that people should not transgress the laws of the Torah, they may impose corporal and even capital punishment in cases where this is not warranted by the Law. They must not, however, make these changes permanent, saying that the *Halakhah* is really so. Similarly, if they see a temporary need to abrogate a positive command or a negative command in order to bring back the masses to the Law or to save many of Israel from sinning in other directions they may act in accordance with the needs of the moment. Just as a doctor amputates the hand or foot of his patient so that he might live, so *bet din* may order at any given time the transgression of some of the commandments temporarily so that all of them (the commandments) might ultimately survive as the early sages said, "Desecrate one *Shabbat* for him that he might observe many *Shabbatot*."

In **2:9** Rambam asks:

> "Since *bet din* can forbid even permanently that which is permitted in Torah law and they can permit at least temporarily that which is forbidden in Torah law how can we understand the prohibition of adding to, or subtracting from, the commandments?"

9.2.2 In reply, Rambam differentiates between rabbinic enactments which are permissible and additions to, and subtractions from, the laws of the Torah which are forbidden. He says that so long as the *bet din* make clear that their enactments are exactly that and they do not present them as Torah laws there is no prohibition involved.

9.3 Before dealing with Morgenstern's claims, I shall first survey the problem of the contravention of biblical law by regular (rather than emergency) rabbinic ordinances.

9.3.1 The decrees and enactments of the Sages (*gezerot* and *taqqanot*).

The *bet din* is clearly invested with the authority to decide whether circumstances call for the issuing of a decree or enactment which would abrogate any point of Biblical Law and to issue such legislation.[21]

The power of the *bet din* to promulgate decrees or enactments which abrogate any commandment is not arbitrary. It is limited to cases where the Sages see good reason to do so, good reason meaning that the uprooting of the individual law(s) is in the interest of a greater good, for example, the avoidance of more serious transgression.[22]

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[21] A survey of the relevant literature on this matter will be found in *Encyclopedia Talmudit* XXV in the article יש כח ביד חכמים לעקור דבר מן התורה which runs from col. 607 to col. 657. The numbers in the upcoming references are those of the footnotes in this *ET* article.

[22] 290, 291.

It is generally agreed that the Sages can, through such rabbinic legislation, abrogate a positive commandment. Whether they can also set aside a negative commandment is disputed amongst the *Amoraim*. Rav Ḥisda says they can,[23] Rabbah says they cannot[24] (and that means even the Great *Sanhedrin*[25]). The *Rishonim* accord with Rabbah[26] but a number of *Aḥaronim* argue that it may be proven that some *Rishonim* rule like Rav Ḥisda.[27]

9.3.2 Emergency legislation.

The above applies to the general area of rabbinic regulations which were introduced out of concern that people might otherwise be led to transgression.[28] However, in emergency situations such as the urgent need to stem the tide of assimilation (as in Rambam above), all agree that the *bet din* can uproot momentarily even a negative commandment, just as the prophet Eliyahu offered a sacrifice on Mount Carmel (I Kings 18), although it was forbidden — since the construction of the first Temple — on pain of excision (*karet*) to do so, since this was the only way to bring back the masses from idolatry to the G-d of Israel.[29]

Whether such decrees of abrogation could, once made, be extended permanently is disputed amongst the *Rishonim*. Rashba and others say yes,[30] Rambam (see above) and others say no.[31]

9.3.3 Which sages/*bet din* have the authority described above?

Some *Aḥaronim* express doubt as to whether it has to be a *bet din* of the calibre of that of Rav Ammi and Rav Assi.[32] Others argue that this authority was limited to the Sages of the Talmud.[33] The majority view is that even a contemporary *bet din* is endowed with this authority.[34] Rabbi Mosheh Feinstein rules accordingly.[35] However, to be effective globally, the *bet din* would need to possess authority recognised across the board i.e. a *bet din* of *Gedoley Ha-Dor*. This is so even for the momentary suspension of even a positive ordinance and how much more so for the

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23 115.

24 138.

25 137

26 155.

27 156.

28 Such as the abrogation (save in the presence of the *Sanhedrin*) of the biblical commandment to sound the *shofar* on *Rosh HaShanah* when the 1st of *Tishri* is *Shabbat*. This was enacted as a guard against the inadvertent transporting of a *shofar* through the public domain, which would constitute a biblical violation of the *Shabbat*.

29 231, 232. For other examples see *ET* ibid. at n. 205.

30 233.

31 244. It is interesting that Morgenstern, who is always seeking lenient rulings in his search for *'agunah* solutions, here adopts the stricter opinion of Rambam and does not even mention that of Rashba.

32 19.

33 21. This always includes, *a fortiori*, the pre-Talmudic sages i.e. those of the first Temple period and earlier.

34 22.

35 Ibid., at the end. As regards the imposition of the death penalty as an emergency measure, some say that this is limited to the Great Sanhedrin (Ran, *Nimmuqey Yosef*, Ritba et al. see *ET* VIII '*Hora'at Sha'ah*' col. 522 n. 146). Others maintain that even non-ordained judges sitting in *batey din* in the Diaspora who cannot, in normal circumstances, hear cases involving capital or corporal punishment or even the imposition of fines, can, in emergency situations, impose the death penalty (Me'iri, Rashba, Rivash *Tur* and *Shulḥan 'Arukh Ḥoshen Mishpat* 2:1. See *ET* ibid. n. 148). It is interesting to note that Rabbi Shelomoh Luria (*Ḥokhmat Shelomoh ḤM* ibid. s.v. *Se'if 'alef*) requires 23 judges for the emergency imposition of the death penalty nowadays, arguing that although the emergency forces us to act without the biblically required ordination we have no reason to act without the biblically required 23 judges. He notes, however, that he has not found any other authority endorsing his position.

suspension of a negative commandment or for permanent abrogation — save in the case of emergency measures required only in a specific community where they could be dispensed by the local *bet din*.

Hence, as a solution for any *'agunah* problem the uprooting of Torah Law, as Morgenstern terms it, would certainly need a *bet din* of *Gedoley HaDor* acceptable to all sects and communities because permission to remarry without a *get* has possible future repercussions on the entire Community of Israel.

Therefore, Rabbi Morgenstern's implied claim that, on the authority of the sources he quotes in this instance, his *bet din* can alleviate the problems of the *'agunah* by abrogation of commandments of the Torah, cannot be accepted.

9.4 (ii): ***Seridey 'Esh* I no. 32 (p. 62) based on Radbaz I no. 120**. In the Mossad Harav Kook, Jerusalem 2003 edition, the first volume has no number 32. In another Jerusalem 2003 edition[36] volume I number 32 deals with allowing, on *Shabbat*, the transport, by a gentile, of a paralytic in a wheel-chair in an area united by an *'eruv*, in order that he may attend synagogue. It contains no material relevant to Morgenstern's argument. In both of these editions page 62, dealing with stunning before *sheḥitah*, is also irrelevant. Morgenstern informs us that Rabbi Weinberg bases himself in this article on a *responsum* of Radbaz I 120, but this takes us no further because that *responsum*[37] deals with a question of the laws of business partnership!

9.5 (iii): ***Seridey 'Esh* II 8** This is a *responsum* justifying the conduct of the *Yeshurun* youth-group in France in the face of the opposition voiced by "a well-known circle of the ultra-Orthodox". The objections were to the fact that the groups consisted of boys and girls together and that these groups sang sacred lyrics such as *Shabbat* table-songs in unison. The *ḥaredim*, Rabbi Weinberg admits, had a point. Are not mixed groups forbidden and is it not also forbidden for a man to hear a female voice in song?

9.5.1 Nevertheless, Rabbi Weinberg issued a permissive ruling as the German *gedolim* (Rabbi Hirsch, Rabbi Hildesheimer etc.) had, in their time, permitted the youth movement *Ezra* (which was similar to *Yeshurun*) in order to save the youth from the danger of assimilation which had spread in Germany. and by means of this they saved many Jewish lives and succeeded in drawing them close to "Torah and the fear of Heaven". Rabbi Weinberg says that this approach is based on the Talmudic understanding of the verse in Psalms עת לעשות לה' חפרו תורתך — "It is time to act for the L-rd because they (the masses) have abrogated Your Law". How should one act? The same verse in reverse gives the solution: "They (the religious leadership) have abrogated Your Law because it is a time to act for the L-rd" and emergency measures are called for.[38] We do not have a military dictatorship, declares Weinberg, so we must employ other means.

9.5.2 He then proceeds to find halakhic support both for the mixed groups and for the mixed singing. עת לעשות לה', he says, was applied by the Talmudic sages to permit even that which was absolutely halakhically forbidden but we cannot do that. However, in this particular case we are dealing with questions not of *Halakhah* but of pious conduct and degrees of modesty,[39] and so we can take a lenient view in the matter of Ezra and Yeshurun in the France of today where, if we do not adopt such a lenient view, the Torah will be abandoned, Heaven forfend. "I cannot bring

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36 Published by The Committee for the Publication of the Writings of Rabbi Ye5i'el Ya'aqov Weinberg *zatsal*.

37 In the edition in my possession (1971, printed in Israel). Morgenstern refers to the *Responsa* of Radbaz edited by Melech Shapiro, Scranton, 5758 (1997/8). I have not yet found this edition.

38 See Mishnah, end of *Berakhot*.

39 I presume he means in the light of the halakhic leniencies he had discovered.

myself to forbid," he writes, "what they (Rabbi Hirsch and Rabbi Hildesheimer) permitted".

9.5.3 He proceeds to point out that even the *Ḥaredim* who have no concern with the outside world send their children to non-Jewish schools and have not a clue how to deal with the influences that can come therefrom. Assimilation is wreaking devastation even among the ultra-Orthodox.

9.5.4 This *responsum*, while emphasizing the need, in appropriate circumstances, for leniency in the application of *Halakhah*, is extremely sparing in its approbation for the abrogation of *Halakhah* in the post-talmudic era and narrows it down to the permitting of meta-halakhic stringencies accepted as the norm in ultra-Orthodox society. This hardly amounts to Morgenstern's "Any *bet din* can uproot Torah law as a *hora'at sha'ah*".

9.6 (iv): ***'Arokh Ha-Shulhan, EH,* 2:14**. Rabbi Epstein here refers to the ultimate removal from active service, by the prophet Elijah, of all priests and Levites of unfit pedigree. Israelite families, on the other hand, amongst whom were inadvertently mixed *'avadim* or *mamzerim*, will be left as they are. Even today, one who is aware of the presence of such individuals in any family should not publicise the matter on the basis of the rule משפחה שנטמעה נטמעה. This rule is part of the *Halakhah*[40] not an abrogation thereof and is, therefore, completely irrelevant to Rabbi Morgenstern's claim.

10.0 **I D 64-5**

10.1 Morgenstern: "Wherever you may coerce according to the *Halakhah*, since today it is impossible in practice to do so, you may annul instead: (i) *Responsa 'Igrot Mosheh*, *EH* I: 79 (end) and 80 (centre); (ii) *Responsa Devar 'Eliyahu*,[41] 48; (iii) *Responsa 'Ohel Mosheh*,[42] II 123."

10.2 Comments

10.2.1 (i): In ***'Igrot Mosheh EH* I 79**,[43] Rabbi Feinstein says that a serious blemish in the husband, unknown to the wife at the time of the wedding, renders the marriage a *miqah ta'ut*. Since no woman would agree to such a wedding even when coercion (by the *bet din*) was possible, how much more so now that it is impossible. Therefore, no *get* is required. Of course, one should obtain a *get* if it is possible but, if not, it is in order **in this case** for her to remarry.

That is far from granting blanket permission to apply annulment every time coercion is halakhically warranted but, due to the secular law, cannot be applied. Rabbi Feinstein only declares **this particular marriage** annulled because of the **false premise upon which it was based** and this would be true even if there were no halakhic case for coercion at all. On the other hand, in cases where the *Halakhah* does permit coercion but where there was no *miqah ta'ut* (as in §4.2.2) Rabbi Feinstein nowhere said that the marriage can be annulled. Exactly the same can be said of *responsum* 80.[44]

10.2.2 (ii): In ***Devar 'Eliyahu* 48** the case is one where, unknown to the wife, the husband was impotent at the time of the marriage. The husband died (childless) and the wife could not obtain *halitsah*. Rabbi Klatzkin argues that in such a case although by the law of the Torah there is no marriage at all, the wife does require a *get* by rabbinic law (according to Rabbi Feinstein cited in §10.2.1 she

40 See *'Arokh Ha-Shulhan* ibid. quoting Malakhi 3:3 and its halakhic exegesis in *Qiddushin* 77a.

41 By Rabbi Eliyahu Klatzkin (20th century).

42 By Rabbi Mosheh Yonah ha-Levi Zweig (20th century).

43 In this case the husband was impotent.

44 A case of insanity.

requires no *get* at all). Thus her marriage and, accordingly, her attachment to her husband's brother are merely rabbinic, so it is only in rabbinic law that she needs *halitsah*.

Now when a husband is impotent and had always been so,[45] no *halitsah* is required. However, if he had not always been impotent but had become so,[46] then *halitsah* is required. In this case it was uncertain whether he had always been impotent and, therefore, there was a doubt whether *halitsah* was required but as the requirement of *halitsah* was, as explained above, only rabbinic, Rabbi Klatzkin applied the rule — ספק דרבנן לקולא — and permitted the wife's remarriage without *halitsah*.

Once again, this is a case of *miqah ta'ut* and says nothing about the power to annul in cases requiring coercion when the original *qiddushin* were without error.

10.2.3 (iii): ***Responsa 'Ohel Moshe*** **II 123**

This case concerns a married woman who discovered that her husband was a *mumar* (apostate) and who could not acquire a *get* from him. Rabbi Zweig first approaches the question from the point of view of the validity of the *qiddushin* of a *mumar*. He tells us, at the end of paragraph 3, that even those who maintain that we must entertain the possibility that at the wedding the groom inwardly repented agree that we do not do so where there is no outer indication whatsoever of any inner repentance (as was the case in this *responsum*). In paragraph 5 the author summarises the opinions regarding *qiddushey mumar*:

(a) According to the *'Ittur* and his school they are valid even in Torah law.
(b) According to the Rash *et al* they are only rabbinically valid (perchance he repented in his heart).
(c) According to Me'iri's teachers and the א"ד in the *'Ittur* he is halakhically classified as a definite non-Jew and his *qiddushin* are totally ineffective.

Thus there is an element of doubt here and we may use this towards a ספק ספקא.

In paragraph 8 he proceeds to examine the question of *miqah ta'ut* and he concludes that any serious blemish, unknown to the spouse at the time of the *qiddushin*, such as total blindness[47] or her being an *'ailonit*,[48] would constitute *miqaḥ ta'ut* and render the *qiddushin* void. He subsequently concludes that the same can be said for the blemish of apostasy. He adds the proviso that if at least one other rabbi — "great in Torah and expert in delivering halakhic rulings" — will agree with him, he will lend his name to permitting this woman without a *get*. The reason for this reticence is that the *Noda' Bi-Hudah*[49] took a strict line in a case such as this and Rabbi Zweig did not want to stand alone against so great and revered an authority.

Thus there is not a word in this *responsum* from which one could derive, as Rabbi Morgenstern claims, that "wherever you may coerce according to the *Halakhah*, since today it is impossible in practice to do so, you may annul instead".

11.0 **I D 69**

11.1 Morgenstern: "If she marries a man who later ceases to be observant the marriage can be annulled — *BaḤ EH* 157:5."

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45 I.e. throughout his life = *seris ḥammah*. See Mishnah *Yevamot* 8:4 (79b).

46 = *seris 'adam*. See ibid.

47 Cf. §4.2.2.

48 Lit. "ram-like" (see *Ketubot* 11a) in the sense of masculine = without womb, incapable of conception.

49 By Rabbi Ye5ezqel Landau (19th century).

11.2 Comments: Firstly, the *Baḥ* refers to a case when the husband became a *mumar* and this term needs defining. Does it mean even *mumar le-davar 'ehad*,[50] *mumar le-khol ha-Torah*[51] or *nidbaq be-umah aḥeret*?[52] We cannot simply assume, as Morgenstern here does, that the *'anan sahadey*[53] of the *Baḥ* applies even to a case where the husband merely became non-observant to suit his own interests (*mumar le-te'avon*) rather than out of spite (*mumar le-hakh'is*). Furthermore, since today we have no adequate reprovers it is impossible for anyone to administer reproof that would be halakhically recognised as such, and without reproof one cannot be halakhically classified as a *mumar*.[54] What is more, the *Baḥ* refuses in practice to permit the woman in question to remarry without *halitsah* (which she would not need if her marriage to the husband who became a *mumar* were considered annulled) since the *Bet Yosef* wrote "Woe to the one who is lenient with this."

12.0 **I D 83 (end)-84**

12.1 Morgenstern: "Hillel the Elder was asked to rule on the status of these women who either had sex or were married to a second man prior to the date of the *ḥuppah*. Hillel the elder ruled that all the *ketubot* stated that even though the *qiddushin* preceded the *ḥuppah*, nevertheless the *qiddushin* did not take effect until the *ḥuppah* occurred. If this clause was missing, the *ketubah* was constructively interpreted as having such a clause. So rules

(i) *Tosafot Bava' Metzi'a'* 104; so rules
(ii) *Qorban Ha'Edah* on *Yerushalmi Ketubot* 4:8; so rules
(iii) Ritva; so rules
(iv) Me'iri on *Ketubot* page 268 regarding the clause in the *ketubah* that a woman could state, "my husband is detestable to me" and the Rabbis would coerce the husband to divorce his wife. See
(v) Jerusalem Talmud 7:6 (end).
(vi) Meiri interprets this law that even if the clause is missing, the Rabbis would constructively insert such clause and the Rabbis would force the husband to divorce his wife. This law was followed by
(vii) *Rabbanan Sabora'ey* following
(viii) the Talmud, by the
(ix) *Ge'onim*, *Rishonim*, and *'Aḥaronim*. See
(x) Rambam *Teshuvos* (?) 14:8;
(xi) *Yabia' 'Omer* Book III *responsum* 18;
(xii) *Tsits 'Eli'ezer* Book 5 *responsum* 26;
(xiii) Rema *Yoreh De'ah* 228:20.
(xiv) This is the law we follow today."

12.2 Comments

12.2.1 (i): ***Tosafot Bava' Metsia'* 104**, s.v. *Ha-doresh leshon hedyot*. The Gemara' there quotes *Tosefta' Ketubot* 4 which records that Hillel understood the condition of delay of *qiddushin* as a part of the *ketubah*'s record of the formula of the wedding declaration of bride and groom. The *Tosafot* add that this means the condition is valid even if it had not been instituted by the Sages and it had not been written into the *ketubah*, because if it were a condition imposed by the Sages or had it

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50 Spiteful abandonment of even one of the commandments. For example, one who intentionally transgresses a law of the Torah without any benefit accruing to him thereby.

51 Spiteful abandonment of all the commandments. The transgression of the single prohibition of idolatry (or related matters) is considered as equal to rejection of all the commandments.

52 Actively joining some other faith group.

53 = "We may presume" that had she foreseen this development in her husband she would never have married him.

54 Rabbi A. Y. Karelitz, *Hazon Ish*, *EH* 118, sub-para. 6.

been actually written into the *ketubah* it would have been obvious that it would be an effective condition and the account of Hillel's ruling would tell us nothing new.

12.2.2 (ii): ***Qorban Ha-'Edah*** on *Yerushalmi Ketubot* 4:8. See there s.v. *Leshon hedyot* and s.v. *Rabbi Me'ir* where the author repeats, more or less, the observations of the Tosafists mentioned in (i).

12.2.3 (iii) **Ritba**. Morgenstern gives no reference but presumably refers to the Ritba's *novellae* on *Bava' Metsi'a'* 104a where, again, the same comments as those of *Tosafot* are recorded, though Ritba also mentions authorities that any common custom not in accordance with the accepted rabbinic regulations (as in Hillel's delayed *qiddushin*) must be written to be effective.

NB So far we have only one statement (with which there would be unanimous agreement): a condition deferring the implementation of *qiddushin* is valid and — according to many authorities — if in common practice, is implied even when not documented.

12.2.4 (iv): **Me'iri on *Ketubot***. The reference is clearly to *Bet Ha-Beḥirah* (ed. A. Sofer, Jerusalem 5707) *Ketubot*, Chapter 5, p. 269. However, Meiri himself says no such thing but he does report that **his teachers' teachers** had so interpreted JT *Ketubot* end of 7:6 —

אמר רבי יוסה הילין דכתבין אי שנאי אי שנאית תנאי ממון הוא קיים

The apodosis of Rabbi Yoseh's sentence is missing. Its context in the *Yerushalmi* deals with the question of a *moredet* and discusses the material losses she suffers. Immediately following this discussion is R. Yoseh's declaration "Those who write 'If I hate you or if you hate me…' — it is a financial condition and it is valid". This is understood by most of the *Rishonim* to mean that if there was an agreement between the couple that if either one would rebel against the other (אין שנאי אין שנאת), the guilty party would not suffer any of the financial penalties (ממון תנאי) applied in such cases, then such an agreement, though in opposition to the law, is binding (ותניין קיים) as is any agreement between two parties who wish to forego their halakhic claims upon each other.

In addition to this, Me'iri reports, in the name of the teachers of his teachers, that included in the apodosis of Rabbi Yoseh's statement is an acceptance by the husband to **divorce** his wife in such circumstances. This, they suggest, lay behind the enactment of the *Ge'onim* to coerce a *get* in the case of the *moredet* which seems to be in direct conflict with the Talmud. See Rabbenu Menaḥem *Ha-Me'iri*, *Bet Ha-Beḥirah* (ed. A. Sofer, Jerusalem 5707) *Ketubot*, Chapter 5, p. 269, lines 13-20:

ורבותי העידו על רבותיהם שפרשו במה שחדשו הגאונים בדין זה שסמכו על מה שאמרו בתלמוד המערב (כתובות פרק ה'' הלכה ח' [בסוף]) בסוגיא זו הילין דכתבין אי שנאי אי שנאית תנאי ממון הוא וקיים, כלומר שכל שהם מתנים שאם הוא שונאה יגרש הן בכתבה הן בתוספת כתבה וכן אם היא שונאתו, שיזקק הוא לגרשה אם בכל הכתבה אם בקצת פחיתה הכל קיים כפי מה שהתנו. וכתבו על זה שמה שחדשו הגאונים הוא מפני שהיו רגילים לכתוב בכתבותיהם אי שנאי אי שנאת, כלומר שאם תשנאנו תטול כתבתה או מקצתה ותצא ולא יהא רשאי לדונה במורדת...:::

12.2.5 (v): **Jerusalem Talmud 7:6 end**. Morgenstern does not identify the tractate but is clearly referring to *Ketubot* where the ruling of Rabbi Yoseh is recorded. This is the *Yerushalmi* referred to by Me'iri in §12.2.4.

12.2.6 (vi): **Me'iri**. Again, the reference is actually to the teachers of Me'iri's teachers not to Me'iri

himself. See Rabbenu Menaḥem *Ha-Me'iri*, *Bet Ha-Beḥirah* (ed. A. Sofer, Jerusalem 5707) *Ketubot*, Chapter 5, p. 270, lines 1-5:

וחם (רבותיהם של רבותיו) כתבו על זה שחדשו [צ"ל שחדוש?] הגאונים הוא מפני שהיו רגילים לכתוב בכתבותיהם שאם תשנאנו תטול כתבתה ותצא ולא יהא רשאי לדונה כמורדת ומאחר שנתפשט המנהג קבעוהו לעשותו אף בזמן שלא נכתב כאלו נכתב, כשאר תנאי כתבה וכתבו בסוף הדברים שנוח לנו לטרוח ולפרש כדבריהם משנאמר שיעקרו כל הסוגיא להדיא בלא טעם...

According to this, even though the agreement not to impose any financial sanctions upon her as a *moredet* and to grant her a divorce was not written in the *ketubah*, it would have been understood and acted upon.

Thus we now have an interpretation of Rabbi Yoseh's ruling in the *Yerushalmi*, proposed by the teachers of the Me'iri's teachers, and stating that an agreement to divorce is binding when written into the *ketubah* and, where it is common practice to insert it into the marriage contract, it is effective — countenancing a coerced *get* — even if not written down. However, most of the *Rishonim* (including Me'iri himself) understand Rabbi Yoseh as referring only to fiscal matters.

12.2.7 (vii): The ***Sabora'im*** did permit coercion in a case of *me'is 'alai* **but that is not the accepted *halakhah*:** see Rabbi Ovadyah Yosef, *Yabiya' 'Omer*, III, *EH*, *siman* 20:34 -

> Many great, mighty, authorities amongst the *Rishonim* agree with Rambam that the husband of a *moredet* must be coerced to issue a divorce and so did the ***Saboraim*** rule. This ruling was accepted throughout the period of the Gaonate — an era of almost six hundred years. Now although many *posqim* disagree and ***Maran* in *Shulḥan 'Arukh* (*EH* 77[:2]) also rules that we do not use coercion**, when there are additional reasons to take a lenient view we can rely on Rambam's opinion and force the husband to divorce.[55]

12.2.8 (viii): **"The Talmud"** — It would have been helpful if Morgenstern had identified the tractate and page. It may be that he refers to the *Yerushalmi* quoted above in §12.2.4 and §12.2.5, i.e. the Rabbi Yoseh tradition or maybe he refers to the statement of Amemar in *Bavli Ketubot* 63b who rules that in a case of *me'is 'alai* "we do not force her" into marital compliance — which may be taken to imply "but we do force him" to divorce her (cf. *Maggid Mishneh*, *'Ishut*, 14:8).[56] In either case, the argument for a talmudic source is questionable and, accordingly, the fact remains that the *Halakhah* has been set in accordance with Rabbenu Tam against the Rambam. Only the Yemenites follow the Rambam in this matter.

12.2.9 (ix): In ***Ge'onim, Rishonim,* and *Aḥaronim***. I presume that *Rishonim* and *Aḥaronim* refer to what follows — see below at §§12.2.10, 12.2.11 and 12.2.12. As regards the *Ge'onim*, of course it is true that they — following the *Saboraim* who preceeded them — would coerce in cases of *me'is 'alai* but, again, Morgenstern must surely be aware **that the opposing view of Rabbenu Tam ultimately prevailed — see above, (vii) and (viii)**.

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55 The accepted wisdom is that whereas the Rambam maintained that coercion in the case of *moredet* has talmudic sanction, the *Sabora'im* and the *Ge'onim* (followed by the Rif) introduced coercion in the case of *moredet* by rabbinic enactment and **against** the ruling of the Talmud: cf. *Yabia' 'Omer* III *EH* 18:6, quoting Rav Sherira Ga'on. However, see next footnote.

56 See also R. Yehoshua' Falk, *Peney Yehoshua'*, *Ketubot* 63b, s.v. *Tosafot d"h 'Aval* for another explanation of the wording of the *Gemara'* there according to Rambam. (Cf. *Yabia' 'Omer* III *EH* 18:5.) Morgenstern seems to be unaware of the reading in this *Gemara'* preserved in the Firkovitch Leningrad manuscript which records, in place of "we do not force her", "we force him" (cf. *Diqduqey Soferim Ha-Shalem*, Jerusalem 1977). According to this, the view of the *Sabora'im*, *Ge'onim*, Rif and Rambam's school is based upon an explicit ruling in the Talmud! See also R. Yehoshua' Falk, *loc. cit.*, who shows that Rashi also agrees with Rambam in this matter. See further in note 57.

12.2.10 (x): **Rambam *'Ishut* 14:8**. True — but again **not accepted in the *Shuḥan 'Arukh***.

12.2.11 (xi): ***Yabia' 'Omer* [*EH*] III:18**. True — but again Rabbi Yosef **still regards himself bound by the *Shuḥan 'Arukh* (for Ashkenazim and Sefaradim) and applies coercion in the case of *moredet* only for Yemenites**. See the full discussion there in numbers 18, 19 and 20 from where it is clear that Rabbi Yosef agrees to using the opinion of the *Ge'onim*, Rambam etc. as one unit of a *sefeq sefeqa'* in cases involving Ashkenazim or Sefaradim.

Thus Rabbi Morgenstern has still not presented us (in paragraphs (vii)-(xi)) with a source that would justify coercion nowadays (for Ashkenazim and Sefaradim) *solely* on the basis of *me'is 'alai*. The following *responsum*, however, is much more promising.

12.2.12 (xii): ***Tzitz Eliezer* Book 5, *responsum* 26. This is a most important statement of Dayan Waldenberg in which he defends, in a letter to Rabbi Elyashiv, his call for the re-introduction of coercion in cases of *me'is 'alai*.** In this *responsum* (end of (א), s.v. *we-'a'irenu*), Dayan Waldenberg points out that the *Mordekhai* records that a number of the *Ge'onim* and Rabbenu Ḥanan'el maintain, like the Rambam and Rashbam, that in a case of *me'is 'alai* we coerce him to divorce her according to the law of the Talmud. So maintains *Tosefot* Rid in the name of Rav Sherira Ga'on — that according to the law of the Talmud after 12 months we force the husband to divorce her, the enactment of the *Sabora'im* being that where coercion is required it is applied immediately. A careful examination of the wording of the *Tosefot* Rid there makes clear that he, too, agrees to this.[57]

In (ד) he points to the Rema in *EH* 77:3 where reference is made to places where the custom is to coerce in cases of *me'is 'alai* which proves that Rema has not excluded this opinion from the *Halakhah*. He also quotes the Rema in *YD* 228:20 (see xiii) where Rema states that in cases of *me'is 'alai* the husband is obliged to divorce (though he does not mention coercion) and *Tsits Eli'ezer* adds that from the *Shakh* there (56) it seems that this opinion is not to be regarded as excluded from the *Halakhah*. In *Noda' Bi-Hudah* also, the statement of Rema — he is obliged to divorce her — is accepted without question.

Dayan Waldenberg concludes:

> "Therefore, according to the poverty of my understanding, the words of Mahara' Tawwa'ah in *Ḥut Ha-Meshulash* may be relied on. He writes that even according to the opinion that one must not coerce, if the hour requires compulsion, let them coerce, for a judge must be guided by the circumstances confronting him — so long as the judge's intention is for the sake of Heaven and he investigates the matter as is proper.

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[57] In *Sefer HaYashar leRabbenu Tam, Heleq haShe'elot wehaTeshuvot…we'im ha'arot me'et Rabbenu Shraga Rosenthal*, Berlin 5658; new ed. Jerusalem 5732, number 24, p.40, **Rabbenu Tam agrees** that after a waiting period of 12 months a *get* may be coerced in cases of *me'is 'alai*. He writes: "…and this [*get*, coerced] within 12 months [of the separation of the couple] is considered [a *get* coerced] not in accordance with the law [and is therefore invalid] **even according to Rabbenu Shelomoh's explanation of the case of *moredet*…** It is not clear what the last phrase (in bold) means. I found the explanation in Maharash Rosenthal's footnote (12) unintelligible. Elon (who also cannot understand Rosenthal's meaning) says in *HaMishpat Ha'Ivri* (Jerusalem 1978), vol. I p. 543 n. 79, that Rabbenu Tam is referring to the Rashi quoted in *Shiltey Ha-Gibborim* on the Rif to *Ketubbot* 63b, s.v. רש"ת כתב סמג בשם א. Rashi is there quoted as saying that according to the Gemara, after 12 months we force the husband to give the *moredet* a divorce. Thus Rabbenu Tam is saying that even if we accept this view (which Rabbenu Tam himself seems to do at this point) we have no right to bring the coercion forward and doing so would render the *get* illegally coerced and hence invalid. However, on the very next page of *Sefer HaYashar*, Rabbenu Tam is quoted as saying that even after 12 months no coercion may be applied and, should it be applied, the *get* would be considered illegally coerced and would therefore be invalid. This is also the position of Rabbenu Tam as quoted in *Tosafot* to *Ketubot* 63b s.v. *'aval 'amrah*.

As mentioned in my book there, I proposed that the final decision in this matter should be through a general agreement of all the rabbinic courts in the land so that we should not find ourselves divided into splinter groups in so fundamental an area of the Halakhah."

12.2.13 (xiii): **Rema, *Yoreh De'ah* 228:20**. The question discussed by Rema in *Yoreh De'ah* 228 is that of a couple who had sworn to marry each other and she requests annulment of her oath (*hatarah*) on the basis that she has discovered faults in him to the extent that he has become repulsive to her. If she produces good evidence of his unacceptable nature (*'amatlah*), *bet din* can annul her oath even without informing him. Rema concludes that even if she were married to him and says that she cannot stand him, he is obliged to divorce her so how much more so can she be released from an oath to marry him.

The following approaches to the apparent contradiction in Rema may be considered:

A. Rema can be understood as saying that even if she were married to him and says that she cannot stand him, he is obliged to divorce her **according to the Rambam etc.** (= *Taz* there) so in this case, where she is not yet married to him, **all** would agree she may be released from her oath.

B. Even if Rema were contradicting himself, ruling in *Yoreh De'ah* like Rambam and in *'Even Ha'Ezer* like Rabbenu Tam, we would follow his opinion in *'Even Ha'Ezer* because there he is dealing with the very case of *me'is 'alai* whereas in *Yoreh De'ah* he is dealing with oaths and vows and mentions divorce in the case of *me'is 'alai* only tangentially.

C. It is preferable, however, to say that both in *YD* and *EH* Rema is expressing his own halakhic opinion (unlike A) and there is no contradiction (unlike B) but that Rema maintains that there is a legal obligation to divorce but compulsion cannot be applied (though, as mentioned in (xii), Rema does not reject coercion entirely). If this is correct, Rema would agree to the application of all pressures excluding violence and excommunication (*harḥaqot de'Rabbenu Tam*). As mentioned above (xii) the *Noda' Bi-Hudah* quotes the Rema's "obliged to divorce" in *YD* without raising the apparent contradiction from *EH*, which implies that he too sees no contradiction at all. The Rema would then be following the ruling of Rabbenu Yonah who says that in a case of *me'is 'alai* although we do not coerce him we tell him that he is commanded to divorce her and if he does not do so there applies to him the saying of our sages: "If anyone transgresses rabbinic law it is permitted to call him a sinner".[58] We find this view also in Me'iri in the name of 'some of the sages of the [previous] generations'.[59]

The difficulty with this solution is that in *EH* 77:2 Maran states only "if the husband wants to divorce", which clearly means that there is no obligation, yet the Rema makes no comment. However, it could be that he relied on his earlier gloss in *YD* and on his subsequent comment in *EH* 77:3 where reference is made to places where the custom is even to coerce in cases of *me'is 'alai* which proves that Rema has not excluded even coercion from the *Halakhah*.

The last two sources are far more promising than anything preceding them but they still do not justify the claim made by Morgenstern dealt with in the next paragraph:

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58 Rabbi Ovadyah Yosef, *Yabia' 'Omer*, III, *EH*, 18:13.

59 See *ET* VI, col. 422, at note 968.

12.2.14 (xiv): **"This is the law we follow today."** Rabbi Morgenstern surely knows that this is not so — neither for Ashkenazim nor for Sefaradim. It is true that the opinion of the *Sabora'im*, *Ge'onim*, Rif, Rambam etc. can be utilised as a *safeq* in order to create a *sefeq sefeqa'* — see Rabbi Ovadyah Yosef in §12.2.7 above — but that is far from saying that "this is the law we follow". An argument can be put forward for talmudic authority for the coercion of the husband of a *moredet* (see note 56) and one can debate the state of the text of *Sefer Ha-Yashar le-Rabbenu Tam* in which one section of text has Rabbenu Tam rejecting coercion and another has him accepting it. These arguments and those of Dayyan Waldenberg (§12.2.12) may one day win the acceptance of the *Gedoley Ha-Dor* allowing us to revert to the coercion of a *moredet*'s husband but Rabbi Morgenstern should not write as if that has already happened. I would finally note that I am very surprised that Rabbi Morgenstern does not mention the *responsum* of Rabbi Y. Herzog (*Heikhal Yitsḥaq EH* I:2) who takes a similar approach to that of Dayyan Waldenberg.

13.0 **I D 86:** *'Or Zorua'* 765.

13.1 Comments: The correct reference is ***'Or Zarua'* 761**. This case of blindness in the husband is dealt with above under **I D 7** (§4.2.2).

14.0 **I D 93**

14.1 Morgenstern: Even if the defect — with which she says she cannot cohabit — appeared after the marriage coercion can be applied:

(i) Rabbi Aryeh Leib Tzinz, *Meshivat Nefesh*, chapter 15.
(ii) *'Avnei Milluim* chapter 44. If the husband becomes an apostate after the marriage he is forced to divorce her. If coercion cannot be applied the marriage is annulled —
(iii) *Minḥat Ḥinnukh*, chapter 20-25. They explicitly state that the marriage is annulled retroactively. See
(iv) *'Otsar Ha-Posqim*, beginning of chapter 17 and
(v) *Seridey 'Esh*, book 3, chapter 25.

14.2 Comments:

14.2.1 (i): There are four sections in **Rabbi Tzinz**'s *responsa*. As Rabbi Morgenstern does not identify the section he refers to I had to consult all four. The only *responsum* that is even remotely relevant is ***EH* number 15 in section 2**. This concerns a married woman whose husband has no children but does have an apostate brother (or one whose whereabouts are unknown). Is it permitted for her husband to divorce her so that she should not need *yibbum* and for her to remain living with him [without *qiddushin*]?

This *responsum* mentions that where the brother is "smitten with boils" we force him to accede to *halitsah*, but I cannot find a reference anywhere in this *responsum* to forcing the **husband** to divorce his wife in this and similar cases. However, it is unanimously agreed,[60] based on the Mishnah,[61] that in all cases of serious defects developing which the wife cannot bear one can employ coercion. So what would be the point of quoting *Meshivat Nefesh* as a source for this ruling even if it were reported there?

14.2.2 (ii): The ***'Avney Millu'im*** referred to is, presumably, the commentary of Rabbi Aryeh Leib Ginsberg on *'Even Ha-'Ezer*, so that the reference is to his commentary on chapter 44 of *'Even*

60 *SAEH* 154:1.

61 *Ketubot* 7:9,10 (77a). See the summary in *ET* VI cols. 415-16.

Ha-'Ezer. I cannot find any mention there of forcing the husband to divorce his wife because he has become an apostate. The only related material is the ruling in the ***Shulhan 'Arukh 'Even Ha-'Ezer*** **there (44:9)** that if an apostate marries a Jewess his *qiddushin* are fully effective and she requires a *get* to be free of him but the *'Avney Millu'im* makes no comment on that.

14.2.3 (iii): In the absence of evidence to the contrary, one must presume that ***Minhat*** *Hinnukh***, chapter 20-25** means the famous commentary of that name by Rabbi Yosef Babad[62] on commandments (= chapters) numbers 20-25 in the *Sefer Ha-Hinnukh*. However, there is not the remotest connection between those chapters (which deal with *Pesah*, firstborn donkeys, *Shabbat* and belief in G-d) and Morgenstern's claim that "if coercion cannot be applied the marriage is annulled" and that "they explicitly state that the marriage is annulled retroactively"!

14.2.4 (iv) ***'Otsar Ha-Posqim*****, beginning of chapter 17**. I don't know how far the 'beginning' of chapter 17 (which is enormous) extends. Perhaps he refers to 17:3, s.v. שיטה ב (beginning), where the opinion is quoted that the acceptance of the testimony of one witness in a case of *'iggun* is based on the principle of retroactive annulment but that has nothing to do with annulment being used instead of coercion.

14.2.5 (v):***Seridey 'Esh*****, book 3, chapter 25**. This is a *responsum* to Rabbi Herzog, Ashkenazi Chief Rabbi of Israel, concerning four women who had arrived in Israel from Yemen with their children but whose husbands had apostatised to Islam and remained in Yemen. It was impossible to obtain from them a *get*, or even a document of authorisation (*harsha'ah*) to write and deliver one. In chapter 3 of this *responsum* end of paragraph 7, Rabbi Weinberg writes that it is possible that *Tosafot* agree that if the husband became an apostate we would assume that the wife did not marry on that understanding [so no *get* would be needed] and he suggests that Rashi also might share this opinion. This is presumably the "annulment" to which Morgenstern refers (but see further the opinion of the *Get Pasut*). However, he fails to mention that Rabbi Weinberg cites opposing opinions and adds (chapter 3, paragraph 7):

> "I know that all the things that I have written are no more than logical arguments and suggestions not firmly based upon sources. The matter requires investigation and profound research in the Talmud and *Posqim*."

He also adds at the end of the responsum, s.v. *Uvnidon*:

> "….or one can use as an adjunct (*senif*) that in a case of an apostate we say that on that understanding she did not marry and according to the opinion of the *Get Pashut* one can argue that in such a case the Sages annulled her marriage."

Thus Rabbi Weinberg goes no further than using annulment in the case of apostasy **as a *senif*** to other arguments for leniency, and even then he does so only **in theory**. This is a far cry from Morgenstern's claim.

15.0 **I D 96**

15.1 Morgenstern: "But as we mentioned earlier, we rely on *Taz 'Even Ha'ezer* 17:15; *Shakh* 242;[63] *'Arokh HaShulkhan*[64] *Yoreh De'ah* 110[65] who permit us to rely on minority opinions to free an

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62 I have been unable to find any other work with this name.

63 *Shakh*, Y*D* 242, *Pilpul be-Hanhagat Hora'ah*. See also his words in *Nequdot Ha-Kesef, YD* 293.

64 This work is often referred to (as here by Morgenstern) as if its name were an inversion of *Shulhan 'Arukh* — although *'Arukh Ha-Shulhan* is meaningless. Its title in reality is *'Aro**k**h Ha-Shulhan* after Isaiah 21:5.

‘agunah.”

15.2 Comments:

15.2.1 (i): The ***Taz ’Even Ha‘ezer* 17:15** accepts the view that in an emergency — such as an insoluble problem of *‘iggun* — one can rely on a singular opinion for leniency although the case is one of Torah law.[66]

15.2.2 (ii) The ***Shakh,* Y*D* 242*, Pilpul be-Hanhagat Hora’at Issur weHeter***, however, maintains that an individual view can be relied on in an emergency only in a case involving purely rabbinic law. If the problem involves Torah law the majority must be heeded.

15.2.1 (iii): The ***‘Arokh Ha-Shul*ḥ*an Yoreh De‘ah* 110:111** (end), rules definitively like the *Shakh*.

15.3 Thus, Rabbi Morgenstern is quoting in support three opinions, two of which are actually against him unless, of course, the particular *‘agunah* problem happened to involve only rabbinic law.

15.3.1 There are, as one might expect, many more than these three disputants involved in this question and Rabbi Morgenstern would have done better to quote those authorities who agree with the *Taz* that even where a Torah prohibition is involved one can rely in an emergency on a lone, lenient opinion. For example: *‘Or Zarua‘* II *Sukkah* sec. 306; *Responsa* of Rashba I no. 253 (as understood by Rashbash *Responsa* no. 513); *Get Pashut*, *Kelalim*, sec. 6; Rabbi M. Y. Zweig, *Responsa ’Ohel Mosheh, Mahadura’ Tinyana’*, 123:2.

15.3.2 It would also have helped his case to refer to the observation of Rabbi A. Y. Kook in the tenth chapter of the introduction to his work *Shabbat Ha-’Arets*. Rabbi Kook argues there that those who maintain that the majority rule is of Pentateuchal gravity even when operating among sages who never debated the issues face to face, as is the case when we nowadays follow *rov posqim*, will also rule that one cannot rely on a minority — let alone a single individual — against a majority because the Torah itself has ruled in accordance with the majority and the minority is therefore, halakhically non-existent. According to those, however, who rule that in any *maḥloqet* where the disputants are *in absentia* of each other the majority rule is not applicable in Torah law (where the situation would be considered one of doubt) and is applied only by rabbinic enactment, we may rely, in an emergency, on a single opinion even if the question is one of Torah law.[67]

15.3.3 This would have important consequences according to the *responsum* of Rabbi Ovadyah Yosef in which he reaches the conclusion that there is ample evidence to demonstrate that it is the second of the two aforementioned possibilities[68] that is accepted in *Halakhah*.[69] Accordingly, one could indeed rely in an emergency situation of *‘iggun* on a lone opinion.

15.3.4 Nevertheless, it must be taken into account that the *Shakh*, who forbids relying on a minority

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65 Chapter 110, end of para. 111.

66 See my comments on this *Taz* s.v. **I C 54** (i)(a) at §3.2.1.

67 See Abel, “*Halakhah* ... Consensus”, §1.2 at note 3. Although this approach regards *maḥloqet ha-posqim* as one of doubt and, therefore, should the question be one of Torah law, we should not be allowed to rely on a lenient minority because *safeq de-’Oraita’ le-ḥumra’*, Rabbi Yosef has shown that the view of the Rambam — that *safeq de-’Oraita’ le-ḥumra’* is only a rabbinic regulation — is the dominant halakhic opinion. Cf. “Halakhah — Consensus”, §IV.12 at n.110.

68 I.e. that in any *maḥloqet* where the disputants are *in absentia* of each other, the majority rule is not applicable in Torah law (where the situation would be considered one of doubt) and is applied only by rabbinic enactment.

69 See Abel, “*Halakhah* ... Consensus”, §IV.13 at n.111.

view even in an emergency in the case of a Pentateuchal prohibition, also has many supporters.[70] It would be interesting to discover if the *Shakh* and his school all maintain the first view of the majority rule in *mahloqet ha-posqim*[71] or, even if they do not, if they follow the Rashba and regard *safeq de-'Oraita' le-ḥumra'* as Torah law.[72] If they indeed maintain either of these opinions this would account for their refusal to rely on a minority view even in an emergency in cases involving Torah law. However, if we accept the arguments of Rabbi Yosef who maintains, on the one hand, that in any *maḥloqet* where the disputants are *in absentia* of each other, the majority rule is not applicable in Torah law and the situation remains one of doubt and, on the other, that the consensus of scholarly opinion follows the Rambam that *safeq de-'Oraita le-ḥumra'* is only rabbinic in nature, it would seem that we could adopt the view of the *Taz* and rely, in an emergency, on a single lenient authority even in a case of Torah law including, as the *Taz* says, *'iggun*.

16.0 **I D 105**

16.1 Morgenstern: "Even if he be normal in all respects but in one area of his behaviour he acts consistently irrationally, the marriage can be annulled. See *Torat Gittin* (by the author of the *Netivot HaMishpat*) *'Even Ha'Ezer* Chapter 121; see *'Igrot Mosheh, 'Even Ha'Ezer* 3, nos. 45 & 46."

16.2 Comments:

16.2.1 (1): Rabbi Feinstein[73] actually refers to the ***Torat Gittin* 121:5** as saying that the *qiddushin* of an imbecile are not effective even if he is of sound mind as to the concept of marriage and his madness is apparent in some other specific area.[74]

16.2.2 (ii): **Rabbi Feinstein**, in the above-mentioned **no. 46**, disputes this and argues that if he is of sound mind regarding marriage (he realises the significance of *qiddushin* and *nissu'in*) his *qiddushin* are effective although he displays signs of madness in other areas. Nevertheless, in a case where she discovered this fact after the marriage and left as soon as she discovered it, there was never any marriage because it was a mistaken acquisition (מקח טעות). In **no.45** he adds that even though (in that case) she left only 7 weeks later it could be that it took her 7 weeks to discover the truth about him or, **even if she became immediately aware of the truth, it may be that she had an acceptable reason for not leaving at once so that her staying on for those 7 weeks does not imply that she had resigned herself to the situation**.[75]

Thus, although Rabbi Morgenstern is right in quoting the *Torat Gittin* in support of his position, he is wrong in quoting the *'Igrot Mosheh* as agreeing with this, because Rabbi Feinstein says explicitly that he does not agree!

Rabbi Morgenstern is also misleading us when he speaks here of annulment. The *Torat Gittin*, who halakhically classifies one who is insane in **any single area** of his behaviour as a *shoteh*

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70 See the summary in *ET* IX cols. 260-262 and the footnotes thereon.

71 I.e. that in any *maḥloqet* where the disputants are *in absentia* of each other, the majority rule is applicable even by Torah law and, therefore, the minority is considered non-existent. I subsequently discovered that the *Shakh* does indeed adopt this opinion; cf. *YD* end of *siman* 242, *Pilpul beHanhagat Hora'at 'Issur weHeter*.

72 See Abel, "*Halakhah* ... Consensus" §IV.12 at n.110.

73 In *'Igrot Mosheh, 'Even Ha'Ezer* 3, no. 46

74 I consulted *Torat Gittin* to *EH* 121:5 and found no mention of this.

75 I.e. so it is not a case of סברה וקבלה. Cf. *'Arokh HaShulhan, EH* 39:13 who speaks (in a similar case) of their remaining together a long time but does not specify.

incapable of contracting a marriage, would say that any 'marriage' of such an imbecile simply never took place. Thus Morgenstern should not say "the marriage can be annulled" but "the marriage is not legally recognised" or words to that effect.

Similarly, even according to Rabbi Feinstein who would recognize the marriage of one who comprehends the significance of married status though he is afflicted with insanity in other areas, the marriage would still be regarded as non-existent if the bride was unaware of this defect in the groom (and left as soon as possible after discovering the truth) because such a marriage would be a mistaken acquisition on her part. This, again, is not annulment.

17.0 **I D 105 end-106**

17.1 Morgenstern: "If few if any women would agree to remain married, then we annul the marriage. See *Ohel Moshe* Vol. II *responsa* 23. This is based on *Chelkes Yoav Responsa* 24 and *Otzer Haposkim Even Hoezer* Chapter 1."

17.2 Comments:

17.2.1 (i):***'Ohel Mosheh* Vol. II *responsa* 23**. The reference should be II **1**23 not 23; see §10.2.3, above.

In paragraph 8 of this *responsum*, Rabbi Zweig examines the question of *miqah ta'ut* and he concludes that any serious blemish, unknown to the spouse at the time of the *qiddushin*, such as total blindness[76] or her being an *'ailonit*,[77] would constitute *miqah ta'ut* and render the *qiddushin* void. He subsequently concludes that the same can be said for the blemish of apostasy.

He adds the proviso that if at least one other rabbi — "great in Torah and expert in delivering halakhic rulings" — will agree with him, he will lend his name to permitting this woman to remarry without a *get*. The reason for this reticence is that the *Noda' Bi-Hudah*[78] took a strict line in a case such as this and Rabbi Zweig did not want to stand alone against so great and revered an authority.

Hence:

(i) Rabbi Morgenstern should have mentioned the proviso.
(ii) "If few if any women would agree…" I did not find in the *'Ohel Mosheh* justification for the 'few'.
(iii) "…then we annul the marriage." The marriage is considered as having been contracted in error and is therefore non-existent. It is, therefore, inaccurate to describe this case as one of annulment because there is no marriage to annul.

17.2.2 (ii) ***Responsa Ḥelqat Yo'av* 23.** Morgenstern means **Vol. I**, ***EH*** 23. The only statement in this *responsum* which is relevant to Morgenstern's claim ("If few if any women would agree to remain married, then we annul the marriage.") is Rabbi Yoav Yehoshua's reference to the Rema (*EH* 154:1), who rules that where she was aware of serious blemishes in the groom before the marriage we say that she accepted them whereas if they developed after the marriage we apply coercion.

The first criticism is that there is here no mention of annulment but, on the contrary, coercion. Secondly, one must ask what the point is of quoting a *responsum* in *Ḥelqat Yo'av* when the only

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[76] Cf. §4.2.2.

[77] Lit. "ram-like" (see *Ketubot* 11a) in the sense of masculine = without womb, incapable of conception.

[78] By Rabbi Ye5ezqel Landau (19th century).

relevant piece of the *responsum* is a quotation of the Rema in the glosses to *Shulhan 'Arukh*?[79]

17.2.3 (iii): ***'Otzar HaPosqim, 'Even Ha'Ezer*, Chapter 1**. I passed over this one! The chapter covers 88 folio pages and not only did Rabbi Morgenstern fail to give an exact citation, he did not even take the trouble to indicate on which of Rabbi Caro's 14 paragraphs, into which this chapter of *'Even Ha 'Ezer* is divided, the relevant quotation is to be found.

18.0 **I D 107-109** (Chapter X — Irreligious on Part of One of the Spouses)

18.1 Morgenstern: "Such a marriage is at most rabbinic. The majority of authorities disagree, but to free an *'agunah* we will use the above as grounds for annulment. See *Minhat Hinnukh*, no. 203; *Seridey 'Esh* III:25; *'Avney Melu'im* 44; *'Otsar haPosqim* beginning of chapter 17; and others cited by *'Even Ha'Ezer* 44 in *Tur*."

18.2 Issues arising from the argument here are discussed extensively in the Appendix below.

19.0 **I D 112-113**

19.1 Morgenstern: "One of the *senifim*, adjuncts, that our *bet din*, Rabbinical Court, uses to annul a marriage is the following: The *Tur 'Even Ha'Eezer* 44 cites the opinion of Geonim that one who violates the Sabbath publicly is deemed a non-Jew. As such, he cannot contract a marriage. Even if he contracted a marriage, the marriage is deemed null and void. In the contingency that no *get* can be obtained from him, the Rabbinical Court can use such fact, that the husband violates the Sabbath publicly, to annul the marriage, in addition to other factors."

19.2 Comments

19.2.1 ***Tur 'Even ha-'Ezer* 44.** "If a Jewish married, his marriage is valid and she needs a divorce [to be free] of him. Some say that if he is an apostate to the extent that he publicly desecrates the Sabbath or worships false gods the Law regards him fully as a non-Jew so that his marriage is ineffective but this does not appear correct."

From the second opinion cited here (the '*yesh omerim*'), we can deduce that:

(**1**) an apostate, as regards *qiddushin*, is defined as one practising idolatry or public Sabbath desecration. How much more so would be included one who has abandoned all the commandments and one who has adhered to another faith.

(**2**) since the apostate is considered a gentile, it would make no difference whether or not the bride was aware of his status and, presumably, the marriage would be equally ineffective if the bride were an apostate.

For further discussion of related sources, see the Appendix, below.

19.3 Morgenstern: "Even if the man was religious and then becomes one who violates the Sabbath publicly, the court still can annul the marriage. The reasoning is based on Rashi to *Yevamot* 49.[80] If such a man *ab initio* wanted to get married, the Rabbis would refuse.[81] Even if he contracted a halakhic marriage, the opinions differ if the marriage is null and void *post factum*, or at the most if it is a marriage having rabbinical status only. See Maharsham, *Levushei Mordecai Even Ha'Ezer*, *Seridey 'Esh* 3: 25."

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[79] Cf. above, §14.2.1.

[80] See below §22.2.6.7.2.

[81] Morgenstern means that according to this Gaonic view marriage with an apostate would be halakhically impossible.

19.3.1 Comments: For Maharsham, see below §21.2.6.7.1-2. The reference to *Levushei Mordecai Even Ha'Ezer* is vague, to say the least, and is presumably directed at 44:9, though what Morgenstern wants to argue from that source I cannot imagine because the *Levush* rules that the marriage of an apostate is as fully valid as that of any other Jew and **he does not bring any dissenting opinion**. For *Seridey 'Esh* III:25 see below §21.2.6.2.

19.4 Morgenstern: "Nevertheless, the literature citing the *Rishonim* as well as ***'Aroch HaShulhan 'Even Ha'Ezer* 140:19** state that we will have the *mumar* — the Sabbath violator — give a *get*. The question is posed: if the *mumar* cannot contract a halakhic marriage because he is like a non-Jew, how can he then contract the *get* — the Jewish divorce? The answer is that by the giving of the *get*, the marriage is retroactively annulled. See ***Responsa Minhat Yitsḥaq* 10:126**. However, ***Minhat** Hinnukh* **203** has another theory. Basing himself on Rashi *Yevamot* 49, where Rashi claims that the marriage explodes. If any given circumstances would render the contraction of a marriage impossible, then if those circumstances arose within an already existent marriage such a marriage explodes. Thus if a marriage is contracted by a religious couple and the husband becomes irreligious (Sabbath violator) publicly, such a marriage explodes."

19.5 Comments on 19.4:

19.5.1 (1): ***'Arokh HaShulhan 'Even Ha'Ezer* 140:19** does indeed speak of the requirement for an apostate husband to divorce his Jewish wife.

19.5.2 (2): ***Minhat Yitsḥak* 10:126**. This *responsum* successfully attempts to remove the status of bastardy from a Jewish girl of irreligious background who had become observant and was at that time attending an orthodox seminary. The girl had been born during the second marriage of the mother who had no *get* from her first husband who had abandoned her, joined another religion and married a gentile.

It discusses, as Morgenstern says, the possibility of retroactive annulment if the father of the girl, the apostate, could not be persuaded to agree to grant the mother a *get*.[82] At the end of the *responsum*[83] there is discussion of the Maharsham's employment of the argument for dissolution of a marriage at the moment that the husband abandons Judaism and joins another faith.[84]

Thus Morgenstern is incorrect in writing "The answer is that by the giving of the *get*, the marriage is retroactively annulled. See *Responsa Minḥat Yitsḥaq* 10:126. However, *Minḥat Ḥinukh* 203 has another theory. Basing himself on Rashi *Yevamot* 49, where Rashi claims that the marriage explodes." This implies that *Minḥat Yitsḥaq* did not mention the theory of 'explosion' as Morgenstern calls it. However, as I have mentioned, this theory **is** referred to at the end of Dayyan Weisz's *responsum*. The only new point here is the fact that there is a *responsum* touching this subject in *Minḥat Yitsḥaq*, but this *responsum* does not contain any material not previously mentioned by Morgenstern. **Morgenstern also fails to mention that Dayyan Weisz refuses to classify contemporary public Shabbat desecrators as apostates — see below, §21.2.6.5.**

19.5.3 (3): ***Minhat Hinnukh* 203** based on Rashi *Yevamot* 49 — see §§19.4, 19.5.2 above, and Appendix §21.2.6.7.2 below.

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82 This suggestion was made by the *Get Pashut*: see §22.2.6.3 no.14.

83 S.v. ולא גמ.

84 See §22.2.6.7.1 above.

19.6 Morgenstern continues: "Thus, argues the *Minhat Hinnukh*, a solution can be found to annul the marriages of women who are unable to acquire a *get* from a husband who becomes a Sabbath violator publicly during the course of the marriage."

19.6.1 Comments: This wording makes it seem that the *Minhat Hinnukh* is seeking a solution to a practical problem — as if he accepts as *Halakhah* the opinion that regards an apostate as a gentile and therefore invalidates his marriage and his divorce. However, this is not true. The *MH* is seeking a solution to a **theoretical** halakhic problem, namely: according to those Geonim who negate the marriage of an apostate, how would it be possible for a woman to be divorced from a husband who had been a believer at the time of her marriage to him and later became an apostate?

19.7 Morgenstern continues: "Maharsham, though he considers such an option in his *Responsa* 2:110,111, does not feel comfortable in endorsing this procedure unless, in addition to using this as an adjunct, other defects are discovered that will defeat the marriage."

19.7.1 Comments: Again, this makes it appear that *MH* did 'feel comfortable in endorsing this procedure' (by itself) and that Maharsham too considers such an option (using this procedure by itself) but opted for employing it only as a *senif*. The truth is that *MH* did not say that he would even accept it as a *senif* in practice[85] and the Maharsham never considered relying on it alone but from the start intended to use it only as a *senif* — see §21.2.6.1.1 above.

20.0 **I D 114-115**

20.1 Morgenstern: "The same reasoning applies to a man who becomes abnormal — crazy — although at the time of the wedding he was normal.[86] See: *Peri Megadim, Petiḥah Kolelet, 'Oraḥ Ḥayyim*, 2:1, page 8 *re* a *shoteh* or abnormal person; *'Even Ha'Ezer* 44:1,2; *Torat Gittin* (by the author of the *Netivot HaMishpat* and the *Ḥawwot Da'at*) 121:5; *Seridey 'Esh*, III:25; *Meshiv Davar* 79."

20.2 Comments:

20.2.1 (i): ***Peri Megadim, Petiḥah Kolelet,'Oraḥ Ḥayyim*, 2:6.** (**1** has no relevance and **p.8**, without information regarding the edition, is of no use.)

This simply tells us that the insane cannot contract a marriage even in Rabbinic Law, as a result of which a woman who went through the form of marriage with an imbecile and later received a *get* from him would be permitted to marry a *kohen* because since the marriage would not be legally recognised neither would the divorce. I could not find here any mention of Morgenstern's claim that just as an imbecile would not have been able to contract a marriage had he been insane at the time of *qiddushin* so, if he were already married and later became insane, his marriage should disintegrate. **This is not surprising since the Mishnah**[87] **records that in such a case it is impossible for a divorce ever to take place — as mentioned later in this paper.**[88]

20.2.2 (ii): ***'Even Ha'Ezer* 44:1, 2.** All that is stated here is that the marriage of a deaf-mute (*ḥeresh*) is only rabbinic and the marriage of an imbecile (*shoteh*) is not legally recognised at all.

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85 *Minhat Hinnukh* is a work of halakhic discourse which does not usually give halakhic rulings.

86 I.e. just as he would not have been able to contract a marriage had he been insane at the time of *qiddushin* so, if he were already married and later became insane, his marriage should disintegrate.

87 *Yevamot* 112b. Cf. *EH* 121:6. See *ET* VI col. 356 **from where it is clear that there is no dissenting opinion.**

88 See §22.2.6.7.2 below.

20.2.3 (iii): ***Torat Gittin* 121:5.**[89] All we are told here is that a man must be of sound mind during the writing and delivery of the *get* for his wife.

20.2.4 (iv): ***Seridey 'Esh* III:25.** I found no mention at all in the 31 pages of this *responsum* of the *shoteh*'s marriage.

20.2.5 (v): ***Meshiv Davar* 79.** There are 5 parts to these *responsa*! I:79 does not seem to exist; II:79 deals with questions regarding writing the tetragrammaton in Scrolls of the Law; III:79 does not seem to exist; IV:79 discusses matters of divorce and annulment[90] but is not relevant here; V:79 discusses the writing of a document of authorisation for a *get* (*harsha'ah*) and is totally irrelevant to the subject under discussion. I therefore do not know what Morgenstern refers to here.

20.3 It is clear that **not one** of these sources supports in any way Morgenstern's claim that a marriage in which the husband becomes insane would disintegrate. Indeed, as I mentioned above, it is explicitly stated in the Mishnah and unequivocally accepted in the *Halakhah* that, in cases of insanity, no such disintegration would take place.

Appendix

21.0 **I D 107-109** (Chapter X — Irreligious on Part of One of the Spouses)

21.1 Morgenstern writes: "Such a marriage is at most rabbinic. The majority of authorities disagree, but to free an *'agunah* we will use the above as grounds for annulment. See *Minhat Hinnukh*, no. 203; *Seridey 'Esh* III:25; *'Avnei Melu'im* 44; *'Otsar haPosqim* beginning of chapter 17; and others cited by *'Even Ha'Ezer* 44 in *Tur*."

"See *'Otsar haPoskim* on Chapter 44 re: *mumar* for [an] encyclopaedia of authorities who annul his marriage. Rav Aaron Volkin [e]xpands the definition of mumor to cover one not observant. Thus if the husband does not observe the Sabbath, kasher laws, and the purity laws of *nidah*, marriage to him would be at most rabbinic according to many authorities."

"Some authorities hold that even if he becomes irreligious after the marriage, the marriage is annulled. See *Baḥ, 'Even Ha'Ezer* 157; also *Tur 'Even Ha'Ezer* 44 cites authorities that a marriage to a *mumar* — irreligious person — is not binding by Divine Law. It is only at most rabbinic. See *Seridey 'Esh* III:25, page 73; *Responsa Maharam Mintz*, no. 105 cited by *Seridey 'Esh* III:25 page 71. Others hold only if he was irreligious before the marriage. Tsuvos (?) Maimonides, Laws of *'Ishut*, 29."

"The reason given is that no Jewish religious woman would agree to remain married to such a man דאדעתא דהכי לא התקדשה. She did not agree to such circumstances — that the husband remain irreligious. Even if a woman agrees to be married to a religious man whose brother is not physically well — מוכה שחין — she would never agree to remain married if the brother is irreligious. She would never have taken a chance to be at his mercy if her husband dies without children. She then would be forced to marry her brother-in-law or be freed by *halitsah*. If he refuses[s] she is an *'agunah* — chained. If this did occur we will state that the marriage to her husband is annulled. Consequently, she need not marry the brother-in-law, neither does she need

89 See §16.2.1 above.

90 Namely, enactment by the town council to void *qiddushin* given without bride's father's consent etc. Also discussed is the rationale, suggested by (a) *Tosafot* (b) Rashbam and Rashba and (c) Rashi and Ramban, behind the Sages' declaring valid, by means of *'afqe'inho*, a *get* which is void in Torah Law.

his *halitsah* — a process that frees her. *Seridey 'Esh* III:25 cites authorities that if the identical defect — irreligious or מוכה שחין (physically ill) occurs with the husband before or after the marriage, the above cited authorities would annul the marriage."

"Some authorities hold that being irreligious is grounds for divorce or annulment only if the irreligious party forced the other spouse to violate Jewish Law, such as cooking non-kasher food and not informing the spouse about this; or bringing in non-kasher food and the spouse, not knowing, eats such food. Likewise, forcing the spouse to have sex when she is in the state of *niddah*. Vice versa, the wife not telling the husband that she is *niddah* and the husband having sex with her. See *'Even Ha'Ezer* 115 and *'Even Ha'Ezer* 154."

"Other authorities hold that even if the religious party is not deceived or forced, the irreligiosity of the spouse is sufficient to prevent a Divine marriage. *'Even Ha'Ezer* 115 and 154; *'Otsar haPosqim* on Chapter 44; *Minhat Hinnukh*, 203; *'Avney Millu'im* Chapter 44; *'Otsar haPosqim* beginning chapter 17."

"We are not about to annul marriages where one spouse is irreligious but in those cases that a woman is an *'agunah* we will use the irreligiosity of the husband as another ground to free the woman — by annulling the marriage. Certainly, as far as the husband is concerned, when he wants the divorce, we will insist that he give a *get*. We will not annul the marriage for him. We will be strict and follow the opinions of every authority."

21.2 Comments: The authorities quoted by Morgenstern in the above paragraphs are:

1. *Minhat Hinnukh* 203
2. *Seridey 'Esh* III 25
3. *'Avney Millu'im* 44
4. *'Otsar ha-Posqim* beginning of 17
5. *Tur 'Even ha-'Ezer* 44
6. *'Otsar ha-Posqim* 44
7. *Zeqan 'Aharon*
8. *Baḥ, 'Even ha-'Ezer* 157
9. *Tur 'Even ha-'Ezer* 44
10. *Seridey 'Esh* III 25 p.73
11. Maharam Mintz 105 quoted in *Seridey 'Esh* III 25 p. 71
12. *Yad, 'Ishut* 29
13. *Seridey 'Esh* III 25
14. *'Even ha-'Ezer* 115
15 *'Even ha-'Ezer* 154

Numbers 1-5 are cited as evidence for the statement: "Irreligious on Part of One of the Spouses — Such a marriage is at most rabbinic. The majority of authorities disagree, but to free an *'agunah* we will use the above as grounds for annulment".

Before examining the sources for this claim, it should be pointed out that, considering the fact that those who regard this marriage as fully valid require a *get* by Torah law and those who regard it as rabbinically valid require a *get* by rabbinic law and those who regard it as invalid require no *get* because there has not been, according to them, any marriage, the question of annulment does not arise here.

21.2.1 **1. *Minhat* *Hinnukh* 203.** This can be found in the New York 5720 edition, on page 238 column 2

beginning on line 8: "According to some Geonim who say that he[91] cannot divorce[92] why are we not concerned[93] that afterwards he will not be able to divorce? According to Rashi's argument there is no problem because Rashi maintains that if the *qiddushin* of a wicked man[94] are not effective then when a husband becomes an apostate [during a valid marriage] the *qiddushin* become undone.[95] It is for this reason that the wife of Eliyahu and the wife of Rabbi Yehoshua' ben Lewi could remarry after their husbands were transformed into angels although they had not been divorced and their husbands had not died. Transformation into a gentile has the same effect, in this case, as transformation into an angel!

Rabbi Babad refers to the *'miqtsat ge'onim'* — a minority of the Babylonian Geonim — who maintained that an apostate is treated by Torah law as a gentile so that his marriage is void. Even if he was a law-abiding Jew at *qiddushin* and later became an apostate, a *get* would not be needed because, on this view, a Jewish apostate **is** a gentile and as marriage cannot exist between a Jew and a gentile the marriage simply ceases to exist. It would make no difference whether it was the husband who apostatised or the wife.

Note:

(1) There is no definition of apostate here.[96]
(2) Morgnstern's translation of *mumar* as irreligious person instead of apostate is grossly misleading.
(3) It is apparent from this *Minhat Hinnukh* that:
    (a) it is irrelevant whether the husband or wife apostatised and whether this occurred before or after the marriage.
    (b) these Geonim would require no adjunct (*senif*) to free the wife without a *get* but we, though we could use this opinion as part of a double or triple doubt, could not rely on it alone except, perhaps, according to the *Taz* and his school who, in an emergency, allow reliance on even a single view even where the question is one of Torah law. (See §§3.2.1 and 15.2.1 above.)

21.2.2 **2. *Seridey 'Esh* III 25** This is a *responsum* to Rabbi Herzog, Ashkenazi Chief Rabbi of Israel, concerning four women who had arrived in Israel from Yemen with their children but whose husbands had apostatised to Islam and remained in Yemen. It was impossible to obtain from them a *get* or even a document of authorisation (*harsha'ah*) to write and deliver one. In chapter 3 of this *responsum*, end of paragraph 7, Rabbi Weinberg writes that it is possible that *Tosafot* agree that if the husband became an apostate we would assume that the wife did not marry on that understanding [so no *get* would be needed] and he suggests that Rashi also might share this opinion. This is presumably the 'annulment' to which Morgenstern refers. However, he fails to mention that not only does Rabbi Weinberg bring opposing opinions but that he also adds (chapter 3 paragraph 7):

> "I know that all the things that I have written are no more than logical arguments and suggestions not firmly based upon sources. The matter requires investigation and profound research in the Talmud and *Posqim*."

He also adds at the end of the *responsum*, s.v. *Uv-nidon*:

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91 An apostate.

92 Because he is not considered a Jew.

93 If he married before apostatising.

94 Here = apostate.

95 At that moment. When the husband ceases to be Jewish the marriage must end as surely as it must when he dies.

96 See the discussion in §§22.2.6-22.2.6.2 below.

> "….or one can use as a *senif* that in a case of an apostate we say that on that understanding she did not marry and according to the opinion of the *Get Pashut* one can argue that in such a case the Sages annulled her marriage."

Rabbi Weinberg suggests that apostasy after the *qiddushin* may create a situation of *qiddushey ta'ut* or one where the Sages applied annulment, but he allows this only as a *senif* and only in theory.

In this case:

(**1**) we are dealing with people who left Judaism for another faith (which everyone agrees is considered apostasy even nowadays) not who were merely 'irreligious'.

(**2**) both partners were religious at marriage but the husband later became an apostate. Rabbi Weinberg says that (according to some authorities) the marriage would dissolve either due to mistaken transaction or (according to the *Get Pasut*) due to annulment by the Sages.

(**3**) the argument for mistaken transaction/annulment is allowed only **as a *senif***.

21.2.3 **3. *'Avney Millu'im* 44.** The reference can only be to 44:9 where the *SA* speaks of the *qiddushin* of an apostate. The *'Avney Millu'im* makes no comment on this paragraph. It is, thus, impossible to say to what Rabbi Morgenstern is referring.

21.2.4 **4. *'Otsar ha-Posqim* beginning of [chapter] 17.** The *OHP* on this chapter of *EH* fills 6 folio volumes! How far does the beginning reach? If we go to the **very** beginning we find (i) discussion of whether a wife is still considered married to a husband who died and was resurrected, (ii) the law that *qiddushin* is totally ineffective when contracted with any of the *'arayot* including a married woman and (iii) the corollary that in a case where *qiddushin* was contracted with a woman who was doubtfully married to another man, a divorce is required from each possible husband. Again, searching for the material relevant to Rabbi Morgenstern's claim is like searching for a needle in a haystack — without being sure that there **is** a needle!

21.2.5 **5. *Tur 'Even ha-'Ezer* 44.** See text and comment above, §19.2.1.

21.2.6 **6 is cited thus: "See *'Otsar haPosqim* on Chapter 44 re: *mumar* for encyclopaedia of authorities who annul his marriage."**

The reference is to ***'Otsar haPosqim 'Even ha'Ezer* chapter 44 paragraph 9**. This is divided into a number of sections. In ***'Otsar haPosqim* 28:1** there is quoted the *yesh 'omrim* in the *Tur* who say that one who has apostatised to the extent that he worships idols or that he publicly desecrates *Shabbat* is considered a non-Jew so that his *qiddushin* are ineffective. The *'Ittur* also quotes this view but concludes on the basis of *Ḥullin* 13b, which says that today's gentiles outside the Land of Israel are not true idolaters, that today we have no true apostate to idolatry. As to *Shabbat* desecration the *'Ittur* maintains that it is only through public *melakhot* involving the ground (such as ploughing) that one would be considered an apostate and a non-Jew. Nevertheless, in *Responsa Mishpat Tsedeq* 3:8 we read that in the case of one who changes his religion and thereby transgresses prohibitions carrying penalties of excision and death, perhaps the *'Ittur* would be inclined to agree with the *yesh 'omrim* and we find similarly in the Meiri, in the name of "some of his teachers", that any apostate nowadays is considered an absolute non-Jew as regards *qiddushin*.

In the glosses on the *Mordekhai*, fourth chapter of *Yevamot*, section 107, Rabbenu Shimshon states that an apostate is not called 'one's [Jewish] brother' and the fact that his *qiddushin* are ruled effective is no more than a stringency based upon the concern that he had possibly 'returned

[to G-d] in his heart'.[97] However, the Rambam — who is the source for the ruling in *SAEH* 44:9 — rules unequivocally that the *qiddushin* of an apostate are fully valid and his bride requires a *get* [by Torah law to be free of him]. The *'Otsar* then quotes a long list of those who maintain that the apostate's *qiddushin* are fully valid.

In ***'Otsar HaPosqim* 28:2** we meet the *Responsa Maharashdam EH* 10 which deals with the Portuguese forced converts. In the course of this *responsum* Rabbi Shelomoh points out that, although the *Tur* says of the opinion of the *yesh 'omrim* that it does not seem correct,[98] the very fact that he mentions it proves that it is not an excluded view[99] and he then proceeds to answer the questions raised against it.[100] He even goes so far as to say that the Rambam and the Semag who say that the apostate's *qiddushin* are valid mean that the effectiveness of his *qiddushin* must be treated as **doubtful** i.e. they are only possibly valid. (See note 97.)

A number of *Aḥaronim* have used this Maharashdam as a *senif* to free *'agunot*. See *Responsa Maḥaneh Ḥayyim* 2:23 who regards *qiddushin* in the case of one who publicly desecrated *Shabbat* by working the land as only doubtful based on this Maharashdam. See also *Yadaw shel Mosheh, Laws of Qiddushin*, 15, who also uses public *Shabbat* desecration by the groom to render the *qiddushin* doubtful based on this Maharashdam.

In *Ba'er Hetev* to *EH* 44, sub-para. 7, there is a reference to *Responsa Mahari Mintz* 12, wherein it is stated that an apostate's *qiddushin* are only rabbinically valid and Mahari Mintz adds that so it seems from Rabbenu *T*oviyah, Mahari *'Or Zarua'* and Maharaḥ *'Or Zarua'*.

We may summarise our conclusions thus far on Morgensterns' use of *'Otsar haPosqim* Chapter 44 (21.2.6):

1. An apostate, as far as *qiddushin* are concerned, is one who has abandoned Judaism for another faith. Possibly also one who, while remaining attached to the Jewish people, practices idolatry or publicly desecrates *Shabbat* by working the ground. Some add one who publicly desecrates *Shabbat* by performing any *melakhah*.
2. Some maintain that an apostate's *qiddushin* are totally invalid whereas others regard them as rabbinic or doubtful. The mainstream view follows the Rambam who declares them undoubtedly effective in Torah Law.
3. The opinion of the *yesh 'omrim*, that excludes apostates from the concept of Jewish marriage and divorce, though not accepted by the majority, has yet not been dismissed, as witnessed by the fact that it is mentioned by the *Tur* and, indeed, some have argued that the Rambam and his school who say that the apostate's *qiddushin* are valid, mean only that they should be treated as doubtful.[101]
4. The opinion that regards the marriage of an apostate as doubtful or rabbinic has been used in practice as a *senif* to free *'agunot*.

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97 This probably means that his marriage is rabbinic though it could also mean that it is a *safeq* of Torah law. In either case the addition of one more *safeq* would render the marriage void.

98 ולא נהירא.

99 It should be noted that even if it were an excluded view it could, according to many *posqim*, still be incorporated into a *sefeq sefeqa'* and so ruled Rabbi Ovadyah Yosef. Only a unique opinion could not be so employed. See §22.2.6.3 note 112.

100 The principle ישראל, אף על פי שחטא, ישראל is deduced from the account of 'Akhan in the book of Joshua (ch. 7). Hence, says Maharashdam, just as there there was but the one offence — albeit a major transgression — of disregarding the *ḥerem*, so the rule derived therefrom can only be applied to similar cases. It cannot be applied to apostates to idolatry or the similar case of public *Shabbat* desecration (both of which are far more serious than *ḥerem* transgression) which render the apostate a fully fledged gentile.

101 Maharashdam, see above, s.v. In 'Otsar HaPosqim 28.2.

Digression: for resumption of analysis of sources cited by Rabbi Morgenstern, see §§21.2.7 below, and following

21.2.6.1 Other examples of using this view as a *senif* for leniency are now presented in the *OHP*:

21.2.6.1.1 ***Responsa Maharsham* II nos. 110 and 111** state that the opinion that an apostate is considered a gentile and therefore cannot contract a marriage, although not accepted as normative, can still be used as a *senif* to some other doubt in order to create a *sefeq sefeqa*. True, the *Bet Yosef* wrote in a *responsum* that *qiddushey mumar* are definite so that even if the bride subsequently accepted *qiddushin* from another party she would not need a *get* but that is because he follows his ruling recorded in *EH* 44:9 where he totally repudiates this opinion [that an apostate is incapable of contracting *qiddushin*]. However, Mahari Mintz cites a number of *posqim* who rule that it (the apostate's marriage) is only rabbinic and so ruled Maharashdam [*EH*] number 10. Similarly did the Me'iri say in the name of his teachers that all the apostates of our time are considered gentiles. Accordingly, this view can at least be joined with some other doubt to generate a double doubt in an emergency.

The above ruling in the name of Maharashdam is apparent from the quotation of Maharashdam in *Ba'er Hetev*, *EH* 44, sub-para. 7 but in the *Kenesset Ha-Gedolah*, *EH* 44, *Hagehot Bet Yosef* 2, it is stated that the Maharashdam recorded this opinion **in the name of the *Mordekhai*** but **the Maharashdam himself** considers an apostate's *qiddushin* as a *safeq de'Oraita'*. So also is it stated in *Responsa Tsemaḥ Tsedeq* (of Lubavitch) number 322.[102]

21.2.6.1.2 Similarly, in ***Responsa 'Avney 'Efod* no.15**, in a case where a Jew had changed his religion, the respondent used as a *senif* the opinion that *qiddushey mumar* are not recognised in Torah Law (basing himself on the Maharashdam and Mahari Mintz) and he writes: "Since, according to most (!) of the *Posqim*, his *qiddushin* are only rabbinic and according to a minority they are doubtful Torah Law, together with one additional doubt as to the validity of the marriage one can permit [the wife's remarriage without a *get*]".

21.2.6.1.3 In ***Responsa 'Ohel Mosheh* II 123** we find a case of a Jew who apostatised to Christianity and then married a Jewish woman who, when she later discovered the truth, fled from the marital home and was left an *'agunah*. The author uses the opinion that an apostate's *qiddushin* are not valid as a *senif* for a solution. Regarding those who say that we must take into consideration that he may have repented in his heart at the time of the marriage and therefore his *qiddushin* are rabbinically valid, the *'Ohel Mosheh* argues that that is only if we see some indication thereof in his conduct but if not, then those who regard an apostate as a gentile agree that his *qiddushin* are totally ineffective.[103]

21.2.6.2 In ***Responsa Seridey 'Esh* (III 25)** also, use is made of the opinion that the marriage of an apostate is only rabbinic in conjunction with other doubts.

21.2.6.3 The *'Otsar Ha-Posqim* then proceeds to list those authorities who say that the marriage of an apostate is fully recognized in Torah Law:

1. Binyamin Ze'ev, Laws of divorce bills, number 108 (who quotes *Hagahot Maimoniyot*, Laws of personal status; *Hagehot Mordekhai*, fourth chapter of *Yevamot* in the name of Rabbenu Gershom; Rashi in a *responsum*);

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[102] It would seem to make no practical difference whether an apostate's *qiddushin* are doubtful Torah law or definite rabbinic law where a second doubt concerning the validity of the marriage is present. In the first view we would then have a double doubt which is sufficient to permit a Torah prohibition (*sefeq sefeqa de'Oraita'*) and in the second view we would have a single doubt which is sufficient to permit a rabbinic prohibition (*safeq derabbanan*).

[103] Those, like the *Bet Yosef*, who regard him as a Jew maintain that his *qiddushin* are effective in Torah Law without a doubt.

2. *Responsa Redakh, bayit* 20, *ḥeder* 2 (quoting Rashi, Rabbenu Tam, Mordekhai and Rash Gaon);
3. *Naḥalat Yehoshua' siman*12;
4. A *responsum* of Ri Ibn Ḥabib[104] (in which he quotes a *responsum* of the Rash son of the Rashbash; also *responsa* of the Geonim who took a strict line with regards to the *ḥalitsah* of an apostate);
5. *Responsa Rabbi Eliyahu Mizraḥi* number 48;
6. *Responsa Maharibal* I number 15;
7. *Zeqan Aharon* of Rabbi Aharon haLewi, number 41.
8. In *Responsa Bet Yosef* number 14 it is stated that his *qiddushin* are fully valid by Torah law. It is not a *ḥumra'* or a *safeq* — and everyone agrees!
9. Rabbi Shim'on son of the Rashbash writes in a *responsum* (*Mayim 'Amuqqim* I number 32) that an apostate's *qiddushin* are, without doubt, recognised by Torah Law. In the course of this *responsum*, he mentions that when the Talmud says[105] 'They did not move from there until they made them (the 10 exiled tribes who had apostatised) into fully fledged gentiles' it refers to that generation only, as the Rashba has written, and so is the opinion of the Rambam. Similarly Rashi rules that it is forbidden to lend to the son of a *mumeret* on interest. Even Rabbenu Tam who permits it [agrees that both mother and son are Jews but allows it] only because one is not commanded to support such a person [and Rabbenu Tam rules that where there is no commandment of support there is also no prohibition of interest]. Therefore, all these *Rishonim*[106] will agree that the apostate's *qiddushin* are fully valid.

   So ruled all the later Geonim and so wrote the Rashbets.
10. In *Kenesset HaGedolah* (*EH* 44) *Hagehot HaTur* 14, [Rabbi Benveniste] cites in the name of the Rashbash in a manuscript *responsum* and in the name of Rabbi Tsemaḥ (son of the Rashbash) also in a manuscript *responsum* that we have not seen nor heard of anyone who relied in practice on the opinion of those who say that an apostate's marriage is not fully valid.
11. The *Ba'er Hetev* (*EH* 44) sub-para. 6 quotes *Responsa Rema* number 62 as saying that if a Jew marries a *mumeret* [the marriage] is valid.
12. In *Responsa Noda' BiHudah* II number 80 we are told that no-one takes that opinion[107] into consideration and so is it stated in
13. *Responsa Paraḥ Matteh 'Aharon* 2:82.
14. So concludes the *Bet Meir* 129: 5. Even if he is a public *Shabbat* desecrator or an idolater his *qiddushin* are certainly valid by Torah Law even when this leads to a leniency.[108] He continues: As to that which the Maharashdam (10) wrote, that an apostate's *qiddushin* are only doubtful and that this is the opinion of the Rambam, the *Get Pashut* (123) has already raised the argument against him — if so, if someone married and later apostatised how is it possible for him to divorce and the answer suggested by the *Get Pashut* (that the Sages annulled the marriage when the *get* is delivered) is not convincing, though it must be said that the *Maḥaneh Ḥayyim* supports the answer of the *Get Pash ut*. The opinion of Rabbenu Toviyah, quoted by Mahari Mintz, that an apostate's marriage is rabbinic,[109] is not right.

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104 Which is brought in *Responsa Rabbi Eliyahu Mizraḥi* number 47.

105 *Yevamot* 17a.

106 Rashi, Rabbenu Tam, Rambam and Rashba.

107 That the marriage of an apostate is invalid altogether or, at least, not recognized in Torah Law.

108 For example, if she should subsequently accept *qiddushin* from another man.

109 This would explain how the Rabbis could validate his *get*. One could add that Maharashdam also could say that the Rambam, who (in Maharashdam's opinion) regards the apostate's *qiddushi*n as a *safeq* (*de'Oraita'*), also maintains that *safeq de'Oraita' leḥumra'* is only rabbinic law so that the marriage is only rabbinic and the rabbis are, therefore, within their rights in recognising the validity of the *get*.

It is obvious, says the *Bet Meir*, that the Rambam means that the apostate's *qiddushin* are **definitely** valid in **Torah Law**. As to that which the *Bet Shemuel* wrote (*EH* 141 sub-para. 47) that from *Tosafot Sanhedrin* 72b, who state that an apostate is no longer a Member of the Covenant, it follows that an apostate cannot effect *gittin* or *qiddushin*, this also is not correct because the *Tosafot* wrote in *Gittin* 34b that an apostate can divorce.[110]

15. In *Responsa Bet Shelomoh* (Rabbi Shelomoh of Sokolow) II *EH* 140, in a case where the groom had, before the marriage, converted to Christianity, the questioner suggested that one could use as a *senif* the opinion that the wife of a *mumar* needs a *get* only rabbinically and he quotes also Rabbi Shelomoh Kluger of Brode as saying so.[111] Rabbi Shelomoh replies that although Maharashdam (*EH* 10) and the *Peney Mosheh* maintain that the apostate's *qiddushin* are only doubtful, the *Bet Meir* has rejected their opinion and, since the vast majority of the *Posqim* have concurred that the *qiddushin* of an apostate are definite *qiddushin* in Torah Law, **this minority opinion should not be used even as a *senif***.[112]
16. Similarly we find in *Bet Yitsḥaq* I 25 and in *Pisqey Halakhot, halakhah* 15.
17. In *Yad David* there (*EH* 44) it is stated that the ruling of the *yesh omrim*[113] is 'a rejected opinion'.
18. We find the same in the *'Arokh HaShulhan* in *EH* 44:9 and in para. 11 he adds: "From the writings of the majority of our teachers the implication is that they are *qiddushin* by Torah Law and so did our teachers record, without noting dissent, in the *Shulhan 'Arukh*. He adds in brackets that there is no foundation for the opinion of Maharashdam [*EH*] number 10.
19 So also wrote the *Ḥayyim shel Shalom* II 81. He adds that since in the case under discussion the husband was an apostate to the religion of the Moslems everyone will agree [that his *qiddushin* are fully valid] since Islam is not idolatry (as stated in *YD* 124).[114]
20. So, too, we find in *Ḥelqat Ya'aqov* III 114. A Jew had converted and afterwards married a Jewess. She had later discovered the truth about him and immediately fled. The enquirer wanted to use the apostate-*qiddushin* argument as a *senif* but the respondent argued that since the lenient view was mentioned neither in *Shulhan 'Arukh* nor in the Rema it could not be used even as a *senif*.[115]

21.2.6.4 We mentioned earlier (§21.2.6, following n.100) the view that even the Rambam and his school who say the apostate's marriage is valid mean only that it constitutes doubtful (Torah)

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110 The *Bet Meir* then explains the *Tosafot* in *Sanhedrin* differently.

111 I presume this to mean that Rabbi Kluger, while not accepting this lenient opinion as correct, agrees to its being used as adjunct.

112 This means that it could not be employed to create a *sefeq sefeqa*. It seems from this that the *Bet Shelomoh* maintains that both doubts in a *sefeq sefeqa* must be 50-50. However, Rabbi Ovadyah Yosef (*Responsa Yeḥawweh Da'at* I *Killeley haHora'ah* p. 26 number 7) rules that where one *safeq* is 50-50 the other need not be. Even a 'rejected opinion' is sufficient (ibid.) though not a lone opinion (ibid. number 8). There is also the further consideration that in any argument amongst the *Posqim* it seems that even a minority/majority split is considered 50-50 — see Abel, "*Halakhah* ... Consensus" §IV.12. In an emergency, one could use even a lone opinion as one of the doubts in a *sefeq sefeqa', a fortiori* from what I wrote above on pp. 24-5 at notes 67-69.

113 = those who say the marriage of an apostate is totally invalid: see above, p. 31 s.v. **Number 5**.

114 I find this astonishing. True, Islam is not idolatrous but its embrace involves the denial of the Tenakh and the Talmud so that the convert is rejecting the truth of both the Written and Oral Law and the Talmud rules that heresy is worse than idolatry! See the discussion in *ET* XXII col. 70 at notes 191-196.

115 There are a number of *posqim* who maintain that an opinion not mentioned in the *Shulḥan 'Arukh* or the *Mappah* is to be considered rejected and thus unfit to be used even as a doubt towards a *sefeq sefeqa*. Other *posqim* argue vehemently against this. Rabbi Ovadyah Yosef accepts the latter opinion: see *Responsa Yeḥawweh Da'at* I *Killeley HaHora'ah* p. 26 number 7.

qiddushin. There are, however, some who argue exactly the converse— that even those of the Geonim and their school who say that his marriage is not valid mean only that his *qiddushin* are not certainly valid in Torah Law but they are rabbinically valid or are to be considered doubtfully valid in Torah Law:

1. ***Responsa Mahari Qatsbi* 10** states that it seems that there are sources which say that his *qiddushin* are doubtful or rabbinic. Nevertheless, although the words of our teacher the *Bet Yosef* are difficult,[116] he argues that when it comes to practical law 'we live from his mouth' and we must not veer from his words to the right or the left. He then adds that even the dissenting view in the *Tur* (that negates the validity of an apostate's marriage) agrees that we must be 'concerned for stringency'[117] like the Rash quoted in the Mordekhai (chapter *Haḥolets*).[118]
2. Similarly we find in ***Responsa Zekhut Mosheh* 86** and in
3. ***Responsa 'Erets Tovah* 12**, that the dissenting view agrees that his *qiddushin* are rabbinically valid — like the Rash in the *Mordekhai* — because maybe he repented in his heart.

21.2.6.5 Some say that even the lenient, minority view (that rules that an apostate cannot contract a marriage) would apply only if the apostate had joined another faith group. Thus, when those *posqim* (espousing that minority view) refer to idolatry they mean, for example, that the apostate had joined a sect of Christianity in which Jesus is worshipped or that he had joined the Hindu faith in which various Hindu gods are worshipped. Similarly, when they refer to *Shabbat* desecration they mean that he replaced *Shabbat* with Friday (because he had converted to Islam) or Sunday (because he had converted to Christianity). However, if the apostate remained a part of the Jewish people, no matter how many, varied and grievous be his sins — including public *Shabbat* desecration and idolatry — the *yesh 'omrim* will agree that his *qiddushin* are fully valid even in Torah Law. This opinion is espoused by:

1. Rabbi Yosef Eliyahu Henkin in ***Perushey Ibra'* 5:5**;
2. ***Responsa Da'at Kohen* in no.153**. A similar view is expressed by
3. **Rabbi Yeḥiel Ya'aqov Weinberg** in *HaPardess* 5714, *ḥoveret* 6 *siman* 29.
4. Dayyan Yitsḥaq Ya'aqov Weiss in ***Minḥat Yitsḥaq* I 13:19**, after writing that according to most of the *Posqim* the *qiddushin* of an apostate are definitely valid even in Torah Law, adds that the *qiddushin* of the *Shabbat* desecrators of our time[119] are definitely valid Torah *qiddushin* even according to the lenient minority who invalidate an apostate's *qiddushin*.

21.2.6.6 ***'Otsar HaPosqim* 28:3** deals with the question whether or not there is any difference if the apostasy was willing or forced and quotes both ***Responsa Redakh, bayit* 20, *ḥeder* 2** and ***Responsa Seridey 'Esh* III 25 (end)**, who say that only if he apostatised willingly do the *yesh 'omrim* regard him as a gentile.

Similarly, those who say that his *qiddushin* are fully valid even in Torah Law mean even if he had apostatised of his own free will.

21.2.6.7 ***'Otsar HaPosqim* 28:4** discusses the question of what will happen, according to those who say his *qiddushin* are totally invalid, if he married when he was a believing and practising Jew

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116 Because he says that there are no such sources and that an apostate's marriage must be ruled definite *qiddushin* in Torah Law even where such a ruling will lead to a leniency. For example, when the apostate's wife subsequently accepted *qiddushin* from another man, these latter *qiddushin* would be ignored and it would not be necessary, even merely in order to be on the safe side, to seek a *get* from the second man.

117 I.e. they treat the matter as a doubt.

118 See §22.2.6 above, s.v. In the glosses.

119 20th century.

and at some point later in his marriage he became an apostate. Would the marriage disintegrate?

21.2.6.7.1 ***Responsa Maharsham* II 110**: those who say an apostate's *qiddushin* are effective will say, in our scenario, that they will not disintegrate[120] and so wrote the Ritba, *Nimmuqey Yosef*, Ramban and Rashba. Those who say that an apostate's *qiddushin* are ineffective will say, in our scenario, that they will disintegrate — see *'Avney Millu'im* to *EH* 18:1[121] Therefore, proceeds Maharsham, those who maintain that the *qiddushin* of an apostate are only rabbinic would say, in our scenario, that when he later apostatises the marriage disintegrates in Pentateuchal Law. For the remaining rabbinic marriage the *get* will — by rabbinic decree — suffice. (*OHP* adds in a footnote: So we find also in *Pithey 'Azarah* here, sub-para. 10.) The Maharsham used this as a *senif* to the main permissive argument in his case, namely that the witnesses to the marriage were members of a group most of whom were apostates and he released the woman without a *get*. Also in *Seridey 'Esh* III 25 Rabbi Weinberg adjoined the apostate-groom argument with other reasons for leniency.

21.2.6.7.2 Rabbi Shelomoh of Sokolo in ***Responsa Bet Shelomoh* II *EH* number 140** argues at length against the view that invalidates an apostate's marriage (concluding that this opinion should not be employed even as a *senif*: see §21.2.6.3 no. 15) but the Maharsham answers each one of the *Bet Shelomoh*'s points. The *Bet Shelomoh* first discusses whether the *get* in the case

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120 And a *get* will be required which the apostate will be fully capable of granting.

121 The *'Avney Millu'im* set out to answer a question raised by *Tosafot*. Rabbi Aqiba maintains that marriages proscribed even by a mere negative commandment (i.e. without accompanying liability to excision or death) cannot be contracted (*qiddushin* with them is not possible), the child born of such a union is a *mamzer* and, as a result, where a situation of potential levirate marriage arises between a couple forbidden to each other even by a non-enhanced negative prohibition, Rabbi Aqiba rules that neither *yibbum* nor *ḥalitsah* is required. The Ri (*Tosafot*, *Yevamot* 9[a s.v. *waharey*]) asks why the positive commandment of *yibbum* cannot override the negative commandment which proscribes the union in question — *'aseh doḥeh lo' ta'aseh*. The *'Avney Millu'im* suggests that the situation can be compared to that described in *Yevamot* 49b where Abbai says that everyone — even Rabbi Aqiba — agrees that a child born through intercourse between a husband and his menstruous wife or a husband and his errant wife (*sotah*) is not a *mamzer* because *qiddushin* are effective between a man and a menstruous woman and between a husband and his errant wife — if he divorced her and then remarried her. In the case of the *sotah* Rashi explains that since we see that when a wife becomes a *sotah*, although she becomes forbidden to her husband, she still requires a *get* by Torah Law to be released from him as stated explicitly in Deutoronomy 24:1, it follows that *qiddushin* with one's (divorced) *sotah* are legally possible (because if they were not it should follow that every *sotah*'s marriage should automatically dissolve and she should not require a *get*) and so the child born from a union of a husband and his *sotah* cannot be a *mamzer* even according to Rabbi Aqiba. According to this, argues the *AM*, we can answer the Ri's question. True, the positive commandment of *yibbum* can override a non-enhanced negative commandment but that is only regarding the first intercourse which fulfils the commandment of *yibbum*. After that, the woman becomes forbidden to her levir by the negative prohibition (see *Yevamot* 20[b: see also *Tosafot* there s.v. *'Atu bi'ah sheniyyah*]) which, according to Rabbi Aqiba, would dissolve the marriage, as Rashi has stated that if, in any case, the relationship of two people is such that *qiddushin* cannot take effect initially between them, then when that relationship arises in the course of a legitimately contracted marriage such a marriage automatically dissolves. Hence, the levirate marriage in such a case would not survive the first intercourse so that the initial levirate *qiddushin* would be valid only up to the time of the first intercourse and the situation would be analagous to the case described in *Nedarim* 29a "Today you are my wife but tomorrow you are not my wife" where the law says that since intrinsic sanctity such as that of marriage cannot depart (without a divorce) once it has taken hold, **it is impossible to contract *qiddushin* for a limited period** (unless by means of a condition makin the marriage dependent on the delivery of a *get* at a certain point in time). Therefore, she would, in such a case, become his wife for ever. However, where she is forbidden to him by a non-enhanced negative prohibition, were we to say that the negative be set aside by the positive (for the first intercourse) then, according to Rabbi Aqiva, immediately after that, the marriage would disintegrate because the positive command would have already been fulfilled so the negative would reassert itself and, according to Rabbi Aqiva, marriage of a couple forbidden to each other even by a non-enhanced negative is impossible. Thus, we would have a situation in which she is married for a limited time (up to the first intercourse) and then ceases to be married and as this cannot be (as above) and we cannot say she becomes his wife forever (according to Rabbi Aqiva, as above) we would have to say that **she does not become his wife at all**. That is why *'aseh doḥeh lo' ta'aseh* will avail us nothing here.

presented to him was acceptable and he reaches the question of apostasy only towards the end of the *responsum* (p. 136b, 27th line above the end of the column). He argues as follows:

The *'Avney Millu'im* compares the case of *ḥayyevey lavin* according to Rabbi Aqiba — who maintains that *qiddushin* with them is ineffective — with Rashi's statement in *Yevamot* regarding a *sotah*, the general rule being that if, in any case, the relationship of two people is such that *qiddushin* cannot take effect initially between them, then when that relationship arises in the course of a legitimately contracted marriage such a marriage automatically dissolves. However, says the *Bet Shelomoh*, the *AM* will agree that even according to those who say that one who has apostatised cannot contract a marriage, a marriage legitimately contracted between two believing Jews will not dissolve when he (or she) later becomes an apostate. The proof is that although the *qiddushin* of the insane are void, when a married man becomes insane he can never divorce his wife and she can never be freed as stated in the Mishnah in *Yevamot* 112b. Now if in the case of the insane, where it is not in his power to regain his mind, the marriage does not dissolve then how much more so in the case of the apostate, where it is within his power to return to Judaism, the marriage will certainly not dissolve.

One could make a distinction arguing that in the case of the insane the problem is merely mechanical — **the law would recognise his *qiddushin* and *gittin*** were he able to perform them but he does not possess the mind to be able to effect either. In other words, it is not that the Torah does not recognise his *qiddushin* and *gittin* but that in his case **there are no *qiddushin* and *gittin* for the Torah to recognise**. Thus when a sane man contracts a legitimate marriage and later becomes insane there is no argument to say that his marriage should dissolve.

The case of the apostate — according to those who say he cannot effect *qiddushin* — is different. Here, it is not the inability of the apostate to intend and to carry out the act of marriage or divorce that renders his marriage or divorce invalid. It is the law which, regarding him as a non-Jew, simply does not recognize the possibility of the legal concept of marriage existing between Jew and non-Jew. This one can compare to Rashi's comment in *Yevamot* 49b that where the relationship between two people is such that marriage between them **is not possible because it would not be recognised by the Torah** (= *la' tafsey qiddushin*), when that relationship comes into being during a legitimately contracted marriage, the marriage will dissolve.

Still, there is a problem with this Rashi itself, as the *Bet Shelomoh* pointed out in *Yashresh Ya'aqov*, from the Gemara concerning the wife of two dead husbands. The Torah introduces the law of levirate marriage by describing a situation where "brothers dwell together and **one of them** dies, the wife of the dead one" shall be bound to her brother-in-law. This implies that if she had been married to two of them and they both died (*'eshet sheney metim*) she would not be subject to the levirate bond. The Gemara in *Yevamot* 31b describes one scenario of *'eshet sheney metim* but the relevant scenario is found in *Gittin* 82b — Re'uven marries a woman stating that she is betrothed to him except as far as Shim'on, his brother, is concerned. Shim'on then marries her without declaring any exception. This second marriage forbids her to Re'uven and she is now considered married to both. If both husbands die childless leaving her a widow she cannot accept *yibbum* from Lewi, a surviving brother, but must have *halitsah*. Now according to our Rashi (in *Yevamot* 49b) it should be the case that when Shim'on marries her and forbids her to Re'uven her marriage to Re'uven should dissolve since she has become, in the course of her marriage to Re'uven, a woman married to another (Shim'on) and just as it would have been legally impossible for Re'uven to contract the initial *qiddushin* with her had she been married at that time to Shim'on, so should it,

according to Rashi, be legally impossible for Re'uven's marriage to survive her becoming, at some stage after *qiddushin*, the wife of Shim'on, for his marriage should simply dissolve.

[The Maharsham, in answer to this question, points to *Tosafot*, *Yevamot* 10[a, s.v. *Le'olam*] and 31[b, s.v. *Miderabannan*], who argue that the marriage of Re'uven in the above situation does indeed dissolve according to the law of the Torah as the concept of the wife of two husbands is a rabbinic construct, and she would still require, in rabbinic law, a divorce from Re'uven. According to this, Rashi would agree that wherever a marriage automatically dissolves a *get* would still be required by rabbinic decree.[122] Indeed, the *Bet Shelomoh* himself notes that *Tosafot*, *Qiddushin* 68[a, s.v. *Hakol modim*] and both Ramban [s.v. *Ha' de'omar*] and Rashba [s.v. *'Amar Rav Yehudah*] to *Yevamot* 11[a] agree with Rashi.]

Nevertheless, the *Bet Shelomoh* argues that Rashi wrote what he wrote only regarding marriage prohibitions that it is impossible to remove as in the case of the prohibition of *sotah* but where it is possible to remove the problem as in a case of the prohibition of another man's wife (*'eshet 'ish*), where divorce is possible, we do not say that the first marriage (to Re'uven) dissolves because of the second marriage (to Shim'on). Accordingly, where the husband became an apostate we would not declare the marriage dissolved, because it is possible to remove the problem by means of the apostate's return to Judaism.

The *Bet Shelomoh* brings a proof to this distinction from *Tosafot*, *Yevamot* 16a [s.v. *Beney tsarot*]. There *Tosafot* distinguish logically between the case where a levir betrothed the sister of his "attached" sister-in-law where the law says that the *qiddushin* dissolve the attachment[123] and a case where the sister-in-law accepted *qiddushin* from another man where the law says that although these are valid *qiddushin* making her forbidden with a penalty of excision and death to her levir, the levirate bond is not dissolved. *Tosafot* say that in the first case it is not possible to remove the prohibition forbidding the *yibbum* because it is forbidden to marry even one's **divorced** wife's sister so long as one's wife is still alive and we cannot murder her to permit the *yibbum*! In the second case, however, it would be possible to remove the ban on the *yibbum* by obtaining a divorce from the sister-in-law's husband hence the attachment remains. It follows, therefore, that even if an apostate cannot contract a marriage, a Jew who apostatises after he has married will not bring about the automatic dissolution of his marital bond since the impediment to his married status can be removed by his decision to repent and as a result his established married status remains in effect.

[The Maharsham also notes the words of this *Tosafot* and responds that according to those who view an apostate as a gentile, he becomes, at the moment of apostasy, **another person** — from a legal point of view — so that his wife's original husband no longer exists and his marriage therefore ceases to be. Even if he later returns to Judaism it is impossible to speak of his returning to the original marriage and, therefore, of the former *qiddushin* still surviving, because he is not the same person[124] who married her and a new betrothal would be necessary.]

The *Bet Shelomoh* adds that both the *Get Pashut* and the *Bet Meir* (*siman* 129) asked against the Maharashdam: If an apostate cannot marry how can he divorce? The *Bet Meir* deduces from the fact that he can divorce that his *qiddushin* are fully recognised in Torah law.

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122 Other answers to this question can be found in *Ḥiddushey HaRim* on *Gittin* ibid.

123 Because the levir has created a situation in which his dead brother's wife has now also become his wife's sister and it is forbidden under penalty of excision to marry one's wife sister and the commandment of *yibbum* does not exist (and, therefore, *halitsah* also is not required) when its consummation would involve a union forbidden with a penalty of excision or death.

124 Having **twice** metamorphosed!

Furthermore says the *Bet Shelomoh*, "I found in the *Terumat HaDeshen siman* 219 that if an apostate betroths, even after his apostasy, his *qiddushin* are valid, how much more so are valid the *qiddushin* he gave before his apostatsy and there is no-one who argues with this. That accords with what I have written. Therefore, let this *senif* disappear and not be suggested again."

21.2.6.7.3 The ***Bet Yitsḥaq* I 25** also argues that once *qiddushin* have taken effect they cannot be undone without a *get*. Although Rashi speaks in *Yevamot* 49[125] of the possibility of *qiddushin* dissolving without a *get* he is talking there according to the opinion of Abbai (*Nedarim* 29b) that bodily sanctity can (in certain circumstances) dissolve by itself but according to the *Halakhah* which follows Rava who rules that once intrinsic sanctity has taken hold it cannot be removed without the application of the required measures,[126] Rashi's explanation is not relevant.

21.2.6.7.4 In a *responsum* of Rabbi Yitsḥaq Herzog which is quoted in ***Seridey 'Esh* III 25** and which deals with apostasy to Islam, the leniency based on Rashi of automatic dissolution due to the apostasy, and the fact that the Maharsham made use of this argument, is mentioned. However, he says that one cannot advocate leniency based upon this because there is a *sefeq sefeqa'* towards stringency — maybe his *qiddushin* are fully valid[127] and even if they are not maybe the *Halakhah* is not like Rashi.[128]

As to that which the Maharshaq[129] wrote in *Ḥiddushey 'Anshey Shem* to answer the question of the *Get Pashut* (if he is a *goy* how can he divorce?) namely, since he said in the marriage formula 'according to the Law of Moses and Israel' he intended that the *qiddushin* will remain only so long as he is a member of the faith community of Moses and Israel, Rabbi Herzog says:

"This is astonishing and I would not dare build a permissive ruling on such a foundation and since the arguments for stringency are more numerous than those for leniency I did not dare to rely on the lenient views especially as none of the great *'Aḥaronim* could find a solution for the wife of an apostate even when he married her after apostatising".

21.2.6.8 **In 28:25 the *OHP*** raises the question: according to those who rule that his *qiddushin* are fully valid would the same apply to a proselyte who returned to his former religion? On this point, the *Bet Shemuel*, sub-para. 12 says that here too the *qiddushin* would be fully effective similar to that which we find in *Yoreh De'ah* 268[:12, end] and so did the *Bet Hillel* write here[130] and the *Ba'er Hetev* quoted him in sub-para. 6. On the other hand, in *Responsa Mahari Qatsbi* number 10 (p. 36 col. 4) the suggestion is made that even the *Tur*, who rules that the apostate's *qiddushin* are valid, agrees in the case of a relapsed convert who now worships false gods as before that his *qiddushin* are not valid in Torah Law but only due to rabbinic stringency.

21.2.6.9 A further important question is mentioned here in *OHP*: If he was an apostate at the time of

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125 49b, s.v. *Deha' tafsey bah qiddushin*. Cf. *Tosafot* there s.v. *Sotah namey*.

126 For example, redemption or divorce.

127 I.e. he is treated as regards *qiddushin* and *gittin* as a Jew so that his marriage (even if contracted after his apostasy and how much more so — as in this case — before it) can be dissolved only by a *get*.

128 I.e. even though he is considered a gentile as regards *qiddushin* and *gittin* also, in this case, where he married before he apostatised so that his marriage was valid and he apostatised only later it may be that, unlike Rashi, the *Halakhah* is that the apostasy does not bring about an automatic dissolution.

129 Rabbi Shelomoh Kluger.

130 *EH* 44:9.

the *qiddushin* but she was unaware of this can this be considered a mistaken transaction? This is dealt with at length in ***OHP* 39:32:23**. The related question of whether one can argue, in a case where he was in order at the time of the marriage but apostatised later, that she did not marry him on such an understanding, is discussed at length in **39:32:26**.

21.2.6.10 ***OHP* 39:32:23 —** If he was an apostate at the time of the *qiddushin* but she was unaware of this can this be considered a mistaken transaction?

21.2.6.10.1 Rabbi Yeḥezqel Landau in ***Noda' BiHudah* II 80** deals with a case in which a man turned up in a town as a Jew and lived there as a Jew for three weeks. He then took a Jewish wife and shortly afterwards fled with all her property. It eventually became known that he had been an apostate for many years and was married to a gentile woman.

Rabbi Landau first mentions the argument of the questioner based on the opinion of the Geonim quoted in the *Tur* but proceeds to reject the approach saying that there is no-one who gives any consideration to that opinion and it should be laid to rest. How much more so in this case where it is possible, during the 3 weeks before his marriage when he was living as a Jew, that he entertained thoughts of repentance in his mind so that he was not an apostate at the time of the *qiddushin* and only afterwards did he return to his former recalcitrance.

The questioner referred to the Talmud in *Bava' Qamma'* that 'on that understanding[131] she did not accept marriage' and wanted to apply it in the case on hand but R. Landau proceeds to bring proof that that will not help us in this case because if a man unknowingly married a woman who was forbidden to him by a negative Torah prohibition — *ḥayyevey lavin* — we would not say that 'on that understanding[132] he did not marry her' because legal prohibition is not to be compared to physical blemish.[133] Now if that is the law where the man (of whom we do not say that he prefers any wife to bachelorhood) was mistaken about the woman, how much more so will that be the law where the woman (of whom we do say — after Resh Laqish — that she prefers any husband to spinsterhood) was in error concerning the man. Furthermore, if that is the case where the man was faced with a problem of a prohibition that can never be resolved how much more so will that be the law where the woman is faced with a problem that can be resolved — by the repentance of the apostate.

One could argue, R. Landau notes, that where the man was misled in matters of law we presume he still accedes to the *qiddushin* because he has little to lose since he can always divorce her and marry another whereas she, who has no such option, would be far more careful as she has a great deal to lose, so that one can argue that she would never have agreed to marry an apostate — and although that would anyway not help in this case because of the possibility that he repented in his heart at the time of the *qiddushin* it could apply in other cases. Nevertheless, Heaven forfend that we rule leniently.[134]

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131 That she would be bound to a leprous levir. The fact that he disregards the Talmud's retort on the basis of Resh Laqish's dictum suggests that he understands that as referring only to the case under discussion in the Talmud, i.e. one where she married a healthy husband and took the risk of the levir. However, he has in mind here a case where her husband himself was leprous, unbeknown to her, at the time of the *qiddushin* and he understands that in such a case, Resh Laqish would agree that the marriage is a mistaken transaction.

132 That he would be married to a woman forbidden to him by Torah Law.

133 The reason for this distinction is expounded in the *responsum.*

134 I.e. we must regard the *qiddushin* of an apostate as absolutely valid by Torah Law without any doubt and against that we cannot rely on the less than certain argument that she would not have accepted the *qiddushin* from him had she known that he was an apostate and already married to a gentile wife.

21.2.6.10.2 R. Meir Posen in the ***Bet Meir* 129:4** accords with the *NB*'s argument that the above case is no worse than a man unknowingly marrying a woman of those forbidden by a negative commandment. He adds to this an observation on the wording in the Rambam's code (*'Ishut* 4:15) and the *Tur* (*EH* 44): "If an apostate married, his marriage is valid and she requires a *get*". Why, he asks, was it necessary to add 'and she requires a *get*'? Obviously, if the *qiddushin* are valid she requires a *get*! He therefore suggests that the meaning is that even if the *qiddushin* were accepted by the bride under the false impression that the groom was a believing and practising Jew — where one could argue for mistaken contract — even then she requires a *get*.

21.2.6.11 However, other authorities disagree entirely with the *Noda' BiHudah* —

21.2.6.11.1 The ***She'erit Yosef*** rules, on the contrary, in the case of the Noda' BiHudah, that the apostate's subsequent behaviour — returning to his gentile wife and ways — constitutes proof that he never thought for a moment of returning to Judaism and as regards the comparison that R. Landau makes to *Ḥayyevey lavin*, he argues that an apostate is more repulsive as a marriage partner than any of the *Ḥayyevey lavin* so most certainly she would never have consented to marry him had she known the truth, especially as she is known to be a religiously sincere person. Thus it is clear that he tricked her and she does not need a *get*. Although in practise the author would not have permitted her remarriage (in the case described by R. Landau) but in his particular case a *get* that was fit in Torah Law had been given by the apostate and it was invalid only in rabbinic law and therefore the *She'arit Yosef* ruled that she could remarry.

21.2.6.11.2 In the ***Terumat HaDeshen*** we find explicitly that if an apostate married and the bride was unaware of the irreligiosity of her groom, on discovering the truth she can leave without a *get*.

21.2.6.11.3 We find the same lenient ruling in ***Ḥayyim shel Shalom* II number 81**. He remarks: "Although in the *Shulḥan 'Arukh* it does not say 'if an apostate marries his marriage is valid **if she realised [his irreligious status] but if not it is a mistaken contract**' — which would lead one to think that his *qiddushin* are valid even in such a case — [that is no argument] because we find a similar thing in *EH* 44:4 [where it is stated that] the *qiddushin* given by an impotent, whether he was so from birth or from some later time, are valid. Although the *Shulḥan 'Arukh* stops there, both the *Ḥawwot Ya'ir* and the *'Avodat HaGershuni* explain that the *SA* means that the bride was aware of the problem and if not so, the marriage is ineffective as a mistaken transaction.

In this case, says the *Ḥayyim shel Shalom*, there is reason to say that everyone[135] will agree that she needs no *get* even as a rabbinic stringency because (1) one can argue that 'a person does not want to make his lawful intercourse promiscuous' does not apply to a woman[136] and (2) only when an explicit condition was made at *qiddushin* and **not repeated** at *nissu'in* do we have reason to suspect that the failure to repeat it implies that it has been rescinded but where we are operating a **presumed** condition with the logic of *'anan sahadey* there **is** no 'failure to repeat the condition' and so there is no reason to suspect the condition's withdrawal and, in the absence of such evidence to the contrary, we have every reason to presume that she wishes to carry the condition with her into the *nissu'in*. Even *Tosafot Ketubot* 73a s.v. *'ela'* who maintain that even if he repeated his condition at the time of intercourse [and the condition was unfulfilled] she needs a *get*, will agree in our

135 Even the majority who say that the apostate's *qiddushin* are fully valid even in Torah Law.

136 So there is no reason for her to withdraw her condition in case the marriage becomes retroactively annulled and the acts of intimacy prove to have been promiscuous.

case that she does not need a *get* [because nothing would make her agree to live with him] and, furthermore, since in our case the condition and the concern are hers [and not his], the reason of *Tosafot* is not applicable.[137] How much more so does the argument fit with the opinion of Rabbenu Avraham HaGadol (which is quoted in *Hagehot Mordekhai* chapter *Haḥolets*, *siman* 108) that a woman who copulates with an apostate can be 'slain by the zealous' for, if so, there can obviously be no concern here to cancel the condition to avoid promiscuous intercourse.[138]

Although the Mishnah in *Qiddushin* 49b is concerned that perhaps the wicked man who marries on the condition that he is righteous might have entertained thoughts of repentance as a result of which we must consider the possibility that she is married to him, that does not present our position with any difficulty because there he introduced the idea of repentance by making the very condition 'that I am a righteous man' so we are forced to consider the possibility that he is repentant and, accordingly, that she is married, even though this contradicts two presumed statuses (*ḥazaqot*) — his *status quo ante* (wicked) and her *status quo ante* (unmarried). However, in the case of the apostate, where no such condition was made, there is no need whatsoever to be concerned that he might have repented inwardly when we neither see nor hear any external evidence thereof (= *Bet Shemuel* 42:22). This is particularly true in the case of apostasy of which it is written[139] "all who come to her shall not return" so that we do not suspect repentance unless there is cause to do so (similarly we find in *Responsa Maharshal* 41).

In *Hagehot Mordekhai*, chapter *Haḥolets*, *siman* 107, in the name of Rabbenu Ḥanan'el we find that the talmudic ruling that an apostate's *qiddushin* **are** *qiddushin* is taken as a rabbinic stringency (based on the minority possibility that at the time of the *qiddushin* he repented in his heart). However, in this case[140] when the groom was found to be in possession of a certificate (of conversion to Christianity) issued by the priest perhaps Rabbenu Ḥanan'el also would agree that we need not be concerned that he repented for if so he should have thrown the document away. (According to the majority of the *Posqim* who say that the *qiddushin* of an apostate are valid in Torah Law there is no need to postulate concern for his repentance because 'his *qiddushin* are *qiddushin*' makes sense as it stands.)

In conclusion, the *Ḥayyim shel Shalom* agreed to release her[141] if one other authority would agree with him.

21.2.6.11.4 In ***Seridey 'Esh* III 33:2**, Rabbi Weinberg brings the *Noda' BiHudah* and his argument from *Ḥayyevey lavin*[142] but he concludes that a case of an apostate groom whose apostasy was not disclosed to the bride is certainly one of mistaken transaction. There is no need to use the argument of *'ada'ta' dehakhi* in such a case because at the time of the *qiddushin* the consent of the bride was obtained in error.

In R. Weinberg's *responsum* published in ***No'am*** vol. 5, he quotes Maharam as saying that we can apply *'ada'ta' dehakhi* merely due to the danger that she might become attached to an apostate levir even if her husband is unblemished (both physically and spiritually) so how much more so will the marriage be void if the husband himself is an apostate and hid

137 See note 131.

138 And to instead assure the marriage to an apostate where the act of copulation will be far worse than merely promiscuous!

139 Proverbs 2:19.

140 Discussed in *Responsa Ḥayyim shel Shalom*.

141 On the basis of mistaken transaction.

142 See §22.2.6.10.1 above.

this fact from her. The *Noda' BiHudah* did not mention this. Now *NB*'s concern that the apostate, having it within his power to repent, may in fact do so, is difficult because if so, how could the Maharam write that, in the case of an apostate levir, we do not apply Resh Laqish's ruling that she prefers any husband (*kol dehu*) to none? Maharam clearly considers him not even a *kol dehu* but as worse than worthless, which yields the result that she was mistaken in contracting the marriage to her late husband, so that marriage is now annulled and she is not attached to her levir. According to the *NB*, since we must consider him as a potential returnee to his faith he most certainly is a *kol dehu*.

We find also in the *Aḥaronim*, says Rabbi Weinberg, that we do not need to concern ourselves with the possibility that an apostate has repented (see also Rashi, *'Avodah Zarah* 17a, s.v. *La' Yeshuvun*.). Rabbi Weinberg then cites the *Ḥatam Sofer* (II *EH* 89) who distinguishes between the case where the wicked individual marries on the condition that he is righteous etc.[143]

Rabbi Weinberg then deals with the 3 weeks, in the case of the *NB*, during which the apostate lived in the Jewish community declaring himself a believing and practising Jew, because of which the *NB* was concerned that he had had thoughts of repentance. R. Weinberg argues that that is only a concern if the apostate had no benefit from his declaration that he was a believing and practising member of the Jewish community, but if this declaration causes any benefit to accrue to him or if it avoids him any embarrassment there is no evidence whatsoever that he has repented. Furthermore, all this is only in accordance with Rabbenu Yonah but according to the *Bet Yosef*, who rules that he is like a fully fledged gentile until he has returned to the fold and confessed his sin, how could it enter one's mind to say, in the *NB*'s case, that he had repented by the time of the *qiddushin*? The fact is that if he had told her the truth she would have spat and fled! The words of the *NB* are, thus, quite astonishing.

What is more, even if he had accepted repentance in his heart the marriage would be void because she wants a husband who is already observant and conducts himself uprightly.[144]

As to *NB*'s argument:[145] "…if a man unknowingly married a woman who was forbidden to him by a negative Torah prohibition — *ḥayyevey lavin* — we would not say that 'on that understanding he did not marry her' because legal prohibition is not to be compared to physical blemish. Now……if that is the case where the man was faced with a problem of a prohibition that can never be resolved how much more so will that be the law where the woman is faced with a problem that can be resolved — by the repentance of the apostate", R. Weinberg notes that the case of an apostate husband is not just one of prohibition but also one of revulsion, disgrace and family blemish, and we may therefore be certain that she would never have agreed to such a union in spite of the possibility of the groom's repentance.

Furthermore, we do not find in the *Rishonim* that *ada'ta' dehakhi* does not apply to marriages where one partner was unaware that the union with the other was forbidden by a negative commandment[146] except for the Ran who is quoted in *Be'er Yitsḥaq*. The *Ḥatam Sofer* has already concluded in his *Responsa* that according to Maharam when she finds herself attached to an apostate levir even after *nissu'in* her marriage is retroactively

143 *Qiddushin* 49b. See §22.2.6.11.3 above.

144 Not one who has mentally determined to start his journey back from the abyss!

145 See §22.2.6.10.1 above.

146 Something which the *NB* is here taking for granted: see ibid., 2 at notes 132 & 133.

annulled[147] and although some disagree with Maharam, that is only in such a case where we are not operating the argument of mistaken contract (*qiddushey ta'ut*) but that of unspoken condition (*'ada'ta' dehakhi lo' qiddeshah 'atsmah*). However, where he misled her and she later discovered that her husband was an apostate I have not found one of our Rabbis — of the *Rishonim* or the *'Aḥaronim* — who says that this is not a mistaken transaction apart from the *Noda' BiHudah* who has 'closed the gate' on us.

Rabbi Weinberg concludes: "Nevertheless, although my arguments seem correct to me, I am not able to permit that which the *NB*, who is accepted as the last *'aḥaron* whom all the people of Israel follow, forbade ….My words, therefore, are not meant as a halakhic ruling but a suggestion for discussion amongst the greatest jurisconsults of our time."

In *No'am* volume 1, R. Weinberg cites the opinion of the Rash (R. Shimshon of Sens) that an apostate's *qiddushin* are rabbinic. One rabbi argued, in *No'am* volume 3, that this is a unique opinion and has been rejected, but R. Weinberg shows that it is not unique.

He further argues from the case of *'ailonit* where the vast majority of the *Rishonim* agree that, where this fact was not disclosed to the husband, the marriage is a mistaken transaction in spite of the possible argument that due to the pleasure of intercourse he overcomes his objections. How much more so where she discovers that he is an apostate, for there is not one daughter of Israel, even one who transgresses the *Halakhah*, who could be persuaded by anything to accept him. This is as the *Rishonim* quoted in the *Mordekhai* write in chapter *Haḥolets*….

21.2.6.11.5 In ***'Ohel Mosheh* II 123** the author discusses the opinion of the *posqim* who hold that an apostate is considered a gentile and the fact that according to a number of *posqim* the negative commandment of *lo' tithaten bam* applies to a union between a Jew and any gentile so if she did not realise that she was marrying an apostate (= gentile = negative Torah prohibition) the *qiddushin* are a mistaken transaction and are void (even though when **she** misled **him** into a marriage proscribed by a negative Torah commandment, such as a bride who failed to disclose to her groom who was a *kohen* that she was a divorcee, one would not declare the marriage void). There are other possible serious blemishes in a man of which we would say *'ada'ta' dehakhi lo' qiddeshah 'atsmah*. *'Ohel Mosheh* then quotes a *responsum* of the *Terumat HaDeshen* wherein it is stated, on the basis of the *responsum* of Maharam, that so long as we do not see evidence that he has repented….the marriage is to be considered a mistaken transaction. Here, says Rabbi Zweig, we have a great authority to rely on in an emergency when it is impossible to obtain a *get* from him and there is thus the danger of *'iggun*.

21.2.6.12 ***OHP* 39:32:26** This section deals with the case where he was observant at the time of the *qiddushin* and apostatised at some point in the marriage.

21.2.6.12.1 ***Responsa Mahari Qatsbi,*** *siman* 10 expresses astonishment at those who say an apostate is a gentile because if so how can a kasher individual who married and later apostatised ever divorce his wife? He answers that those who maintain this position would say that when he becomes an apostate his wife can say that on such an understanding she did not marry him (based on *Bava' Qamma'* 110). Although Rashi holds that Resh Laqish's pronouncement concerning the leprous brother-in-law applies equally to an **apostate** brother-in-law, that is only where the husband is acceptable and the levir is an apostate but if the husband is an apostate Rashi, too, will agree that we apply *'ada'ta' dehakhi lo' qiddeshah 'atsmah*.

[147] On the basis of the argument that *'ada 'ta' dehakhi* she did not agree to marry.

(Mahari Qatsbi maintains that Rashi agrees also in the case of a leprous husband.)

He adds the argument that the wedding declaration of the groom that he betroths his bride 'according to the law of Moses and Israel' implies 'on the condition that he remains an Israelite' — which an apostate has clearly not done. Although he does not rule to release her without a *get* nevertheless, he says 'one can certainly rely on the apostate husband's appointment of people to write, and deliver to her, a *get*'.

21.2.6.12.2 ***Responsa Noda' BiHudah,*** I 88 deals with someone who apostatised and whose wife has been left an *'agunah* and suggests a solution according to the opinion of the Geonim who release without *halitsah* a sister-in-law attached to an apostate levir as brought in the glosses to the *Mordekhai* in chapter *Ha*ḥ*olets,* and in *Terumat HaDeshen* no. 223 and in *Shulhan 'Arukh EH* 155:4. Some explain that this is because he is considered a gentile and his intercourse is considered as incest; therefore neither *yibbum* nor *halitsah* applies to such people. Others explain that they relied on that which is recorded in *Bava' Qamma'* 110b, where Resh Laqish declares that a woman would marry unconditionally and take the chance of being later attached to a leprous levir but, add the Geonim, as regards an apostate levir we may be sure that she would not have taken the chance — *'ada'ta' dehakhi lo' qiddeshah 'atsmah*.

In the glosses to the *Mordekhai* a question is raised against this from *Tosafot Bava' Qamma'* where it is stated that the question of the Gemara and the answer of Resh Laqish only applies to an *'arusah* but once *nissu'in* have taken place there is definitely an unconditional marriage. One can answer that *Tosafot* speaks only of a leprous levir but will agree in the case of an apostate levir that *'ada'ta' dehakhi lo' qiddeshah 'atsmah* even after the *nissu'in*.

In *Ketubot* 47b *Tosafot* ask why it is that when a husband becomes leprous we do not say that she can leave without a *get* since *'ada'ta' dehakhi lo' qiddeshah 'atsmah* (rather we say that he can be forced to give a *get*)? They respond that if he had said to her that he is marrying her on the understanding that he may one day become leprous **she would have agreed** to go ahead because otherwise he (or any other man) may well not have married her. However, in the case of the levir, the husband would have agreed to the marriage being retroactively dissolved after his death because he is not concerned about what happens then.

Hence, taking on board the words of the Geonim and assuming that intercourse with him is considered incestuous, so that as soon as he apostatises his wife becomes forbidden to him, we can argue that since she is forbidden to him it makes no difference to him whether the marriage stands or retroactively dissolves. Therefore, we can say *'ada'ta' dehakhi lo' qiddeshah 'atsmah* — to be joined with an apostate, so she can leave without a *get*.

If you will ask why we do not find mention of this logical argument and why did the Geonim speak only of a woman finding herself attached to an apostate levir and not of the wife of an apostate, the answer would seem to be, as the *Terumat HaDeshen* points out, that the Geonim who maintain that the intercourse of an apostate is 'incestuous' themselves had a problem because the *Halakhah* states clearly that an apostate's *qiddushin* are valid. They solved this by distinguishing between the case of the sister-in-law where she became attached to him (without his doing anything)[148] and where there is involved only a non-enhanced negative prohibition[149] and the case of *qiddushin*, where he commits a positive

[148] Circumstances beyond human control brought about the levirate bond. Cf. note 150.

[149] Which is not so serious so we may be somewhat lenient.

action[150] and where there is involved a negative commandment enhanced with excision.[151]

Therefore, in our case, where the *get* has been delivered but there is some concern [on the rabbinic level], so that she has been divorced in Torah Law and there is no prohibition involving excision but merely a rabbinic invalidation which is a lesser matter than the prohibition of *yevamah* (a non-enhanced negative), we may say that she did not accept *qiddushin* on the understanding that she would find herself married to an apostate.

However, my contention that he does not care [about the retroactive dissolution of his marriage] and that the matter depends entirely on her and that we can therefore apply *'ada'ta' dehakhi lo' qiddeshah 'atsmah*, as we do regarding *yibbum*, is not correct. True, what occurs after his death makes no difference to him but what occurs during his life, even though he has become an apostate, [is still relevant to him because] she does not become irretrievably forbidden to him since he might repent, so it is certainly not agreeable to him that the marriage should be dissolved.[152] Furthermore, so long as she is attached to him, **she needs to persuade him [to give a *get*] with money and for that reason also he would not want the *qiddushin* annulled….!!**

I do not want to dwell on this point, *Noda' Bi-Hudah* concludes, due to the jurisconsults who seek leniencies and lest they take my words and corrupt them in order to be lenient even with a woman definitely married in Torah Law, whose husband has apostatised.

Resumption of analysis of R. Morgenstern's sources (on no.7, *Zeqan 'Aharon*)

21.2.7 Morgenstern writes: "**Rav Aaron Volkin** [e]xpands the definition of *mumar* to cover one not observant. Thus if the husband does not observe the Sabbath, kasher laws, and the purity laws of *niddah*, marriage to him would be at most rabbinic according to many authorities".

Where is this *responsum* of **Rabbi Volkin**? Having searched his writings I concluded that Morgenstern refers to **volume II number 124** which speaks of a case of an apostate brother-in-law where it has proved impossible to obtain *halitsah*.

Rabbi Volkin firstly points out that the Redakh permitted her remarriage without *halitsah* if it is physically impossible for the widow and her brother-in-law to meet (for example in times of war), as was the case dealt with in Rabbi Volkin's *responsum*. This ruling of Redakh is quoted in *Ba'er Hetev EH* 157.

He then quotes a *responsum* of the Geonim, heads of the college of *Matha' Mehasyah*, regarding an apostate brother-in-law in which they rule that the widow is exempt from *halitsah*. This permissive ruling is quoted in *Mordekhai*, chapter *Haḥolets* and in *'Or Zarua' Hagadol* and in *Tur 'Even Ha'Ezer* 157 and it is built on 3 arguments:

(i) We find in the laws of interest that one may take interest from an apostate because the Torah describes the prohibition of interest as obtaining between 'brothers' and an apostate has departed from the brotherhood of the Jewish people. Similarly in the case of *yibbum* and *halitsah*, the Torah speaks of the dead husband's brother 'building up his brother's family', thus excluding an apostate brother from

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150 *Hatam Sofer* II 72 explains this to mean that he commits an action **of Jewish import** — giving *qiddushin* — leading us to suspect that he has entertained thoughts of repentance so his *qiddushin* will be valid.

151 So we must take a stricter approach.

152 For if it is, she becomes lost to him forever.

performing this task since in the Torah's view he is no longer a brother of the deceased.

(ii) It cannot be permitted for him to perform *yibbum* when he is classified as a wicked gentile so that 'the zealous may run him [and her] through'[153] — the situation thus being one of *'erwah* — and the rule is that wherever *yibbum* is impossible under Torah Law there is also no requirement of *halitsah*.

(iii) The Talmud says that if a widow found herself bound to a levir who was leprous one could argue that had she known that she was going to find herself in such a situation she would never have married her former husband, so she should not need *halitsah*. It is only because of the observation of Resh Laqish that a woman can find satisfaction with any husband that we presume she would have married her first husband even if she had realised the danger of becoming bound to his brother (who, though leprous, is still a husband with whom she could live). However, say these Geonim, where the levir is an apostate there is surely no Jewish woman who would prefer him even if the alternative were spinsterhood, so she would certainly not have married her former husband had she realised that the circumstances in which she finds herself might arise.

Hence, where the woman finds herself in circumstances that trigger a bond with her former husband's brother and that brother is an apostate, the woman's marriage should become retroactively annulled, which means that she never was that man's wife and, therefore, she is not the apostate's sister-in-law and so requires no *halitsah*.

However, says Rabbi Volkin, Rashi and many others object strongly to the ruling of these Geonim. The counter arguments are as follows:

(i) It is not true that an apostate is not called a brother because the prophet Malakhi[154] says "Was not Esaw a brother to Ya'aqov?"[155] and Esaw was an apostate, as it says in *Qiddushin* 18[a].

(ii) Although he is forbidden to copulate with her, if he did so the child born from that intercourse would not be a *mamzer* and therefore there is a levirate bond just as there is when *yibbum* with the brother-in-law is banned in Torah law by a negative commandment without further sanction.[156] Just as all agree that *halitsah* must be performed in the latter case, so must it be performed in the former.

(iii) *Tosafot* argue that the Talmud in *Bava' Qamma'* refers only to a widow from *'erusin* but if she had entered into *nissu'in* with her former husband we no longer presume that she married him conditionally but we rather say that she took on board the chance of becoming bound even to a leprous levir so that her *nissu'in* might be definite and unconditional, as the Talmud says elsewhere 'there is no condition in *nissu'in*'.[157]

Rabbi Volkin proceeds to answer all the questions raised against the Geonim and he adds that there is support for their opinion in the *Yerushalmi*. Although Rashi disagrees with the Geonim, in this particular case brought before Rabbi Volkin, Rashi would agree that there is no levirate attachment since there is no way that she could physically reach her brother-in-law (see above §21.2.7, third paragraph) in the name of the Redakh).

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153 קנאים פוגעים בו: see *Sanhedrin* 81b.

154 1:2.

155 See in the *responsum* the lengthy discussion of the significance of 'brother' in various biblical contexts and especially the difference between biological and religious brotherhood.

156 *Yibbum* cannot be performed in such a case but *halitsah* is compulsory.

157 See, *inter alia*, *Yevamot* 107a.

He also quotes additional reasons — besides the three listed above — that have been advanced for the position of the Geonim by the *'Avney Millu'im* (157, the apostate does not inherit) and by the *Netsiv* (*Meshiv Davar* 75, the apostate cannot 'raise up a name in Israel for his brother'). According to these interpretations of the ruling of the Geonim, the arguments against them, in (i), (ii) and (iii) above, are irrelevant because their position was never based upon any such considerations.

Nevertheless, the opinion of those who dispute the Geonim won the approbation of the later *posqim* to the extent that the *Bet Yosef* wrote that the words of the permissive ones (the Geonim of *Matha' Mehasya'*) possess 'neither root nor branch'[158] and in *SA* he ruled stringently. Nevertheless, in this case Rabbi Volkin came to a lenient conclusion as follows.

1. Mahari Mintz and Maharam Padua permit a widow's release without *halitsah* merely on the basis of the levir's being an apostate.
2. The Redakh and the *Meshivat Nefesh* permit it if there is no way that she can reach him.
3. The Rema (*EH* 157[:3]) rules that if she has remarried without *halitsah* (in the case of the apostate levir) she may remain with her husband.

Rabbi Volkin argues that in any case where the *Halakhah* allows a *post factum* situation to stand even when it is not an emergency,[159] that situation may be *ab initio* entered into where there is an emergency[160] as the Talmud states in *Yevamot* 37:[161] "Since it is not possible to do otherwise we shall follow the Rabbis" although the *Halakhah* is in accordance with Rabban Shim'on ben Gamliel. Rabbi Volkin adds that there is no reason to differentiate between an apostate who has been baptised and one who has joined the Communists. He also points out that the emergency in his case is very great because the doctors have said that the unbearable situation is endangering the young woman's life and he directs us to the *responsum* of the *Hatam Sofer* ([*EH* II] 82) where the latter discusses whether it is permitted to transgress the prohibition of *yevamah lashuq* to escape mortal danger and, he adds, in addition to all the above, there was a report that the brother-in-law had died. He therefore regards it as straightforward to permit the woman's remarriage and concludes that if the contemporary rabbis will agree he will join with them.

I could not find in this *responsum* any extension of the definition of apostasy to include irreligiosity in lesser matters. I therefore do not know to what Rabbi Morgenstern is referring.

21.2.8 ***Baḥ, 'Even ha-'Ezer* 157. This is cited by Morgenstern for the claim that "Some authorities hold that even if he became irreligious after the marriage, the marriage is annulled".**[162]

The *Baḥ* comments: Now that which the *Bet Yosef* wrote 'even if he married her after he apostatised' means to say let alone if he married her before apostatising, since according to one opinion it is the wedding that creates the levirate bond, it is obvious that she is bound to the levir,[163] but even if he married her after he had apostatised, when she would not be

158 Malakhi 3:19.

159 As in the ruling of the Rema.

160 As in the case with which Rabbi Volkin was dealing.

161 *'amud 'alef.*

162 Actually, a number of earlier cited authorities maintain this position. See §§22.2.1, 22.2.2, 22.2.6.7.1, 22.2.6.12.1 above. The statement of the *Baḥ* is *sub voce Umah shekatav haBet Yosef wa'afilu qiddeshah aḥar shehemir*.

163 Since at the time of the wedding there was no apostasy on the husband's or levir's part there was no reason to doubt the levirate attachment

bound to her levir according to the opinion that the wedding creates the bond, even so one must be stringent since according to the one who says death (of the husband) creates the bond she is bound to the levir.[164]

The *Baḥ*, however, argues that exactly the opposite is the case. It is obvious that, if he married her **after** he had apostatised, his marriage is valid because she accepted his *qiddushin* in full awareness of the facts and is therefore certainly married. However, where he married her first and only afterwards apostatised, we may presume that she accepted his *qiddushin* (*'erusin*) and was married to him (*nissu'in*) on condition that he would conduct himself as a Jew so when he changes his religion she can say that on such an understanding she never married him. Hence, the ring of the *qiddushin* must be, in retrospect, considered a gift and every act of intercourse during the 'marriage' will become retroactively promiscuous.

See **I D 69** (§11, above) where I have already criticised Morgenstern's use of this *Baḥ*.

21.2.9 **Numbers 9 (*Tur 'Even Ha'Ezer* 44), 10 (*Responsa Seridey 'Esh* III number 25, page 73) and 11 (*Responsa Maharam Mintz*, number 105, quoted in *Responsa Seridey 'Esh* III number 25, page 71)** are cited by Morgenstern for the ruling that "a marriage to a *mumar* — irreligious person — is not binding by Divine Law. It is only at most Rabbinical".

21.2.9.1 Comments: Firstly, Morgenstern's interpretation of *mumar* as 'irreligious person' is grossly misleading as is abundantly clear from many of my preceding comments.[165] Secondly, he is repeating here what he has just said. He does, however, add some sources.

21.2.9.2 ***Tur 'Even Ha'Ezer* 44 —** See §19.2.1, above.

21.2.10 ***Responsa Seridey 'Esh* III 25, page 73**[166] **—** Although the matter of marriage to an apostate is discussed there, there is no mention of its not being recognized in Divine Law or being at most rabbinic.

21.2.11 ***Responsa Maharam Mintz*, number 105, quoted in *Responsa Seridey 'Esh* III 25, page 71 —** This is quoted on p. 71 in the second column, last paragraph but one (s.v. *mashma'*). It discusses the application of אדעתא דהכי to a woman married to one whose brother apostatised and says that from Maharam[167] it seems that it makes no difference whether he was an apostate when she married his brother or apostatised only later — in both cases we can say that she did not accept the *qiddushin* on such an understanding and that therefore she is free to remarry without *halitsah*. There is no mention here of the halakhic status of an apostate's marriage. To be certain, I did not rely solely on the quotation in *Seridey 'Esh* but checked out the entire *responsum* in *Responsa Maharam Mintz* and found no additional information that would lend any support to Morgenstern's claim.

21.2.12 **Rambam, *Yad, 'Ishut* 29** is cited as a source for the claim: "Others hold only if he was irreligious before the marriage [is no *get* required]"….because this is a mistaken

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164 The final section of the *Baḥ*'s statement (since according to etc.) makes no sense, as pointed out in *ET* XXI col. 393 n. 21. I think it should read: when she would not be bound to her levir both according to the opinion that the wedding creates the bond and according to the opinion that death creates the bond, even so one must be stringent since most *Posqim* hold that the widow of a childless apostate is bound to her husband's brother".

165 See, for example, §22.2.6 Summary (at the end), number 1.

166 In the Mossad Harav Kook edition, Jerusalem 2003.

167 Quoted in *Mordekhai, Yevamot, siman* 30.

transaction.

21.2.12.1 Comments: The reference given in Morgenstern: *Tsuvos*(?) Maimonides, Laws of *'Ishut*, #29, is unhelpful. I cannot decipher the first word and there is no chapter 29 in Laws of *'Ishut*, the last chapter being 25. I checked every 29th **paragraph** in this chapter but still found nothing relevant. If *Tsuvos* is intended to be *Tshuvos*, why the reference to Laws of *'Ishut*?? Nevertheless, I checked no. 29 in all 3 editions (Blau, Jerusalem 1986; Pe'er haDor, Jeruslem 5744; Freimann 5694) of the Rambam's responsa and found nothing relevant to Morgenstern's claim.

21.2.13 Morgenstern claims that ***Seridey 'Esh* III 25** cites authorities who say that if the…defect — irreligious or….physically ill[168] — occurs with the husband before or after the marriage, the marriage can be annulled. See my comments above, p. 30, **Number 2**.

21.2.14 ***'Even ha-'Ezer* 115 & 15 — *'Even ha-'Ezer* 154** are cited for the claim: "Some authorities hold that being irreligious is grounds for divorce or annulment only if the irreligious party forced the other spouse to violate Jewish Law, such as cooking non-kasher food and not informing the spouse about this; or bringing in non-kasher food and the spouse not knowing, eats such food……"

21.2.14.1 Comments: The *SA* quotes two views in such cases: one says it is obligatory upon him to divorce her and the other says it is optional. It is true that this chapter of *SA* speaks not of apostasy but of causing the spouse to sin in various ways but at the same time it speaks only of divorce and there is no mention of coercion or annulment. See *Ḥelqat Meḥoqeq* 115:18. Hence Morgenstern's claim that this source refers to 'grounds for divorce **or annulment**' is absolutely unjustifiable.

21.2.14.1 As to ***'Even ha-'Ezer* 154** the nearest to anything relevant to Morgenstern's claim is found in paragraphs 17 and 20. In 17 we are told that a woman who has been divorced from two previous husbands, due to her having lived with each for ten years and given neither of them children, should not marry a third husband unless he has already had a son and a daughter. If she does marry such a husband the law says that he must divorce her. The *Bet Shemuel* notes that he must do so immediately even if he knew before marrying her that she was infertile because she is forbidden to him as he has not fulfilled the commandment of procreation and has no other wife with whom he could have children. If he did not know at the time of the marriage that she was infertile the *qiddushin* would be a *miqah ta'ut*.

In 20 we read that if a man marries any woman forbidden to him, even if only rabbinically so, such as the *sheniyot*, the court must force him to divorce.

So we have an example of an obligation to divorce and a mistaken transaction in 17 and an example of coerced divorce in 20 but not a single mention in either of annulment. Also, these paragraphs do not speak of one partner forcing the other to sin. They therefore afford no support for Morgenstern's claim.

22.0 Conclusion

[168] Again Morgenstern translates the terms *mumar* (apostate) and *mukkeh sheḥin* (leprous) as 'irreligious' and 'physically ill' which allows them a far wider meaning than they really have. This suits the aim of freeing as many women as possible from *'iggun* but it is based on good intentions rather than accurate scholarship.

22.1 Most noticeable in Rabbi Morgenstern's selections of sources is the percentage thereof that fails to prove the point for which they were cited.[169] There are two sources that prove the very opposite of the claim in support of which Rabbi Morgenstern cited them.[170] In one case, he makes a statement that is contradicted by the Mishnah, the Talmud and all the *Posqim*.[171]

22.2 Another problem is his reference to sources that do not seem to be located in the place cited[172] and a related problem is his occasional tendency to give a vague source or no source at all.[173]

22.3 In this paper, I have indicated numerous examples of these phenomena. I shall now briefly summarise a number of these.

Sources that fail to prove the point

22.4 In **4.2.1-3** Rabbi Morgenstern argued that dead marriages can be annulled where the husband will not give a *get* and annulment can also be employed to save a child from *mamzerut*. For this he quotes *Responsa*: (i) Maharsham I:9, (ii) *'Or Zarua'* 761 (quoting Rabbenu Simḥah), and (iii) *Bet 'Av* book 7, chapter 27 but, as I demonstrate there, (ii) and (iii) speak of mistaken acquisition or coercion but not of annulment. As to (i), this does speak of annulment to save a child from *mamzerut* but is subjected to drastic limitations (unmentioned by Morgenstern) by Maharsham who states that it applies only where the woman was an innocent victim of circumstances and even then the ruling was only theoretical. In addition, Rabbi Morgenstern failed to note that this *responsum* of Maharsham was strongly criticised by Rabbi Shelomoh Zalman Auerbach.

22.5 In **5.1** I refer to Rabbi Morgenstern's claim that due to a minimum of 20 (out of a maximum of 30) doubts in every case that he deals with it is impossible that the child from the second relationship could be a *mamzer*. To support this claim he cites (5.2.1) no fewer than 8 authorities:
(i) *Yabia' 'Omer* VII 6
(ii) *'Igrot Mosheh EH* IV 20
(iii) Rema *EH* 17:58 (end)
(iv) *Pithey Teshuvah* 17:175
(v) *Ḥokhmat Shelomoh* 17:58
(vi) Rema *EH* 178:3
(vii) *Bet Shemuel* 178:4
(viii) *Pithey Tesuvah* ibid.

22.5.1 However, not one of those authorities could shed any light on the correctness of Morgenstern's claim because at no point does he inform us of the nature of even one of his 20-30 doubts so it is impossible to know whether the doubts he uses to create *sefeq sefeqa* arguments are valid halakhically. In addition, only the first of his sources actually speaks of freeing a *mamzer* by means of *sefeq sefeqa'*. The second treats a question of *mamzerut* but does not employ the methodology of *safeq*. The remaining sources do not mention *mamzerut* or *safeq* at all!

22.6 In **10.1** three sources are quoted to support the argument that "Wherever you may coerce according to the *Halakhah*, since today it is impossible in practice to do so, you may annul instead". The sources are: (i) *Responsa 'Igrot Mosheh, EH* I:79 (end); (ii) *Responsa Devar 'Eliyahu*, 48; (iii) *Responsa 'Ohel*

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169 See: **4**.2.1-3, **5**.2.2-9, **6**.2.1-5, **7**.2.1, **9**.3.3, **9**.5.4, **9**.6, **10**.2.1-3, **11**.2, **12**.2.7-11, **12**.2.14, **14**.2.5, **16**.2.2, **17**.2.1, **19**.3.1, **19**.6.1, **19**.7.1, **20**.2.1, **20**.2.2, **20**.2.3, **21**.2.2-4, **21**.2.6.5, **21**.2.7 end, **21**.2.9.1, **21**.2.13 and note 168, **21**.2.10-11, **21**.2.14.1 end.

170 See: **5**.2.10, **7**.2.2.

171 See **20**.2.1.

172 See: **2**.2, **7**.2.1, **9**.4, **14**.2.2-4, **20**.2.4-5, **21**.2.3, **21**.2.12.1.

173 See: **3**.2.2(iii), **14**.2.1(i), **19**.3.1, **21**.2.4.

Mosheh, II 123.

22.6.1 On examining (i) I found that Rabbi Feinstein had merely stated that a serious blemish in the husband, unknown to the wife at the time of the wedding, renders the marriage a *miqah ta'ut*. Since no woman would agree to such a wedding even when coercion (by the *bet din*) was possible, how much more so now that it is impossible. Therefore, no *get* is required.

22.6.2 That is far from granting permission to apply annulment every time coercion is halakhically warranted but, due to the secular law, cannot be applied. Rabbi Feinstein only declares this particular marriage annulled because of the false premise upon which it was based and this would be true even if there were no halakhic case for coercion at all. On the other hand, in cases where the *Halakhah* does permit coercion but where there was no *miqah ta'ut* (as in §4.2.2) Rabbi Feinstein nowhere said that the marriage can be annulled.

22.6.3 Number (ii), ***Devar 'Eliyahu* 48**, deals with a case where, unknown to the wife, the husband was impotent at the time of the marriage. The husband died (childless) and the wife could not obtain *halitsah*. Rabbi Klatzkin argues, on the basis of mistaken transaction and a doubt concerning the existence of a levirate bond in this case, and permitted the wife's remarriage without *halitsah*.

22.6.4 Once again, I pointed out that this is a case of *miqah ta'ut* and says nothing about the power to annul in cases requiring coercion when the original *qiddushin* were without error.

22.6.5 Regarding (iii), ***Responsa 'Ohel Mosheh,* II 123**, I indicated that it concerns a married woman who discovered that her husband was a *mumar* (apostate) and who could not acquire a *get* from him. Rabbi Zweig first approaches the question from the point of view of the validity of the *qiddushin* of a *mumar* which, he concludes, may be classified as sufficiently doubtful to be a unit in a *sefeq sefeqa'*. He furthermore concludes that the blemish of apostasy having been unknown to the wife at the time of the *qiddushin* warrants a ruling of mistaken acquisition.

22.6.6 Thus there is not a word in this *responsum* from which one could derive, as Rabbi Morgenstern claims, that "wherever you may coerce according to the *Halakhah*, since today it is impossible in practice to do so, you may annul instead".

22.7 In **21.2.7** Rabbi Morgenstern cites a *responsum* of Rabbi Volkin as extending the meaning of apostate to include any non-observant Jew. "Thus", he writes, "if the husband does not observe the Sabbath, kasher laws, and the purity laws of *niddah*, marriage to him would be at most rabbinic according to many authorities".

22.7.1 After a wide-ranging search for the *responsum* in question, I concluded that Rabbi Morgenstern was referring to volume II number 124 in which Rabbi Volkin rules that there is no difference between an apostate that was baptised and one who had joined the Communists but beyond that there is no extension whatsoever of the term to include Jews guilty of lesser violations of the *Halakhah* in the category of apostates.

Sources proving the opposite

22.8 There are two sources that prove the very opposite of the claim in support of which Rabbi Morgenstern cited them (5.2.10, 7.2.2.).

22.8.1 The first of these (*Responsa 'Oneg Yom Tov* II chapter 121) is cited for the claim that whenever a woman is not in violation of any law the child she bears in that situation cannot be a *mamzer*. On consulting the *responsum*, I discovered that the author describes hypothetical situations in which a couple

are correctly advised by *bet din* to commit an act of adultery in order to save their lives and he discusses the status of a child born from such a union concluding that even in such a situation the child would be a *mamzer*.

22.8.2 The second source is cited by Morgenstern to prove that if a woman remarried without a *get* on the authority of a *bet din* that erred the subsequent child of her remarriage is kasher because permission from a *bet din* to remarry is an annulment of the former wedding. The case discussed by Maharsham concerned a woman whose husband had disappeared 12 years earlier. The missing husband's brother then appeared with a letter from his mother testifying to the death of her son. In addition, the brother had also heard definite news of the husband's death and there was also a report from the government rabbi in charge of registration stating that a man with the name and surname of the husband was known to have died. On the basis of all this the *Bet Din* correctly allowed *ḥalitsah* and remarriage to take place and the woman gave birth. When it was ultimately discovered that the husband was still alive the Maharsham made the most strenuous intellectual efforts to save the child from *mamzerut* but finally had to admit defeat. Clearly, the Maharsham knows nothing of Morgenstern's annulment.

Contradicting all the sources

22.9 One Morgenstern claim (20.2.1) is contradicted by the Mishnah, the Talmud and all the *Posqim*.

22.9.1 Morgenstern argues that just as the insane cannot contract a marriage so if one were to become insane during his marriage the marriage would disintegrate and no *get* would be necessary. This is flatly contradicted by no less an authority than the Mishnah itself (*Yevamot* 112b) which rules that if a married man loses his mind his wife becomes an *'agunah* and there is no remedy. This ruling is accepted without dissent by the Talmud and, needless to say, all the *Posqim*, and is recorded as *halakhah* in the *Shulḥan 'Arukh* (*EH* 121:6) as I pointed out above in 20.2.1.

Citations that cannot be found

22.10 On numerous occasions I have sought for passages cited by Rabbi Morgenstern and failed to find them where they are stated to be. Occasionally, I found them elsewhere but often I failed to discover them anywhere.

22.10.1 For example, Rabbi Morgenstern (7.2.1) refers to a statement of Redaq as being on II Samuel 3:14 whereas the relevant statement is to be found in Redaq to I Samuel 25:43 (though it must be added that the Redaq's comments there also fail to offer any support for Rabbi Morgenstern's claim).

22.10.2 One example of a non-traceable source is that proffered by Rabbi Morgenstern (9.1(ii)) to demonstrate that "Any *bet din* can uproot Torah law as a *hora'at sha'ah*" – *Seridey 'Esh* I no. 32 (p. 62) based on Radbaz I no. 120". As I point out there (9.4) a full search of both editions of *Seridey 'Esh* and of the *responsum* in Radbaz upon which this *responsum* in *Seridey 'Esh* is said to have been based yields information on the transportation of a paralytic to synagogue on Shabbat, stunning before *sheḥitah* and business partnerships!

22.10.3 Another example is Morgenstern's claim (14.1) that even if the defect — with which she says she cannot cohabit — appeared after the marriage coercion can be applied for which he cites, amongst others, *'Avnei Milluim* chapter 44. Yet (as I say in 14.2.2) in the whole of the *'Avney Millu'im* to *EH* 44 there is not a word of this.

22.10.4 One source upon which he bases his claim (14.1) that if the husband becomes an apostate after the marriage he is forced to divorce her and that if coercion cannot be applied the marriage is annulled is *Minhat Hinnukh*, chapter 20-25. As I point out there (14.2.3) the *Minḥat Ḥinnukh* in those chapters deals with *Pesah*, firstborn donkeys, *Shabbat* and belief in G-d!

Vague sources/No sources

22.11 In 3.1, Rabbi Morgenstern claims that "All doubts in law and facts are resolved in favour of the Agunah. Even minority views in law in favour of annulment can be relied on". His final citation for this ruling is "Rabbi Mosheh Feinstein" without any indication where such a statement can be found in Rabbi Feinstein's voluminous writings. I have so far failed to locate it.

22.12 In 19.3.1 he gives as sources Maharsham and *Levushey Mordekhai 'Even Ha'Ezer*. I managed to find the relevant Maharsham (see there) but I never found the *Levush*.

22.13 In 21.2.4 Rabbi Morgenstern cites *'Otsar HaPosqim* beginning of chapter 17. Now the *'Otsar* on *'Even Ha'Ezer* 17 fills six folio volumes (!) so that the vague reference "beginning" is not really helpful. I consequently conclude there, "Again, searching for the material relevant to Rabbi Morgenstern's claim is like searching for a needle in a haystack — without being sure that there **is** a needle!"

Positive observations

22.14 Nevertheless, I have been led by Rabbi Morgenstern to valuable sources as follows:

22.14.1 The ruling of the *Taz*[174] that in an emergency it is permitted to rely on a single lenient authoritative opinion, even when dealing with a Torah prohibition and that this leniency extends to situations of *'iggun* also. I discuss the halakhic implications of this in 15.3.1-4.

22.14.2 The rulings of a number of authorities[175] in cases where the wife was unaware of serious blemishes in the husband as a result of which it was possible to free her without a *get* due to the argument of mistaken acquisition (*miqaḥ ta'ut*) and the related fact that most *Posqim* agree that if the bride discovered after the wedding that the groom was an apostate, since she had been unaware of this when she accepted *qiddushin* from him, the marriage is considered a mistaken transaction and she is free to remarry without a *get*.[176]

22.14.3. The conclusion of Rabbi Ovadyah Yosef that only one doubt in a *sefeq sefeqa'* needs to be 50-50.[177]

22.14.4 The usage of the opinion of some of the Geonim that the *qiddushin* of an apostate are not effective.[178]

22.14.5 The interpretation of the condition of Rabbi Yosey that understands it as referring to a divorce, coerced if necessary, as well as to financial arrangements.[179]

22.14.6 The arguments of Dayyan E.Y. Waldenberg in *Tsits Eliezer* for the general acceptance of the Rambam's ruling for coerced divorce in cases of *me'is 'alai*.[180]

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174 See: **3**.2.1, **15**.2.1-3.4.

175 See: **4**.2.2-3, **10**.2.1-3, **14**.2.5, **16**.2.2, **17**.2.1, **21**.2.2, **21**.2.6.11.1-5, **21**.2.6.12.1, **21**.2.8, **21**.2.11.

176 See **21**.2.6.11.1-5.

177 See **5**.2.1.

178 See: **10**.2.3, **21**.2.6, **21**.2.6.1-2, **21**.2.6.7.1.

179 See **12**.2.4-6.

180 See **12**.2.12.

22.14.7 The possibility that the Rema is basically in agreement with the Rambam in this matter.[181]

22.14.8 Maharashdam's surprisingly permissive approach to the question of an apostate's *qiddushin* and the fact that his position has been used, at least as a *safeq*, by a number of *'Aḥaronim*.[182]

All of these sources have led me to further fruitful research and, in spite of my sometimes severe criticisms of Rabbi Morgenstern's *'agunah* solution, I am duty-bound to acknowledge my indebtedness to him for the benefits that have accrued to me from reading his work.

A final comment on the first volume of Morgenstern:

23.0 **ID 116-17**

The view of Rambam and Rashi's teachers regarding qiddushey khesef

23.1 Rabbi Morgenstern here argues that we may use as a tool for leniency the view of the Rambam and the teachers of Rashi that marriage with a ring (*qiddushey khesef*) is only rabbinic.

23.2 He adds that in *Sefer HaMitswot*, *shoresh* 2, the Rambam states that any commandment derived by means of one of the 13 exegetical principles is to be categorised as *miDivrey Soferim* ("of the words of the Scribes"), an expression that could well be understood to mean a rabbinic, as opposed to a biblical, law.

23.3 Similarly, he points out that in the *Yad*, *'Ishut* 1:2, Rambam writes: "In one of these three ways a woman is acquired, with *kesef* or with a document or with intercourse, with intercourse or with a document by Biblical Law and with *kesef* by the words of the Scribes".[183]

23.4 It would seem from here that since *qiddushey khesef* are not written in the text of the Bible but are derived by one of the exegetical principles (in this case *gezerah shawah* – see *Qiddushin* 2a) they create a marriage bond that is only rabbinic.

23.5 The same view is, apparently, propounded by Rashi's teachers as quoted by Rashi in his commentary to *Ketubot* 3a s.v. *Shavyuah rabbanan*: "I have heard all my teachers explain that if he betrothed her with *kesef* [it is easily understandable how the Sages could have annulled the marriage] because such *qiddushin* are only rabbinic". [184]

The Shav Ya'aqov and the Piṯḥey Teshuvah

23.6 Morgenstern furthermore states: "Shev (sic) Yaaqov cites why Pischei Tsuvoh at the end of Even Hoezer 42 rules like Rambam. He uses Rambam's ruling in conjunction with other rulings that are in dispute to annul a marriage and free an Agunah".

Comment on 23.6

23.7 It is difficult to decipher this statement but the facts of the matter are as follows. The *Piṯḥey Teshuvah* at the end of *EH* 42 (sub-para. 25) cites a *responsum* of Rabbi Aqiva Eiger (no. 94) regarding a case where one of the two witnesses to a wedding was the brother of the other witness's wife. As the Rambam, at the beginning of chapter 13 of the Laws of Testimony, rules that matrimonial relationships

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181 See 12.2.12 (where I refer also to similar arguments for the application of coercion in cases of *me'is 'alai* in Rabbi Yitsḥaq Herzog's *Hekhal Yitsḥaq*).

182 See **21**.2.6.

183 See also *Respomsa of the Rambam, Pe'Er HaDor*, no. 144.

184 Rashi writes similarly in *Yevamot* 90b, s.v. *'Amar leh* and in *Gittin* 33a, s.v. *Be'ilat zenut*.

(eg. brothers-in-law) and maternal relationships (eg. maternal half-brothers) between two witnesses or between the witnesses and parties, render the testimony only rabbinically invalid and the Rema in *Ḥoshen Mishpat* 33 cites this opinion of the Rambam as that of *yesh 'omrim*, it would seem, says Rabbi Aqiva Eiger, that in the case before him one would have to consider the *qiddushin* as a *safeq* and require a *get* for her remarriage.

23.8 At this point, R. Eiger turns to a *responsum* of the *Shav Ya'aqov* (no. 21) where the argument is made that in the case under consideration no *get* could possibly be required and the reasoning behind this is as follows.

23.9 There is a debate amongst the *'Aḥaronim* as to what the Rambam meant when he described the laws derived through exegetical principles as *Divrey Soferim*. Did he mean that they are merely rabbinic laws or did he mean that they are Torah laws but are not to be counted amongst the 613 commandments as the latter include only such as are written in the text of the Torah. According to this latter possibility they are called *Divrey Soferim* only because we know of their existence through the traditions of the Scribes (rather than through the biblical text) but not because the commandments thus derived were themselves invented by the Sages.

23.10 Hence, it is possible that the testimony of witnesses maternally or matrimonially related is inadmissible according to Biblical Law so that any marriage conducted with such witnesses would be totally null and void and no *get* would be required for the woman to marry another man. It is also possible that such testimony is valid on the biblical level and only rabbinically inadmissible so that the said marriage would be binding in biblical law and a *get* would be required for its dissolution. (This is the *safeq* referred to by Rabbi Aqiva Eiger above – end of 23.7)

23.11 Now in the case under discussion the marriage bond was forged with a ring (*qiddushey khesef*) and the validity of this mode of *qiddushin* is derived by means of a *gezerah shawah* (see 23.4) it therefore being debatable whether such a marriage is biblically or rabbinically valid. However, if laws derived from the exegetical principles possess biblical authority so that this marriage **is** biblically valid, by the same token the invalidity of the witnesses, being also derived from an exegetical principle, will also be biblical so there will be no marriage. If, on the other hand, laws derived from the exegetical principles possess no biblical authority and are but rabbinic so that the invalidity of the witnesses in our case would be only rabbinic but in Biblical Law they would be valid witnesses so that the marriage would be biblically valid, by the same token the *qiddushey khesef* which first brought the marriage into existence would not be biblically recognized so that we would finish up with a rabbinic marriage performed in the presence of rabbinically invalid witnesses which, as the Rema notes in *Shulhan 'Arukh 'Even Ha'Ezer* (end of chapter 42), is no marriage at all and requires no *get*.

23.12 Rabbi Aqiva Eiger comments that the reasoning seems correct but on closer examination must be rejected. He argues as follows.

23.13 There is no question, he says, that the Rambam regards *qiddushey khesef* as biblically binding. This is clear from the *Yad* at the beginning of *Hilkhot 'Ishut* (1:2&3) where the Rambam rules unequivocally that a woman who has been betrothed by **any one** of the three possible methods is considered a married woman and he who commits adultery with her is liable to the death penalty. If the Rambam regarded *qiddushey khesef* as only rabbinic there could not possibly be a death penalty for adultery with a woman betrothed by these means as pointed out by the *Maggid Mishneh* (*'Ishut* 1:2) and the *Tashbets* (I:151).

23.14 However, it does not follow that maternally or matrimonially related witnesses who are also exegetically excluded are also biblically invalid because the exegetical method employed in their case is not the same as that used to include *qiddushey khesef*. The latter are derived by means of *gezerah shawwah* – a principle of exegesis that no man can apply on his own initiative but which must be used

only on the basis of tradition from Sinai. Such a principle is obviously of biblical import.

23.15 In the case of the said invalid witnesses, however, their exclusion is derived by means of the midrashic principle *'im 'eno 'inyan* which is open to interpretation by the informed reader and not dependent on Sinaitic tradition. Laws deduced by this method, the Rambam maintains, are rabbinic. This distinction is made by the *Leḥem Mishneh* to *'Ishut* 4:6 and by *Responsa Shittah Mequbetset* no. 19 and is further supported, as indicated by *Responsa Temim De'im* (no. 83), by the fact that the Rambam himself differentiates between these two categories referring to *qiddushey khesef* as *midivrey soferim* but to the exclusion of testimony by maternally/matrimonially related witnesses as *miderabbanan*.

23.16 Accordingly, in the case under discussion the marriage is definitely valid in Biblical Law but there is doubt whether the witnesses are biblically or only rabbinically invalid. If the latter view is correct then this marriage is biblically valid and a *get* will be required.

23.17 It is a synopsis of this *responsum* of Rabbi Aqiva Eiger that the *Pithey Teshuvah* cites. Clearly, this doesn't seem to leave much room for the arguments of the *Shav Ya'aqov*.

23.18 We may now refer back to 23.6 where I quoted Rabbi Morgenstern as saying: "*Shev* (*sic*) *Ya'aqov* cites why *Pisc̱hei Tsuvoh* at the end of *'Even Hoezer* 42 rules like Rambam. He uses Rambam's ruling in conjunction with other rulings that are in dispute to annul a marriage and free an Agunah". The following errors of Morgenstern become clear:

1. The *Shav Ya'aqov* did not cite the *Pitḥey Teshuvah*. On the contrary, the *Pitḥey Teshuvah* cited the *Shav Ya'aqov*.
2. The *Pitḥey Teshuvah* did not rule like Rambam [that *qiddushey khesef* are only rabbinic]. On the contrary, he cited Rabbi Aqiva Eiger who ruled that Rambam maintains that such *qiddushin* are definitely biblical.
3. In the statement "He uses Rambam's ruling in conjunction with other rulings that are in dispute to annul a marriage and free an Agunah", 'He' presumably means the *Shav Ya'aqov* so the statement is true when taken independently. However, the context makes it seem that the *Pitḥey Teshuvah* agrees with the *Shav Ya'aqov* and this is not true.
4. No mention is made by Morgenstern of the arguments of Rabbi Aqiva Eiger, cited in this very *Pitḥey Teshuvah*, which would appear to prove beyond doubt that Rambam considers *qiddushey khesef* to be biblical, the description *midivrey soferim* notwithstanding.

Comment on 23.1-ḥ

23.19 Nevertheless, returning to consider Morgenstern's arguments for using the Rambam's view of *qiddushey khesef* and, similarly, that of Rashi's teachers, the question must be dealt with: Are there authorities who do indeed maintain that *qiddushey khesef* are only rabbinic according to the Rambam in spite of the apparently unassailable arguments put forward by Rabbi Aqiva Eiger and others? Even if the answer to this is no what is the position with Rashi's teachers? Is it agreed that they regard *qiddushey khesef* as rabbinic so that their opinion could be used at least as a component in a *sefeq sefeqa*?

23.20 A great deal of relevant material may be found in the notes of Rabbi David Yosef to *She'elot UTeshuvot Rabbenu Mosheh ben Maimon* (ed. *Pe'er HaDor*, Jerusalem 5744), number 144, note 13. It is clear from there that the **Ra'avad**, **Ramban** and **Rashba** all understood **Rambam** to mean that *qiddushey khesef* are only rabbinic and all three consequently rejected his opinion as totally untenable. Similarly, **Rashi** understood his teachers as saying that *qiddushey khesef* are rabbinic and rejected this as irreconcilable with the Talmud. **Rashbam** also rejects the view of 'some' who maintain that *qiddushey khesef* are rabbinic. On examining the commentary of the Me'iri to *Qiddushin* 2a[185] I was surprised to

[185] S.v. *Wehamishnah harishonah* (ed. A Schrieber, Jerusalem 1963, p. 3, lines 18-22 and note11).

learn that **Rav Hai Gaon** also maintains the view that *qiddushey khesef* are rabbinic.

23.21 However, it is not at all clear that the **Rambam** actually maintained such a position and this is for two reasons. (i) Rabbi Avraham ben HaRamabam in his *responsa* (44) states that his father corrected his earlier expressed opinion regarding *qiddushey khesef* and other laws derived through *gezerah shawah* and other methods of exegesis. In his later formulation he wrote in the *Yad, 'Ishut* 1:2 "…with *kesef* or with a document or with intercourse **and the three of them are Biblical Law**" (cf. above, 23.3). (ii) As *Kesef Mishneh* and others point out, even according to our reading in the *Yad*, Rambam can agree that *qidduhey khesef* are Biblical Law but are not to be counted amongst the 613 commandments as the latter include only such as are written in the text of the Torah. According to this latter possibility they are called *Divrey Soferim* only because we **know of their existence** through the traditions of the Scribes (rather than through the biblical text) but not because the commandments thus derived were themselves **invented** by the Sages.[186] (See above, 23.9) Rabbi Caro furthermore claims that it is possible to understand **Rashi's teachers** in the same way and the **Rashbets in *Zohar HaRaqia'* argues at length that this is the correct understanding of Rambam and that the Ramban et al. had misunderstood the Rambam's words**.

23.22 On the other hand, Rabbi Yosef Caro states[187] that the testimony of Rabbi Avraham ben HaRambam regarding the correct reading in the *Yad* is not reliable (see 23.21 (i)) and Rabbi Yeruḥam Perla in his monumental commentary to the *Sefer HaMitsvot* of Rabbenu Sa'adyah Gaon (Jerusalem 5733) examines, in his introduction, s.v. *HaShoresh HaSheni*, pp. 18-21, the arguments of the Rashbets in *Zohar HaRaqia'* (see 32.21 (ii)) and **rejects them absolutely** as being totally incompatible with the words of the Rambam who definitely intended to say that any law derived by *gezerah shawah* etc. is of rabbinic authority only except in the few cases where the Talmud states explicitly that that particular law is biblical.[188]

23.23 At the end of the debate the matter remains in doubt: Rambam and Rashi's teachers **may** have meant that laws derived through the principles of exegesis are rabbinic (in the absence of proof to the contrary from the Talmud).

23.24 Hence we find in *Yabia' 'Omer* (IV *EH* 5:9) that Rabbi Ovadyah Yosef concludes that it is possible to use the opinion that *qiddushey khesef* create only a rabbinic marriage as a *senif* to other arguments for leniency in order to release a married woman without a *get*.[189]

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24.0 **II A 4-49**

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186 It must however be noted that according to Rashbets, Rabbi Caro etc. although *midivrey soferim* can mean Biblical Law handed down orally by the sages it does not always have that meaning. Rambam clearly uses it sometimes for Rabbinic Law as pointed out in *Yad Malakhi, Killeley HaRambam*, no. 7 and in *Sedey Ḥemed, Killeley HaPosqim*, *siman* 5, number 8. See further the discussion in *Sedey Ḥemed* ibid. nos. 6 and 7 as to whether the Rambam uses also the terminology *midivrehem* and *miderabbanan* for exegetically derived laws of biblical gravity.

187 *Kesef Mishneh, 'Ishut* 1:2.

188 See in *Margenita' Tava'* (of Rabbi Aryeh Leib Zittel, *Av Bet Din* of Minsk), commentary to Rambam's *Sefer HaMitsvot*, *HaShoresh haSheni*, who deals with the whole question at great length and who, in his opening paragraphs, shows brilliantly how the Talmud can be understood even if we were to accept the position that the exegetical principles – and therefore *qiddushey khesef* - are rabbinic.

189 I am surprised that Rabbi Yosef fails to mention the opinion of Rav Hai Gaon (as attested by the Me'iri – see 23.20) or to refer to the arguments of Rabbi Perla.

24.1 Rabbi Morgenstern here sets out a tripartite agreement involving **conditional marriage**, accompanied by a **conditional *get*** – delivered at the time of the marriage – and the writing of a **document of authorisation for the writing of a *get*** in certain future contingencies.

24.2 On page 4, Rabbi Morgenstern states that his draft marriage agreement is adapted from that proposed by Rav Henkin in *Perushey 'Ivra'* pp. 110-17 and that Rav Aharon Kotler has relevant comments in *Responsa Mishnat Rabbi Aharon* no. 60, that are incorporated in this draft. Besides the fact that Rabbi Henkin himself later withdrew his proposal because he felt he could not justify the introduction of conditional *nissu'in* (see end of 24.3 and see note 192) the critique of Rabbi Henkin's proposal by Rabbi Kotler rejects the halakhic propriety of the conditional *nissu'in* **and** of the conditional *get*. I do not know how it is possible to incorporate the rejection of a proposal into the proposal!

24.3 Further down the page, the claim is made that the proposal set out on pp. 10-26 has the support of Rabbi Kook and Rabbi Weinberg and Rabbi Henkin. It should, however, be pointed out that Rabbi Kook refused to sanction conditional marriage (though he agreed that if practised the condition would be effective)[190] and Rabbi Weinberg also said no more than that the proposals of Rabbi Berkovits in *Tenai BeNissu'in UvGet* were worthy of the most serious consideration by the *Gedoley HaDor* but he did not render any decision of his own[191] and Rabbi Henkin withdrew his proposal on learning of the contents of the pamphlet *'Eyn Tenai BeNissu'in*[192] yet Rabbi Morgenstern fails to publicise these relevant facts.

24.4 On p 8, reference is made to relying on Rambam (rather than Rashba) that all doubts in Torah Law are resolved leniently in the biblical perspective, the resolution towards stringency being only rabbinic. It would have helped his case to record that a clear majority of the *Posqim* follow the lead of the Rambam on this point.[193]

24.5 It is noteworthy that on pp. 9-10, Rabbi Morgenstern prefaces his prenuptial agreement with the words: "For Research and study. Not for Actual Practice and Use". This warning is repeated on p. 37.

24.6 Pages 10-13 present us with a conditional marriage which will, on the breaking of the condition, have been concubinage. However, the new paragraph on p. 13 seems to change horses in mid-stream and describes the "marriage" as unconditional concubinage but in the second half of the paragraph (on p. 14) there is a return to conditional marriage!

24.7 The paragraph beginning on p. 13 opens: "I, (groom's name)….and (bride's name)….agree that our relationship be one of Pilegesh, as recorded in Rema, *'Even Ha'Ezer*, 26:1, citing Ra'avad, Ramban, Rav Ya'akov Emden, *Tur* in name of Rosh and *Yam Shel Shlomoh*…". This implies that the Rema actually cited all these authorities as permitting concubinage. Three observations: Firstly, the Rema cites Rosh and *Tur* as **forbidding** concubinage (though they actually seem to permit it – see *Bet Shemuel* and *Ḥelqat Meḥoqeq* there). Secondly, for the Rema to cite Rav Ya'aqov Emden is historically impossible. Thirdly, rather than cite the Rema who merely records a dispute – some permit concubinage (Ra'avad and a number of other commentators) and some forbid it (Rambam, Rosh and *Tur*), the Rema giving no clear ruling[194] – it would have better served his purpose to point out that the majority of the *Posqim* permit

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190 See *TBU* 68.

191 See the final paragraph of R. Weinberg's introductory remarks to *TBU*.

192 *TBU* 170. It was the conditional *nissu'in* aspect of his proposal that he felt was in contravention of *ETB* but see *TBU* ibid. where it is forcefully argued that *ETB* bans the use of only certain types of condition in marriage. The *gedolim* cited in it would not, says Berkovits, have opposed the type of condition suggested by Rabbi Henkin (or by Berkovits himself).

193 See *Responsa Yehawweh Da'at* I *Kileley Ha-Hora'ah*, p. 19, no 1. Cf. above, note 67.

194 See *Sedey Ḥemed*, *Kileley HaPosqim*, 14:12 where the tradition is recorded that when the Rema writes two opinions and introduces each of them with *yesh 'omrim* it means that he is leaving the matter undecided unless he clarified his position elsewhere. (This is not the case with the *Meḥaber* where the *halakhah* in such a case would be fixed like the later *yesh*

concubinage and he fails to point this out even on pp.39-49 where he deals with concubinage at length.[195]

24.8 I noted with some surprise that on p. 16 Morgenstern advocates the full stringency of the *'Aḥaronim* regarding the repetition of the condition at *ḥuppah*, *yiḥud* and *bi'ah* (at least for the first time) and makes no mention of the fact that the *Ḥatam Sofer* wrote that, strictly speaking, no repetition is necessary. This is especially surprising considering that Berkovits argues at some length to demonstrate that repetition of the condition is non-essential especially when the *nissu'in* follow the *qiddushin* immediately as they always do nowadays.[196]

25.0 **II B 3**

Testifying to mamzerut

25.1 (p.3) Rabbi Morgenstern states that if no records of *mamzerim* were kept they would be permitted to remarry. For this he cites *'Arokh HaShulḥan*,*'Even Ha'Ezer* 2:14 and *'Igrot Mosheh* [*EH*] IV 9:3. He continues, "A *mamzer* cannot marry another Jew only when his or her status is exposed."

Comment

25.2 Neither the *'Arokh HaShulḥan* nor the *'Igrot Mosheh* forbid the exposure of *mamzerim*. What they forbid is the exposure of **families** into which, at some time in the past, a *mamzer* has married and it is no longer possible to identify the individuals in that family who are tainted with bastardy. Although the prophet Eliyah will not expose even the **individuals** in those families whom he knows to be *mamzerim* that is because his knowledge is derived from prophecy and prophetically derived knowledge cannot be co-opted into this halakhic process. If, on the other hand, there are witnesses who can testify – without the use of prophecy or the holy spirit – which individuals in a tainted family are the *mamzerim*, they are **obliged** to publicise the facts – see *Igrot Mosheh* [*EH*] IV 9:5.

Testifying to the date of marriage

25.3 (p.3) Morgenstern states that since the witnesses to the marriage do not testify in *Bet Din* in the presence of all the concerned parties as to the exact day of the marriage, no proof exists of the marriage, and the children from the second husband are not *mamzerim* - *'Igrot Mosheh, 'Even Ha'Ezer*, IV 20.

Comment

'omrim – see Rabbi Ovadyah Yosef, *Responsa Yeḥawweh Da'at* I *Kileley HaHora'ah*, *Kileley Maran HaShulḥan 'Arukh*, 25).

195 See Rabbi Naftali *HaKohen* Schwartz, *Responsa Bet Naftali* (Brooklyn, New York, 5766) number 45, part 1, s.v. *We'od yesh lomar* (p. 276, col. 2). Rabbi Schwartz adds that even if we take into account the view of the Rambam which (according to many opinions) regards concubinage as forbidden by Biblical Law we could still justify conditional marriage (that would prove, should the condition be broken, to be concubinage) with the argument that any such marriage when entered into is only a doubtful case of concubinage (i.e. it might and it might not turn out to be a concubinic relationship depending on whether or not the condition will be broken) and the Rambam himself (followed by most *Posqim* – see *Responsa Yehawweh Da'at* I *Kileley Ha-Hora'ah*, *Kileley Safeq De'Oraita'*, no 1 and see "Consensus" IV.12 and note 110) maintains that all doubtful prohibitions are permitted by Biblical Law. Hence according to the Rambam a conditional marriage would at most be only rabbinically prohibited (because it is **possibly** concubinage i.e. it is a *safeq 'issur*) and in any rabbinic matter the rule (agreed to by all) is that we should follow the lenient view – in this case the view that concubinage is permitted! (See below, 47.21.) This would further fortify Morgenstern's position (see his remarks on p. 49 – top p. 50). However, it is only fair to point out that Rabbi Schwartz speaks of conditional marriage only in the case of a groom who has an apostate or missing brother.

196 *Responsa Ḥatam Sofer EH* part 2, no. 68. See also *TBU* 48 and "Conditional Marriage" IX.37-40

25.4 In the case discussed in the cited *responsum* of Rabbi Feinstein a woman wishing to marry in the Orthodox synagogue had been told by her mother that she (the mother) had been married, before her present marriage to this daughter's father, to a Jew from whom she had separated without a *get*. The mother has no papers or other evidence of this former marriage. However, relatives of the alleged former husband have testified that the mother in question was indeed once married to him. Rabbi Feinsten replied that the daughter is permitted, according to the *Halakhah*, to marry anyone she wishes because "a mother is not believed to declare her son/daughter a *mamzer*/*et*" and the relatives of the alleged husband are unfit for testimony, being close relations and religiously non-observant - either of these reasons being sufficient to disqualify them.

25.5 There is thus not a word in this *responsum* to support Rabbi Morgenstern's claim that if (valid) witnesses "do not testify in *Bet Din* in the presence of all the concerned parties as to the exact day of the marriage, no proof exists of the marriage, and the children from man 2 are not *mamzerim*". Though the claim is not disproved from this *responsum* of Rabbi Feinstein it most certainly cannot be substantiated therefrom.

25.6 (p.3) Morgenstern: "If the witnesses do not remember the exact day of the wedding there is no marriage. See *Bet Shemuel* 17:63 *Yabia' 'Omer* III no.18."

25.7 No such ruling appears in either of these citations! However, Rabbi Yosef in *Yabia' 'Omer* III 8:20 (see above 8.2 where Morgenstern gives the correct reference) does use the argument that the witnesses did not know the date of the wedding **as a *senif*** to release the woman without a *get*. The case was one where **the woman denied that the wedding had ever taken place** and **the testimony was highly suspicious** because the woman was **from a good family** and the "groom", who was **an immoral and immodest type**, claimed to have given her *qiddushin* without *shiddukh*, in the absence of her family, without *birkat 'erusin*, without a *minyan* and with concealed witnesses.[197] In addition, the witnesses were known to be **desecrators of Shabbat publicly**. There were also **contradictions between the witnesses** regarding the time of the alleged wedding and one of them said that the groom had **failed to use the word *li*** in the formula of the *qiddushin*.

25.8 In view of all the above, Rabbi Yosef permitted the woman concerned to marry 'anyone she pleased' without the need for a divorce from the alleged groom (who had resolutely refused every request to agree to a *get*). It is clear that one cannot derive from this *responsum* that it is possible to rely on the single fact that the witnesses do not remember the date of the wedding as sufficient to release a woman without a *get*.

26.0 **II B 4**

Rebuttal of presumption of married status

26.1 Morgenstern: "The fact that the woman held herself out as a married woman is only a presumption that there was a halakhic marriage. This presumption can be rebutted when other factors are introduced that challenge the validity of the marriage. Then if there does not exist any other relief for the *'agunah* to gain her freedom we will rebut this presumption that a halakhic marriage existed because the *'agunah* previously held herself out as a married woman. See *'Igrot Mosheh* IV no. 112, *Noda' BiHudah* I nos. 61, 66, *Bet Efrayim*, *'Even Ha'Ezer* no. 1, *Responsa Rema* no. 2."

Comment. Consultation of sources

[197] In such suspicious circumstances many authorities maintain that the court must apply *derishah wahaqirah* (see above, note 17) so that the failure of the witnesses to identify the date of the wedding would invalidate their testimony. Others say that although the court is not obliged to apply *derishah wa-haqirah* even in such cases, if they nevertheless did so and the witnesses failed to identify the time of the proceedings their evidence is void. See further above, 8.2.

26.2 *'Igrot Mosheh* [*EH*] IV 112. This *responsum* deals with two cases, the first of which concerns a woman who arranged to marry in a secular ceremony in order to gain entry to the country of the "husband" and then to divorce after the passage of three months. Rabbi Feinstein rules that no *get* is required though it is preferable, if possible, to obtain one because of their having lived publicly together as man and wife which creates public assumption of their being married and bestows upon her the **assumed status of "a married woman"**(*ḥezqat 'eshet 'ish*). He explains that if it proves impossible to obtain a *get* she can still remarry because the *ḥezqat 'eshet 'ish* does not apply in America today since many Jewish couples are married only in secular law or in the Reform movement so the mere fact that a Jewish couple live together as man and wife in such a milieau no longer implies that they have been married in Orthodox Jewish law and so no *ḥazaqah* is created. However, Rabbi Morgenstern says that she "held herself out as a married woman" which implies that she declared herself (in word or deed or both) a woman married with *qiddushin* and *nissu'in* and this is not the case described by Rabbi Feinstein.

26.3 The second case deals with a couple that married, this time with *qiddushin* and *ḥuppah*, so that entry might be gained to a certain country. Here Rabbi Feinstein says that a declaration before the witnesses and the congregation that they are marrying only for such a purpose would not stop the *qiddushin* from taking hold any more than a declaration that he, for example, is only marrying her for her money! What is required in this case is for them to declare to the witnesses and the congregation that they do not want the *qiddushin* to take effect because they are only going through the motions to dupe the authorities of the country concerned. If this is done, no *get* will be required. Here, there is no reference to *ḥezqat 'eshet 'ish* at all.

26.4 *Noda' BiHudah* I 61 deals with the case of a couple who had been "married" when both were minors and the doubt was whether there had been intercourse when both were halakhicly adults – something which she denies. The husband had died childless and left a brother who would not be old enough to perform *ḥalitsah* for many years during which she would have to remain unmarried. The *NB*, after profound dialectics (*pilpul*) dealing with questions of *ḥezqat 'issur* and *sefeq sefeqa'*, is finally inclined to exempt her from *ḥalitsah* but he does not come to a firm conclusion. He then[198] dismisses the *pilpul* as irrelevant on the grounds that she is anyhow to be considered married due to the fact that she had lived with her husband for a while when she was 12 and he was 13 which is sufficient to produced a rumour (*qol*) amongst the public that they are indeed halakhicly man and wife and such a *qol* is sufficient for her to require *ḥalitsah*.

26.5 Towards the end of this *responsum*, Rabbi Landau suggests a novel solution[199] to this problem of rumour based on *Tosafot*, *Ketubot* 26b[200] who state that where there is no alternative solution[201] **we cancel a rumour**.[202] Rabbi Landau takes this one step further suggesting that where there is no alternative solution **we simply ignore a rumour**.[203] This is why we find in *Gittin* 89a that if there is a rumour that a certain woman was married, but there was no mention of whom she was married to, we ignore the rumour entirely. If the rumour was that she was married to a named person there would be the possibility of her either actually marrying him or receiving a divorce from him but if we were to accept the possible truth of a rumour declaring her married to someone unknown then she would never be able to marry anyone. In such a case we would ignore the rumour entirely.

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198 Seventh paragraph from the end, s.v. *'akh kol zeh*.

199 In the fourth and third paragraph from the end s.v. *'Ela'* and s.v. *Ulefi zeh.*

200 S.v. *We'asqineh.*

201 As in that case when a rumour was circulating that a certain *kohen* was profane (eg. son of a divorcee) and would thus be barred forever from eating *terumah.*

202 We take note of the rumour yet we solve the problem it causes by demonstrating to the public that it is false so that people will stop repeating the rumour and it will die.

203 *Bet Din* need not take the trouble of organising an information campaign in order to counteract the rumour but may simply instruct the parties concerned to proceed as if the rumour did not exist.

26.6 The *NB* proceeds to suggest that an alternative solution means one that is readily available as in the case where the rumour is that she was married to a named individual and the problem can thus be resolved right away by her marrying him or accepting a *get* from him. However, in the case with which he was dealing the "solution"[204] was too harsh to be seriously considered a solution at all and, therefore, we should simply ignore the rumour and let her get on with her life.

26.7 He continues: "However, [in support of] the basic leniency that I have proposed, namely that in a case where there is no alternative solution we may ignore a rumour, I have found neither colleague nor master in [the writings of] any one of the *Posqim*. I would yet further say that I would not dare, without clear proof, to be so lenient [as to rule] that her having to wait until the levir grows up be classified as her having no solution".

26.8 Can we assume that where the woman would be left an *'agunah* **for ever** the *NB* would dare to be lenient or does his admission that "I have found [in support] neither colleague nor master in [the writings of] any one of the *Posqim*" mean that he is hesitating to advocate practical application even of this leniency? From the next cited *responsum* it does seem that the *NB* would be willing to rule leniently[205] but will that help Rabbi Morgenstern who speaks not of a woman about whom a mere *qol* is circulating and who denies ever having been married (see 26.4) but of a woman who does not deny that she was married and indeed speaks and behaves accordingly and who has therefore a definite *Ḥazaqah* of *'eshet 'ish*?

26.9 *Noda' BiHudah* I 66. This *responsum* has nothing to do with rumour but towards the end the *NB* does refer to the same idea that he first mentioned in *responsum* 61 namely that where there is no alternative solution we ignore a rumour and this time there is no reference to the fact that he had found in support "neither colleague nor master in [the writings of] any one of the *Posqim*". This would suggest that he **was** willing to advocate his novel ruling in spite of its being just that – absolutely new.

26.10 *Bet Efrayim EH* 1. In this *responsum* Rabbi Efrayim Zalman Margaliot discusses a man who had lived in a certain town for 12 years and eventually became engaged to a young woman. The following question was then brought to the town's rabbi:[206] This man has been saying for years that he is married and has a wife and daughter living elsewhere but now that he wishes to marry here he says that his repeated assertions that he was a married man were all false as he had only wanted to avoid the embarrassment of admitting that at thirty he was still a bachelor. The rabbi was concerned about the man's *'amatlah* as it would have been sufficient for him to say that he was a widower and, besides, why did he need to invent the daughter? This implies that he had been telling the truth and we may therefore not allow him to marry this young woman because of the *Ḥerem* of Rabbenu Gershom. After reviewing in the first paragraph the arguments of Rabbi Naftali Hertz, Rabbi Margoliot, in the second paragraph, s.v. *'Omnam ken*, says that he takes a lenient view of the matter on the basis of the words of the *Mishneh LaMelekh*[207] who proves from the writings of Maharai[208] that wherever witnesses contradict a man's statement regarding his own personal status and he then retracts his statement and agrees with the witnesses he is believed even without giving an *'amatlah* for his original false statement.

26.11 However, Rabbi Margaliot asks, in *Ḥoshen Mishpat* 79 we find that if a person responds to a claim for payment of a debt by insisting that he had never borrowed the sum in question in the first place and witnesses then came and testified that he had indeed borrowed and paid back the sum in question and he then says that he now recalls the loan and the repayment, the law says that he is not believed and must still repay the money to his creditor. In which way is this case different from the previous one? Why is his

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204 Waiting for years until the brother would be old enough to perform *Ḥalitsah*.

205 See 26.9.

206 Rabbi Naftali Hertz.

207 *'Ishut* 9:15 s.v. *'akh*.

208 *Siman* 228.

retraction to accord with witnesses believed there but not here?

26.12 Rabbi Margaliot answers by distinguishing between *mammon* (monetary law) and *'issur* (ritual law). In matters of *mammon* we have an established rule that when a person admits liability his word is accepted and is considered more authoritative than witnesses.[209] Another rule states that once a person has denied borrowing a sum of money he has *ipso facto* denied paying it back so if witnesses later turned up and testified that he had borrowed it the law says that we are now in possession of two definite facts (i) he borrowed the money (which we know from the witnesses) and (ii) he never paid it back (which we know from his initial claim not to have borrowed it) so he must now pay the debt. This holds true **even if the witnesses added that they saw him repay the debt** because on that point we give preference to his initial testimony that he had not paid (which is included automatically in his statement that he had not borrowed and which, being an admittance of liability, creates a legal liability to pay[210] that cannot later be retracted) which carries more weight than that of the witnesses who say that he had paid - as note 209).

26.13 In the case of *'issur*, however, when he declares himself, for example, married and so makes himself forbidden to any woman but his wife due to the *ḥerem* of R. Gershom, there is no rule that says that this declaration actually makes him into a married man.[211] We merely accept his word in the absence of proof to the contrary and act as if it is true, therefore forbidding him to marry a woman who would be considered his second wife. If he then retracts his statement and claims that he lied and that he is in fact a bachelor the situation from the point of view of others – including the *bet din* – is one of doubt. If witnesses then appear who testify in accordance with his latter claim they remove the doubt in our minds and *bet din* may now regard him as unmarried.

26.14 In the case under discussion there were no witnesses, only a retraction, so we are left with a doubt[212] but since the prohibition we are dealing with is the *ḥerem* of R.Gershom and after the (beginning of) the fifth millennium it is only a custom – see *Darkey Mosheh*, [*EH*] *siman* 1[sub-para. 10] – we resolve leniently any doubt in fact or law touching upon it.[213]

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209 *Hoda'at ba'al din keme'ah 'edim domey* (the admittance of a disputant is equal to a 100 witnesses).

210 In this case retroactively from the time of the witnesses' testimony that he did indeed borrow.

211 Unlike the admittance of debt which actually makes him a debtor in law.

212 That is if the *'amatlah* is considered unacceptable – see 26.10.

213 The wording of *DM* is: "It seems that nowadays we do not need a hundred men to permit [a second wife] becausee the time of the decree has already passed and one does not require permission at all as *Tosafot* and the Asheri have written at the beginning of *Betsah* (*Tosafot* 5a, s.v. *Kol davar*; Rosh 1:3). Therefore, although we still apply the decrees of the Gaon the decree has already ceased and from now (= 5000) onwards it is only 'a stringent custom that people have accepted and one may not permit it in their presence'.

Regarding the question of the historical era to whichh the *ḥerem* applies, there are, indeed, many authorities who regard the prohibition after 5000 as a custom only (see, eg. *EH* 1:10) but there are also many who argue that the *ḥerem* was issued for all time. Maharshal adds that even if it had been originally issued only until 5000, it would still be in **full force** today because no time limit is **explicit** in the wording of the *ḥerem* so it would require a *bet din* of the required calibre to repeal it and this never happened. Rabbi Mosheh Sofer goes further pointing out that Rabbenu Tam and other Tosafists renewed all the post-talmudic enactments - includeing that of Rabbenu Gershom - **and set no time limit to them**.The *Ḥatam Sofer* (*Responsa EH* part 1, no. 2) writes that if the *'Aḥaronim* who ruled leniently had seen the arguments of the Maharshal they would have retracted their opinion. See *ET* XVII cols. 384-86 for full discussion.

As regards the question of geographical limitations, the decree applies today in all Ashkenazi communities across the world including America, Australia (*'Arokh HaShulhan*, *EH* 1:23) and the State of Israel (*Taqqanot HaRabbanut HaRashit LeYisrael*, Shevat 5710). See further *ET* Ibid., col. 386-90. It was never accepted by the Sefaradim and Temanim and Rabbi Ovadyah Yosef rules that it is not binding on these communities even in the State of Israel where it has been includeed in the enactments of the Chief Rabbinate.

Rabbi Margaliot takes it for granted that as it is merely a custom any doubts relating to its application should be resolved leniently. The *Ḥatam Sofer* (*EH* Part 1, no. 4) states that even if it is nowadays merely a custom it would be considered as a vow and be included under the prohibition of *lo' yaḥel devaro*. Although he thus considers it a **biblical** prohibition, the *Ḥatam Sofer* agrees that cases of doubt would be resolved leniently. Many *'Aharonim* rule that doubts as to the applicability of the *ḥerem* are to be resolved leniently - see ET ibid., col. 392 n. 149..

26.15 Furthermore, argues Rabbi Margaliot, the *'amatlah* is not suspect because he did not wish to say he was a widower so as to avoid people pressurising him to remarry for reasons of procreation.[214] Once he says he is married, people will understand that he cannot take another wife and will leave him alone. As regards his claim that he had a daughter, he may have added this because he wanted to be sure that people would not start pressurising him to divorce his first wife and take another.[215] If he says that he has a daughter from his wife people will realise that divorce would be highly inappropriate because of the daughter's welfare.

26.16 Rabbi Margaliot then cites the concern of Rabbi Naftali Hertz that it should be impossible for the man to retract since he has been assumed for thirty days (and more) to be a married man and the Talmud rules that this creates a *ḥazaqah* that is treated as a certainty and even a satisfactory *'amatlah* cannot undo it. Indeed, even the death penalty can be executed on the basis of such a *hazaqah*.[216] R. Margaliot explains, in accordance with a *responsum* of the Rema (cited below), that the reliance on a *ḥazaqah* – even to the extent of inflicting corporal or capital punishment – is possible only where the *ḥazaqah* came into being independently of the statement of the individual concerned but where the entire origin of the *ḥazaqah* lies with the individual's statement and had he/she not made any reference to his/her personal status no assumption concerning that status would ever have been made by the public, then an *'amatlah* will help to undo the *ḥazaqah* when the individual retracts.[217]

26.17 Although this case would not seem to offer itself as a source for Rabbi Moregenstern because it deals only with a question of a custom – not even a rabbinic prohibition – and Rabbi Morgenstern is dealing with a grave biblical prohibition, it does seem that if the *'amatlah* is acceptable it would remove any doubt so that his final statement could be accepted as the truth and the *ḥazaqah* (created by him) rescinded even if we were dealing with a biblical prohibition. However, Rabbi Morgenstern does not seem to be speaking of a woman who wishes to withdraw, on the basis of an *'amatlah*, her former claim that she was married.

26.18 *Responsa Rema* no. 2. The Rema here describes a case of a woman who wished to hide her pregnancy from her family and neighbours because she feared that she had previously miscarried three times due to the evil eye and therefore said to everyone except her husband that she was menstruant. The question is whether she and her husband who know the truth can continue to have relations in private or whether the mere fact that she has acquired an assumed status of *niddah* amongst her family and acquaintances renders her forbidden to her husband in accordance with the ruling of the Talmud in

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However, Rabbi Ḥayyim El'azar Shapiro (the 'Munkaczer Rebbe') in *Responsa Minḥat 'El'azar* I 16 argues that even if it be accepted that the *Herem deRG* is today to be treated as a rabbinic law it is still, at least according to the Rambam, protected by the **biblical** prohibition of *lo tasur* (like every other rabbinic law). This should require doubts of rabbinic law to be stringently resolved but does not do so because the Sages included in their enactments a leniency, namely that doubts should be resolved permissively. However, Rabbenu Gershom did not include such a rider In his decree, on the contrary the text of the *ḥerem* says that even the I00 rabbis who are asked to permit overriding the decree should not do so unless they see **a clear reason** to issue a permissive ruling. This implies that doubts as to the applicability of the decree would not permit overriding it so that there remains a doubtful biblical prohibition of lo tasur whichh must be resolved stringently. It seems, however, that this is a minority view and even the *Minḥat 'El'azar* agrees that according to Ramban, who maintains that rabbinic laws are not protected by *lo tasur*, a doubt vis-à-vis the *Herem deRG* would be leniently resolved. On the other hand, those who maintain that the *ḥerem* is still in full force today and that this lends the prohibition the gravity of biblical law, rule that all doubts regarding RG's enactment must be resolved stringently - see *ET* ibid. col. 391 at n. 133 and nn. 135-139.

214 Either for reasons of *peru urvu* (if he did not yet have at least one son and one daughter) or for reasons of *lashevet* (even if e did have a boy and a girl).

215 Since he was living apart from her for so long – see 26.10.

216 See, inter alia, *Bet Shemu'el*, *EH* 19, sub-para. 2.

217 The *Bet Efrayim* then proceeds (s.v. *we'od* to the end of the *responsum*) to demonstrate at great length that in the case under discussion neither retraction without *'amatlah* nor *ḥezqat 'issur* present any problem at all.

Ketubot 72a and *Qiddushin* 80a. The Rema concludes that the couple can continue their relations because in this case (i) the *ḥazaqah* came into being only on the basis of her statement and (ii) she has a preceding presumed status of purity (*ḥezqat tahorah*) before she (falsely) declared herself defiled and (iii) she has a completely satisfactory excuse (*'amatlah*) for the misleading declaration that she originally made. Moreover, the continuation of relations, says the Rema, would be permitted even before she announces her *'amatlah* to her relations and friends.[218]

26.19 Similar, says the Rema, is the case[219] of a very beautiful woman who declared to various suitors that she was already married but ultimately betrothed herself. When the Sages asked her how she could marry after already having declared herself married she replied with an *'amatlah*: "To the former suitors I said I was married because they were all unworthy but to this last man I agreed to be betrothed because he was of good character." To this, the Sages agreed.

26.20 I can only repeat here what I said above - Rabbi Morgenstern does not seem to be speaking of a woman who wishes to withdraw, on the basis of an *'amatlah*, her former claim that she was married. In addition, it must be pointed out that there are many authorities who take a stricter line regarding *ḥezqat 'issur* than that suggested in the above-mentioned *responsa* of *Bet Efrayim* and *Rema*.[220]

26.21 Nevertheless, I think Rabbi Morgenstern is right in saying that the *ḥazaqah* can be rebutted because he speaks of a case where a *bet din* competent to deal with such matters has declared a marriage annulled. He seems to be saying that the residual problem of *ḥazaqah* can be ignored. I think that in a case where the very marriage becomes undone the *ḥezqat 'eshet 'ish* created by the marriage will, *a fortiori*, become undone just as it would become undone if the wife were to receive a *get* from the husband. Similarly, a *ḥazaqah* of presumed status can be undone by two witnesses who testify against it.[221] However, if this is what Rabbi Morgenstern means, none of the sources he quotes is relevant.

27.0 **II B 5-6**

Engineering situations to trigger annulment

27.1 Morgenstern: "The procedure [of engineering halakhic retroactive annulment] was used in Israel by Chief Rabbi Goren and documented in a pamphlet known as "The *Get* of the Maharsham" vol. 1 – *responsum* 9. The *get* is given by an agent rather than the husband. When the agent leaves the Rabbinical Court his agency is revoked.

27.2 Following [this], another *get* is thrown by the husband to the wife both standing in a public domain, half way where the wife is standing facing the husband.[222] The effect of this procedure is to annul the marriage. This procedure was endorsed by Rav Shelomoh Kluger *Even Ha'Ezer* 141:60. Rav Mosheh Feinstein told me orally that *post facto* he likewise endorses this procedure.

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218 The Rema cites the Bible itself for proof of his contention. In Genesis 26:7-9 Yitsḥaq, in order to protect himself from assassination, had told the Philistines that Rivqah was his sister thus establishing for himself a presumed status of sexual prohibition vis-à-vis her according to the Noaḥide Law. However, since (i) the *ḥezqat 'issur* came about only due to Yitsḥaq's statement and (ii) there had existed up to that point a *ḥezqat heter* in that the presumption was (correctly) made that she was his wife and (iii) he had a perfectly good excuse to explain why he had lied, he had allowed the sexual relationship to continue in private (and it was only because of Avimelekh's unwarranted inquisitiveness that the matter was discovered and the *'amatlah* had to be given).

219 *Ketubot* 22a.

220 See *ET* XIII col. 720-25.

221 Rabbenu Yeruḥam, *Netiv* 23:4 in the name of Rabbi Meir HaLevi Abulafia. One witness, however, cannot undo a *ḥazaqah* of presumed status – see *Shev Shema'tatha'* 6:7. See further discussion in *ET* XIII cols. 729-733, *Bimqom Hokhaḥot Negdiyot*.

222 I presume that this means that the *get* is thrown and lands at a point equidistant from husband and wife.

27.3 In addition to the above, if the husband presently giving the *get* violates the Sabbath publically, the *get* is, in effect, an annulment. Such is the ruling of the Manchester UK sage Rav Yitsḥaq Ya'aqov Weiss writing in *Minhat Yitshaq, Even Ha'Ezer* X no. 126".

Comment on 2t.1 and 2t.2

27.4 The *responsum* of Maharsham has already been dealt with above, 4.2.1, where the problems of relying on such a stratagem, pointed out by Rabbi Shelomoh Zalman Auerbach, were set out.

27.5 The annulment mentioned in 27.2 is sourced in the Talmud. I cannot comment on what Rabbi Feinstein said to Rabbi Morgenstern but I can say that Rabbi Kluger in his glosses to *EH* 141:60[223] says nothing whatsoever about the casting of a *get* to a half way point between him and her.

27.6 What Rabbi Kluger does refer to is the case where the husband sent a *get* to his wife through an agent and then cancelled it (as in 27.1). In such a case the *Halakhah* is fixed like Rabbi that if the cancellation was in front of three it is valid *post-factum* but if it was canclled in front of two there is a divergence of opinion in the Talmud.[224] If the cancellation took place in front of one witness only, all agree that Rabbi accords with Rabban Shim'on ben Gamliel and rules that the cancellation be ignored and the *get* take effect by rabbinic decree. Rabbi Kluger says that the Talmud explains the theory behind this as being that everyone marries only with the agreement of the Sages and in this case they did not agree and "removed his *qiddushin* from him" i.e they deprived him of his *qiddushin*.

27.7 Rabbi Kluger then cites *Shittah Mequbetset* in the first chapter of *Ketubot* who cites Ramban[225] as asking many questions against this rationale. In one solution, Ramban maintains that the Talmud means that the Sages annulled his marriage **only from the time of the *get*** and not retroactively from the moment of *qiddushin*. This, argues Rabbi Kluger, is very difficult because the Talmud states in *Nedarim* that if a man betrothed a woman saying "Today you are my wife and tomorrow you are not my wife" the betrothal is valid **for ever** and cannot be undone in the husband's lifetime, without a *get*. So how can the Sages undo the marriage (= 'deprive him of his *qiddushin*') from the moment he cancels the *get*? Is that not creating a case of 'today you are my wife and tomorrow not'?

27.8 Furthermore, how can one understand the rationale for this given by the Talmud – 'Every-one betrothes only with the agreement of the Sages' which means that the Sages take their power to annul a marriage from the fact that the marriage was entered into originally upon an implied condition, namely that the Sages agree to it. Hence, the groom himself has agreed to limit his marriage in accordance with the will of the Sages and it is from this limitation placed by the groom (and bride) that the Sages derive their legal power to annul. However, the power derived by the Sages cannot be greater than the power of the groom himself so just as the groom could not arrange his marriage so that it should be valid for a time and later proactively annulled, the Sages also, who derive their authority in this matter from the groom, cannot annul proactively.

27.9 Rabbi Kluger finds no solution to the problem and concludes with 'צריך עיון גדול'.

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223 See *Ḥokhmat Shelomoh* ibid.

224 One opinion is that according to Rabbi the cancellation, though valid in Torah Law, is ignored by rabbinic decree. The other opinion is that the cancellation is effective i.e. the Rabbis did not, in this case over-rule Biblical Law.

225 *Shittah Mequbetset*, *Ketubot* 3a, s.v. *Wezeh leshon haRamban zal*. In the version of *SM* in my possession, Ramban is represented as saying that because the husband knows that the Sages will retroactively dissolve his marriage if he cancels the *get* in such circumstances as described in 27.6, **he will therefore not really mean in his heart to cancel** in order that his past relationship with his wife will remain a sanctified bond. Thus the *get* is still valid in Biblical Law and it is the *get* which ends the marriage not the husband's or the Sages' limitation of the period of the *qiddushin*.

27.10 Firstly, it must be pointed out that *Tosafot* in *Ketubot* also understand the annulment of Rabbi to be non-retroactive and to be based upon the concept of the rabbinic authority to override Biblical Law. Rabbi Aqiva Eiger explains that a careful reading of the text of the Talmud implied this to the Tosafists. See above 4.2.1 for further details.

27.11 Secondly, all that Rabbi Kluger says here is that the annulment according to Rabbi would be retroactive like the Maharsham. He does not, however, say that a re-enactment of the talmudic scenario may be engineered in order to free an *'agunah* or a *mamzer* as the Maharsham proposed. Besides, as I mentioned above (27.4), Rabbi S.Z Auerbach objected to the proposal of the Maharsham on a number of grounds.

27.12 Furthermore, as I pointed out at the end of 4.2.1, the Maharsham himself confined this suggestion of his to the realm of halakhic theory — להלכה ולא למעשה.[226] In addition, the suggestion was made only in cases where the wife was beyond reproach, as in the case discussed in that *responsum* where she had remarried with the permission of a *bet din* which later proved to have been based on an error. None of this is mentioned by Rabbi Morgenstern.

Throwing the get to the half way point

27.13 Throwing the *get* in a public domain to the half-way point between him and his wife is discussed in the Mishnah and Talmud in *Gittin* 78a-b. The Mishnah (5:2) reads: "If she was standing in the public domain and he threw [the *get*] towards her, if it landed near her she is divorced, if near him she is not divorced, if at the half way point she is divorced and not divorced (= there is doubt whether she is divorced)". It is immediately clear from here that throwing the *get* to the half way point achieves nothing. The case that Rabbi Morgenstern should have cited is the first in the Mishnah – "If she was standing in the public domain and he threw [the *get*] towards her, if it landed near her she is divorced". There is considerable debate in the *Gemara* and the *Rishonim* as to the exact meaning of this Mishnah.

27.14 The *Shulhan 'Arukh* (*EH* 139:13), in giving the final rulings in this matter, describes the situations in which the divorce is definite. One of these is if the *get* was thrown into her four cubits[227] by the husband who was standing so that the *get* was outside his 4 cubits.[228] The question then arises that since the *qinyan 'arba' 'amot* is only a rabbinic enactment and is not a mode of acquisition recognised in Biblical Law, how can it suffice for the acquisition of a *get*?

27.15 The *Bet Shemuel* replies that once the Sages instituted this form of *qinyan* they applied to it the concept of *hefqer bet din* so that although the article in the *'arba' 'amot* remained, in Biblical Law, ownerless (in the case, for example, of a found article without identification) or remained the property of the previous owner (in the case of a gift or sale), the Sages conveyed it, by the authority of *hefqer bet din* which **is** recognised in Biblical Law, to the person standing within the *'arba' 'amot*.

27.18 However, Ramban in *Gittin* (ibid.) and Ritva (ibid.) suggest that the *get* acquired by *qinyan 'arba' 'amot* achieves a biblically recognised dissolution of the marriage by means of retroactive annulment by rabbinic decree - *'afqe'inho rabbanan leqiddushin mineh*. It is presumably to this solution proposed by Ramban and Ritva that Morgenstern is referring but he writes as if there is a consensus on the matter

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226 See, however, Rabbi Ovadyah Yosef, *YO* V *EH* 18:8, who lists many authorities who say that when a *poseq* gives a lenient ruling and adds "in *Halakhah* [= in theory] but not for practical application" or "if two other authorities will agree with me" the truth is that we may rely on his opinion **in practice** and **even if no other authorities expressed their agreement** as we may presume that the *poseq* added these words only as an expression of modesty.

227 The Sages instituted that in a side street or at the edges of the main public thoroughfare, a square of 8x8 cubits, with a person at its centre, be considered his courtyard (*ḥatser*) and acquire for him property found there or deposited there as gift or sale (= *qinyan 'arba' 'amot*)

228 See the gloss of the Rema there. This is obviously one meaning of 'near to her' (but not to him).

rather than saying that it is a suggestion of 2 *Rishonim*.

Regarding 2t.3 – The Minḥat Yitsḥaq

27.19 See above, 19.5.2 where I have dealt with this argument of Morgenstern and shown it to be totally incorrect. See also 21.2.6.5, number 4.

28.0 **II B 8-9**

Missing witnesses

28.1 On page 8, Morgenstern mentions a specific case in which:
1. The husband beat the wife and nearly killed her soon after the marriage and the wife left immediately.
2. The husband lied about his marital status failing to reveal that he was previously married and that he had never given his first wife a *get*.
3. He represented himself as religious when in fact he did not keep *Shabbat* or *Yom Tov* ate non-kasher food and brought it into the house and never laid *tefillin* or prayed.
4. The witnesses to the marriage were not *Shabbat* observant.
5. The husband also forced the wife to marry him.
6. The witnesses were missing.
His comments from then onward seem to refer to that case. See further at 30.6.2-5.
Morgenstern: "I mentioned as additional grounds the fact that the witnesses to the marriage…were missing. I cited Rav Mosheh Feinstein that in such a case, since no witnesses exist, there exists no proof that a marriage occurred in the first place, *'Igrot Mosheh*, *'Even Ha'Ezer*, IV 20."

Comment

28.2 In the case dealt with in *IM* a rabbi had asked a young lady if her mother had been married to anyone before her present husband. The lady did not know and went to ask her mother. The mother replied that some 30 years ago she was married in an orthodox synagogue and had remained married to this former husband for about a year and a half. She then parted from him without a *get*. She does not remember the name of the Rabbi who oversaw the *qiddushin* and she has no papers or other proofs that she was formerly married. Relations of the alleged former husband also said that he had been married to this woman 30 years ago. The rabbi had previously asked Rabbi Feinstein about the young lady and the latter had responded that she was perfectly halakhically fit to marry. However, the rabbi was now asking for further clarification.

28.3 The major part of Rabbi Feinstein's response is devoted to the principle that though a father is believed to declare his child a *mamzer* (by biblical decree) a mother is not. Indeed, even if a married woman said that her child was born from an adulterous relationship with another Jew she is not believed at all[229] and the child is permitted to marry into the Congregation of Israel **even if we hear no contradiction from her husband**. The testimony of the relations of the alleged first husband is also unacceptable either because of their relationship to him or because of their irreligiosity.

28.4 Therefore, in this case, where the mother is the sole source of halakhically valid evidence of her former marriage – which, if accepted, would make her daughter from the second marriage a *mamzeret* – we cannot accept her evidence vis-à-vis her daughter because that would be tantamount to believing the word of the mother that her daughter is illegitimate.

28.5 Rabbi Feinstein concludes with a citation from *Qiddushin* 12b where it is stated that Rabbi Hiyya' was informed by his wife that she had heard from her mother that when she (Rabbi Hiyya's wife) was a

[229] I.e. the child is not even considered as a doubted bastard – *safeq mamzer*.

minor her father had accepted *qiddushin* for her and she was therefore forbidden to Rabbi Hoyya'. To this, Rabbi Hiyya' replied that his mother-in-law had no legal power to forbid her daughter to him. Hence, we see that even one as pious as Rabbi Hiyya' who would distance himself even from the possibility of the smallest prohibition, was not at all concerned in this case.

28.6 However, he adds that perhaps one should check with the relevant marriage registry to see if there is any documentation of the alleged marriage even though it will not, of course, tell us whether there had been *qiddushin* and *nissu'in*.

Relevance to Rabbi Morgenstern's case?

28.7 Rabbi Morgenstern gives valid reasons (which I have not cited here) for allowing the woman in this case to remarry but I do not see how this particular reason could be of help. In the case discussed in this *responsum* in *'Igrot Mosheh*, Rabbi Feinstein refers only to the status of the daughter which he says cannot be adversely affected by the declaration of the mother. He says nothing of the marital status of the mother herself so it is impossible to derive from this *responsum* anything relevant to Rabbi Morgenstern's case.[230]

29.0 **II B 10-11**

Leniency in bastardy = leniency in remarriage

29.1 Rabbi Morgenstern argues that ruling that a child of a second marriage is not a *mamzer* amounts to allowing the mother of that child to remarry. He states: "If the children are legitimate it is only because there exists no marriage to man 1. Otherwise the children from man 2 would not be legitimate. Therefore she can marry man 2 also. See Rema *'Even Ha'Ezer* 20:2. Even Rabbi Ovadyah Yosef in *Yabia' 'Omer* III [*EH*] 8 cites authorities that permit the woman to remarry. See *Responsa Rashba* 1209, *Bet Shemuel EH* 17:63, *Tsemaḥ Tsedeq* 90:3, *Ḥatam Sofer EH* 103."

Comment

29.2 Although Rabbi Morgenstern's argument sounds like common sense it is, in my opinion, fallacious. One must bear in mind that the prohibition of bastardy is lesser than that of adultery in two ways. Firstly, marriage with a mamzer is a non-enhanced negative biblical prohibition which carries at most a penalty of lashes (*malkut*) whereas adultery, in addition to the negative biblical prohibition, carries a penalty of excision (*karet*)[231] when the crime is committed intentionally but without warning or without witnesses or both and a penalty of strangulation (*ḥeneq*) when it is committed immediately after due judicial warning and in the presence of at least two valid witnesses. Secondly, the Talmud states that the biblical prohibition on a *mamzer* applies only to one who is **definitely** a *mamzer* and not to one whose bastardy is uncertain. A doubtful case of *mamzer* does not exist in Torah law which recognizes only definite *mamzerim* as such; the prohibition of doubtful cases of *mamzer* is only rabbinic even according to those (Rashba *et al*) who maintain that the rule that every doubt of Torah law must be resolved towards stringency is itself Torah law.[232] Hence, it is conceivable that a rabbinic respondent would rule leniently in

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230 It seems to me that we would apply, even in the absence of any corroborative evidence, the rule of *shavyah nafshah ḥatikhah de'issura* (cf. *'Igrot Mosheh EH*: III 8 & IV 22) but in a case where she was married at the time of her declaration her husband would not have to divorce her because of the ruling in the Mishnah, *Nedarim* 11:12. In Rabbi Morgenstern's case there is no question that a halakhic marriage took place so the mere disappearance of the witnesses would not have any effect on her married status.

231 A form of Heavenly death penalty.

232 As to why the Torah needs to write a special permit for a *safeq mamzer* according to the Rambam *et al* who regard *safeq* in every area of Torah law as permitted by the Torah – so that a *safeq mamzer* is anyhow permitted by Torah Law - see Rabbi A. L. Guenzberg, *Shev Shema'tata, Shema'ta' 'alef*, chapter 1, s.v. *We-hiqshu*.)

a case of possible bastardy yet rule strictly, in the very same case, regarding the remarriage of the woman as we find, for example in *'Igrot Mosheh EH* III 6 s.v. *'aval mikol maqom*.

Examination of citations

29.3 Rema *'Even Ha'Ezer* 20:2

29.3.1 There is no gloss of the Rema on this paragraph. *EH* 20:1 (the only other paragraph in *EH* 20) is glossed but has no connection to Rabbi Morgenstern's argument.

29.4 *Yabia' 'Omer* III 8.

29.4.1 See above, 8.2 and 25.7 where I have briefly described the contents of this *responsum*. I cannot see its relevance here because there is no discussion whatsoever in it of questions of bastardy. As an aside, Morgenstern's wording "Even Rabbi Ovadyah Yosef in *Yabia' 'Omer* III [*EH*] 8 **cites authorities that permit the woman to remarry**" implies that this was not Rabbi Yosef's conclusion but that is not so because at the end of the *reponsum* Rabbi Yosef unequivocally permits her to remarry.

29.4.2 On reflection, I thought that perhaps Rabbi Morgenstern is quoting this *responsum* in *Yabia' 'Omer* with reference to his claim that if the witnesses to the alleged marriage cannot testify to the date thereof their testimony is invalid and the marriage declared null and void. Although this is not at all implied by the immediate context in which the *YO* is here cited (as is clear from my quotation of Rabbi Morgenstern's words above (29.1)) it is possible to detect that this is Rabbi Morgenstern's meaning from the fact that this is the last 'loophole' that Rabbi Morgenstern mentioned (on p. 9 of *Hatorot Agunot* II) and this is also the very matter discussed at the end of *YO* III *EH* 8 (para. 20) where Rabbi Yosef cites authorities that permit the woman to remarry on the basis of the witnesses' inability to recall the date of the wedding but does not rely solely upon them just as Rabbi Morgenstern writes.[233]

The final list of citations

29.5 Rabbi Morgenstern directs us to a further four *posqim* to support his ruling - *Responsa Rashba* 1209, *Bet Shemuel EH* 17:63, *Tsemaḥ Tsedeq* 90:3, *Ḥatam Sofer EH* 103. Three of these authorities are cited in the previously quoted *responsum* of Rabbi Yosef as follows. Rashba in col. 1 line 7,[234] *Tsemah Tsedeq* in col. 2 line 43 and the *Ḥatam Sofer* in col. 2 line 35. The problem is that all three require *derishah waḥaqirah* only where the evidence is suspect which is not so in the case dealt with by Rabbi Morgenstern (see note 233).

29.6 As to the *Bet Shemuel*, I think that the reference should be 17:64 where it is recorded that even in monetary cases if the witnesses contradicted each other in the *ḥaqirot* their testimony is invalid. This will then certainly be so in matters of *qiddushin*. However, Rabbi Morgenstern refers to cases where the witnesses **do not know** the date of the wedding not where they **contradict each other** regarding the date and the fact that the *Bet Shemuel* invalidates the testimony in the latter scenario (in accordance with the ruling of most *Rishonim*) does not mean that he would do so in the former (where, indeed, most of the

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233 There is a substantial difference between Rabbi Morgenstern's case and that of the *YO* in that in the latter case the woman denied absolutely that any wedding had taken place and other suspicious circumstances supported her contention. This adds weight to the argument that *derishah waḥaqirah* should be required and hence to the argument that the witnesses' inability to give a date for the wedding is sufficient to declare the alleged *qiddushin* invalid. Nevertheless, I have not recorded this as a question on Rabbi Morgenstern because Rabbi Yosef does quote authorities who would disregard the *qiddushin* on the basis of the witnesses' inability to identify the date even if she did not deny their testinmony and even if there were no other suspicious circumstances.

234 The enumeration of the lines begins in paragraph 20 in the large edition of *YO* III, Jerusalem 5746.

Posqim maintain that the evidence would stand).[235]

30.0 **II B 11-14**

Further arguments to free the 'agunah

30.1 Rabbi Morgenstern writes: "In addition we employed another strategy to free the *'agunah* in my *responsa*. The *'agunah* had received a marriage proposal. Would she marry husband 2, in a valid halakhic marriage, such marriage would in effect uproot the prior marriage that was shrouded by many halakhic doubts. I cited *Mishneh LaMelekh*, *''Issurey Bi'ah* 15:10. Dayyan Berkovits argued that such a procedure would only save the child from man 2 from being illegitimate, but she still would not be permitted to remain with man 2. The problem with such a reading is that it contradicts what *Maggid Mishneh* in Laws of *Gerushin* 10:2 explicitly states that such a woman in the above precise circumstances need not divorce husband 2. This position is further supported by Mahariq, *shoresh* 172 and affirmed by *Kesef Mishneh Gerushin* 10:2. Furthermore, *Yabia' 'Omer* III *EH* 8 on page 245 explicitly reinforces my position on this matter."

Examination of sources cited in 30.1.

30.2 *Mishneh LaMelekh,'Issurey Bi'ah* 15:10. This comment does not seem to be from Rabbi Koli but apparently belongs to the editor of the former's commentary. Nevertheless the discussion it raises is perfectly cogent. The Rambam there states there are three levels of *mamzerim* certain, doubtful and rabbinic. In his list of examples, the Rambam says that a doubtful case of *mamzer* would be a child born from a union of doubtful adultery for example a union of a man with a woman who had been betrothed to another man in a manner creating uncertain marriage or with another man's wife who had been divorced in a manner classified as uncertain divorce.

30.2.1 The editor notes the following question that he had heard raised. The Mahariq cited in *Kesef Mishneh*, *Gerushin* 10:3, writes that a woman who entered into an uncertain state of marriage and then accepted certain *qiddushin* from another man and bore him a child, must leave the second man. The child, however, is untainted because we put her on her presumed former status of being unmarried (*ḥezqat penuyah*) when she accepted the *qiddushin* from the second man. This contradicts the statement of the Rambam here that classifies such a child as an uncertain *mamzer*.

30.2.2 Before proceeding, it must be pointed out that neither in the Mahariq nor in the citation therefrom in *Kesef Mishneh* is there any indication that she must leave the second man. In the Jerusalem 5733 edition, this *responsum* of Mahariq is found in *shoresh* 171, and, as this is an extremely long *responsum*, (11 double-columned pages!) it will be helpful to mention that the relevant piece is on page 206, column 2, lines 28-34. (See below, 30.4.1.)

30.2.3 The suggestion of the editor is that the Rambam speaks of a case where the doubtfully betrothed woman became pregnant from a second man without having first accepted *qiddushin* and *nissu'in* from him. It is in such a case that we say the child is an uncertain *mamzer* due to the mother's *hezqat penuyah* having been weakened by the *safeq qiddushin* she accepted from the first man, which left her – and her child – in a position of doubt.

30.2.4 The Mahariq and the *Kesef Mishneh*, however, speak of a case where the woman had accepted certain *qiddusin* from the second man before the child was conceived. In such a case we regard the certain *ḥezqat 'eshet 'ish* of the second man as overriding (not only the preceding *hezqat penuyah* – which it obviously does) but also the preceding uncertain *ḥezqat 'eshet 'ish* which the first uncertain marriage

[235] See *ET* VII col. 652 at notes 195-98 and 217-19.

brought about. She is therefore considered the definite wife of the second man and she may therefore remain with him and her child from him is *kasher*.

30.3 Morgenstern stated: "Dayyan Berkovits argued that such a procedure would only save the child from man 2 from being illegitimate, but she still would not be permitted to remain with man 2. The problem with such a reading is that it contradicts what *Maggid Mishneh* in Laws of *Gerushin* 10:2 explicitly states - that such a woman in the above precise circumstances need not divorce husband 2".

30.3.1 The *Maggid Mishneh* in Laws of *Gerushin* 10:2 writes: "Thus did Rabbenu Hai Gaon write in a *responsum*, 'In any case where they said that the child is *kasher*, if she (the mother) married another man she need not leave him even though she has no children as yet.' The Ramban wrote that he withdraws his opinion in favour of that of the Gaon and there is support for this position in the *Gemara'* [*Gittin*] in the chapter *HaMegaresh*". This clearly supports Morgenstern.

30.4 Morgenstern: "This position is further supported by Mahariq, *shoresh* 172 and affirmed by *Kesef Mishneh Gerushin* 10:2".

30.4.1 I have referred above (30.2.1 and 30.2.2) to this Mahariq and *Kesef Mishneh*. Here, I shall cite the relevant texts. The Mahariq writes: "The wise man whose eyes are in his head will, on the contrary, know and understand from the words of our teacher Mosheh [ben Maimon] that there is a difference between an uncertain state of marriage and an uncertain state of divorce. [The discerning reader will deduce this] from the fact that he (= Rambam) did not make a general statement in cases of uncertain marriage that everywhere where it says 'she is uncertainly married' or 'she needs a divorce out of doubt' or 'these are uncertain *qiddushin*' that if she became married to another man she must leave him and the child is an uncertain *mamzer* as he did for cases of uncertain divorce where she is possibly divorced. Hence it is certainly absolutely obvious that in cases of uncertain *qiddushin* it is not possible to say that she must leave him and the child is a possible *mamzer* and she a possibly married woman as he (the Rambam) wrote in cases of uncertain divorce. Because this one (the woman possibly married) remains in a *ḥezqat heter* i.e. *ḥezqat penuyah*[236] and the other (the woman possibly divorced) retains the *ḥezqat 'eshet 'ish*[237] as I proved earlier with unimpeachable proofs".

30.4.2 The *Kesef Mishneh* quotes the above words of Mahariq without addition, subtraction, alteration or question and thus clearly agrees with them. Again, Rabbi Morgenstern is right.

30.5. Morgenstern: "*Yabia' 'Omer* III *EH* 8 on page 245 explicitly reinforces my position on this matter".

30.5.1 In this *responsum*, Rabbi Yosef touches upon our question only tangentially and briefly. The reference can be found in paragraph 17 of the *responsum* and appears in the large edition of *Yabia' 'Omer* III (Jerusalem 5746) on p.245, col. 2, lines 6-27 wherein Rabbi Yosef cites the Mahariq 171 and the *Mishneh LaMelekh*, *'Issurey Bi'ah* 15:10 and apparently accepts the distinction made by the editor of the *Mishneh LaMelekh* (see above, 30.2.3 and 30.2.4) without question. Again, Rabbi Morgenstern is right. However, Rabbi Yosef adds after his citation of the said distinction: "See further in the work *Naḥal 'Etan 'Ishut* 3:2 but this is not the place to protract [the discussion]", so he has not spoken his final word on the matter.

30.6 The problem with Rabbi Morgenstern's citations in this case – as elsewhere – is not what he cited

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236 Obviously, from birth every girl has a *ḥezqat penuyah* and this *ḥazaqah* stands until we **know** that she has married. If we are merely in doubt as to whether she has married (*safeq qiddushin*) the doubt should be resolved in favour of the original *ḥazaqah*.

237 Once a woman has definitely married, she acquires a *ḥezqat 'eshet 'ish* until we know that she is a widow or a divorcee. If there is doubt as to whether she has been divorced (*safeq gerushin*) the doubt should be resolved in favour of her *ḥazaqah* and she must therefore be presumed married until we have proof to the contrary.

but what he left out, in this case the final sentence in the '*Mishneh LaMelekh*' which reads as follows.

30.6.1 "See the statement of the Remah cited by the *Tur* 31:4. See also the question in *PM* (*Peney Mosheh*) I:33. Investigation is required". In the *Tur* there, the Remah is quoted as saying that in a case of *safeq qiddushin* followed by certain *qiddushin*, the woman concerned **must leave the second man** but any child she may have had from that second man is *kasher*. The *Bet Yosef* there adds that Mahariq in *shoresh* 84 says that she must also leave the first (uncertain) husband because she might be his wife and therefore guilty of adultery with the second man and the rule is that such a woman is forbidden to the *ba'al* (the husband, in this case the first man who is possibly her husband) and the *bo'el* (the adulterer, in this case the second man who is possibly guilty of adultery with her). It is this contradiction concerning the woman that the editor marks as requiring investigation.[238] Similarly, in *Peney Mosheh* there is a case of one Le'ah who had *safeq qiddushin* from Re'uven and then went on to accept definite *qiddushin* from Shim'on on the basis of a permissive ruling from a certain rabbi that was contradicted by all the other sages who ruled not only that she should not have entered the second mariage without a *get* from Re'uven but also that she must leave Re'uven immediately. This ruling is confirmed by the *PM*.[239] She lived with Shim'on for more than 10 years until his death and she has children from him.

30.6.2 Nevertheless, Rabbi Morgenstern could reasonably argue that even if the ruling permitting her to remain with the second man is uncertain it is still *ḥazey le-itstarofey* (fit to be added) to all the other arguments for leniency in his case, as a *senif*.

30.6.3 These arguments were:
1. The husband beat the wife and nearly killed her soon after the marriage and the wife left immediately.
2. The husband lied about his marital status failing to reveal that he was previously married and that he had never given his first wife a *get*.
3. He represented himself as religious when in fact he did not keep *Shabbat* or *Yom Tov* ate non-kasher food and brought it into the house and never laid *tefillin* or prayed.
4. The witnesses to the marriage were not *Shabbat* observant.
5. The husband also forced the wife to marry him.
6. The witnesses were missing. (See above, 28.1-7 where I questioned whether this last point would have any effect on the marriage.)

30.6.4 The first three points make a powerful argument for **mistaken acquisition** (*miqaḥ ta'ut*). Number four is an argument for biblical **invalidation of the witnesses** and therefore for no marriage and the fifth point is an agument for talmudic **annulment** of marriage under compulsion.

30.6.5 To say that we have here an uncertain marriage is something of an understatement so it is acceptable to argue that should any residual doubt remain[240] the fact that she has accepted definite *qiddushin* from a second man is a good argument for cancelling the doubtful status of her first marriage and accepting her former *ḥezqat penuyah* so that her second marriage can be recognised as fully valid.

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238 The contradiction is particularly acute in that Mahariq in *shoresh* 84 adopts the stricter view and in *shoresh* 171 the lenient view but see *Bet Shemuel EH* 31:4 sub.-para. 10.

239 She now intends to remarry again and does not want to accept a *get* from Re'uven (because this would cast aspersions on the children from her second marriage) although he is perfectly prepared to give it. The suggestion was raised that the *get* should be delivered to an agent, appointed by the *bet din* acting on behalf of the woman, as a *get zikkuy* but this was ruled out of order by the *PM*. See below, note 250.

240 Against 1,2 and 3 one could argue *tav lemetav* (as indeed Rabbi Henkin often did in cases of marriages 'annulled' by Rabbi Feinstein). Against 4 one could argue that perhaps the witnesses had internally repented (see the lengthy discussion in *Yabia' 'Omer* III *EH* 8:1-19) and against 5 one could question whether the situation was correctly classified as compulsion and whether the degree of compulsion is sufficient to annul rather than to impose a *get* (see the lengthy discussion in *Yabia' 'Omer* III *EH* 20).

30.6.6 The fact is, however, that whether the *Ḥezqat penuyah* stands and can be relied upon to permit her remarriage – whether *ab initio* or *post factum* - in a case where doubtful *qiddushin* have occurred and whether a child conceived in the second marriage is *kasher* when the conception occurred before her receipt of a *get* from the first (uncertain) husband, depends upon the **type** and **degree** of doubt that has been introduced. The matter is discussed at some length in *ET* XIII cols. 549 (s.v. *Ḥazaqah shehur'ah*) - 551 (at note 467) and IX cols. 71 (sv. *Shenayim 'omrim*) - 74 (at note 95) and there are, as usual, conflicting opinions. For some practical rulings in this area see *EH* 31:3,4.

30.6.7 As the matter is extremely complicated and not relevant to the particular case with which Rabbi Morgenstern is here dealing, I will not pursue it any further at present.

30.7 Morgenstern: "I also mentioned *'Avney Millu'im* 44:4, not as Dayyan Berkovits misread my citation as 54, to the effect that since the husband was not observant in any way certain authorities maintain that to free an *'agunah* such a fact can be used as an adjunct in addition to other strategies to annul the marriage. This position is supported by *Minḥat Ḥinukh*, *Mitswah* 203 and Maharsham cited by *Seridey 'Esh* III no. 25."

30.7.1 Morgenstern is here referring to the views that question the validity of the *qiddushin* of an apostate. (Are they void or only rabbinic or only a *safeq de'Oraita*?) He also has in mind the opinion that a marriage in which the husband became a heretic after he married is annulled or disintegrates. He has mentioned these views before. See above, 14.2.2, 14.2.3 and 14.2.5, 18.1, 19.3 and 19.4, 19.5.2 and 19.5.3, 19.6 and 19.6.1, 19.7 and 19.7.1. There is a broad discussion of these and other sources in section 21. Wherever relevant, I pointed out that there is no mention of an apostate's *qiddushin* in *'Avney Millu'im* 44. I think the reference should be *'Avney Millu'im* 18:1 (as above.21.2.6.7.1). As I have indicated above,[241] mere failure to observe the commandments does not necessarily confer upon the transgressor the title of heretic or apostate and this is especially so nowadays.

30.8 The *Get Zikkuy*.

30.8.1 Morgenstern writes: "We also use another procedure known as a *get zikkuy* that was employed by HaRav Eliyahu Klotzkin writing in *Devarim Aḥadim* 43, 44 and used in Lublin and Warsaw, Poland. This fact is testified to by HaRav Kahana of the *Bet Din* of Yerushalayim and cited by *Seridey 'Esh* III:25.[242]

30.8.2 For the halakhic justification of giving a *get* for the husband even when the husband is protesting that he is opposed to giving the *get* see *Ḥiddushey Rashba*, *Qiddushin* 23a; Rosh 12 on *Sanhedrin* 60b; Ran, *Gittin* chapter 4, regarding *prozbul*. He states that even if the recipient of the gift suffers some negative consequences as long as most of the consequences are positive the *bet din* can still acquire the gift or other benefit for him or her. See *Mahaneh Efrayim* Laws of *Zekhiyah* and *Matanah*, section 6. See also *'Igrot Mosheh* [*EH*[IV:120.

30.8.3 See Rav Herzog, *'Ohel Yitsḥaq* II:64 who cites and explains the procedure of *get zikkuy*. Even though both the *Seridey 'Esh* and *'Ohel Yitshaq* have their reservations about *get zikkuy*, the *Taz*, *Yoreh De'ah* 293:4 and *'Even Ha'Ezer* 17:15 rules that in order to free an *'agunah* we can depend even on a minority ruling. We use *get zikkuy* only as an adjunct coupled with 30-40 other procedures to free the *'agunot* from eternal prison.

30.8.4 The reasoning is that a husband who refuses to give his wife a *get* would have been beaten until he agreed to give a *get* or [would be] killed by beating. Even though it is forbidden by civil law to do this today, nevertheless the community can withhold any aid, even medical aid, from such a husband. See *Yoreh De'ah* 158:1. Such a husband in a sense has kidnapped his wife by imprisoning her and preventing

241 19.5.2 (end), 21.6.5 no. 4 and 21.2.6 et al.

242 Committee edition I:90.

her from going on with her life and having normal sex. For this, it is permitted not to save his life. By giving a *get* for the husband and freeing his wife, the husband, in effect, again becomes eligible to have his life saved".

Comment on 30.8.1

30.8.5 Morgenstern cites "…HaRav Eliyahu Klatzkin writing in *Devarim Aḥadim*…". Rabbi Klatzkin was dealing with cases of Jewish husbands who had been conscripted during the First World War and were not permitted to return home. Using the concept "*zakhin lo le-adam shelo befanaw*" he went so far as to say that the *bet din* could order a scribe to write a *get* and tell witnesses to sign it and to deliver it - all on behalf of the missing husbands on the understanding that this is something that we know they would want.

30.8.6 Now it is clear from here that Rabbi Klatzkin speaks only of husbands who would want to divorce their wives not of those who are openly hostile to the idea of doing so, something which Rabbi Morgenstern fails to mention. He furthermore fails to point out that in the *Quntress Heter 'Agunah* of Rabbi Y. Z. Mintzberg there is found a lengthy rejection of every argument in this *responsum* in *Devarim'Aḥadim* coupled with the report by Rabbi Mintzberg that **Rabbi Klatzkin himself had urged Rabbi Mintzberg to publicise his *quntress* so that people should not be tempted to put Rabbi Klatzkin's proposal into practice**.

30.8.7 The next line in Morgenstern reads: "This fact is testified to by HaRav Kahanah of the *Bet Din* of Yerushalayim and cited by *Seridey 'Esh* III:25". The exact reference is to be found in section 4 of the post-script (*hashmatah*) of the letter sent to Rabbi Weinberg by Rabbi Herzog. This precedes the *responsum* of Rabbi Weinberg. Rabbi Weinberg himself returns to this subject in the body of his *responsum* (see below).

30.8.8 Rabbi Herzog refers to the proposal of the "great gaon" Rabbi Klatzkin of Jerusalem of writing a *get* on behalf of a husband lost at war. The latter relied, says Rabbi Herzog, on the ruling of Rabbi Yitsḥaq Elḥanan Spektor in *Be'er Yitsḥaq* that [just as we say *zakhin le'adam*] we also say '*zakhin me'adam*' for this is a great merit for him as he has no possibility of any relationship with his wife even if he is alive. "Rabbi Shelomoh David Kahana *zatsal* told me that such a solution was used in Warsaw but I am in doubt as to the foundations [upon which the action was taken]."

30.8.9 "Furthermore," continues Rabbi Herzog, "I am concerned that if we do such a thing that it might lead to devastating results in that they may issue *gittin* against the husband's wishes. I do not refer to forcing the husband in accordance with the *Halakhah* until he declares 'I agree' but to cases where he refuses explicitly to divorce. This once happened in Italy where the *bet din* had ordered the preparation of a *get* on behalf of a husband who refused to divorce his wife and we sent them a telegragh warning that the children would be *mamzerim* and apparently the idea was abandoned. However, who knows if others might not employ such methods in distant countries?

30.8.10 Furthermore, a *quntress* has been issued here by the Gaon Rabbi Y. Z. Mintzberg *shlita*, one of the elder *posqim* of Jerusalem, against the aforementioned ruling of the Gaon Klatzkin of blessed memory. (See above, 30.8.6.) In spite of the fact that in a *responsum* I answered a number of his questions [against Rabbi Klatzkin], I am fearful of relying on this because in practice [as opposed to theorising] and when dealing with the prohibition of *'eshet 'ish* [as opposed to other areas of the *Halakhah*] it is different as is well known".

30.8.11 Rabbi Herzog then relates that he considered utilising the suggestion of the Sefaradic Gaon *Zekhut Mosheh* who proposes in his work *siman* 7 that it might be possible to grant a *get zikkuy* on behalf of an apostate husband who refuses to divorce his wife, based on an argument in *responsum* 67 of volume

I of the Ra'am who allows a *get zikkuy* for the wife of an apostate whose husband has granted the *get* but who is not present to receive it and does not know about it. The *ZM* then cites the Rashba in *Qiddushin* 23 who says that in cases of 'great spiritual advantage' one can issue a *get zikkuy* to a servant even against his express wishes.

30.8.12 "At the end of the *responsum*, the *ZM* distinguishes between the wife receiving a *get zikkuy* willingly issued by her husband and the husband having a *get zikkuy* issued on his behalf without his knowledge or consent. In the first case, he says that since a divorce given to a woman even against her will is effective,[243] in the case of the wife of an apostate it is possible to say that we can accept on her behalf a *get zikkuy* even against her will since the divorce is definitely an advantage for her from a spiritual point of view. However, in the second case, since we require his consent, when he is present, for the *get* to be valid, we cannot issue a *get zikkuy* on his behalf in his absence without his consent on the grounds that it would be spiritually advantageous for him to divorce. As to the Rashba – most of the *Rishonim* dispute his ruling".

30.8.13 Rabbi Herzog concludes: "Considering all that, I would not dare rely in the matter of *'eshet 'ish* on such infirm foundations".

30.8.14 Rabbi Weinberg takes a similar line. I quote his concluding paragraphs on *get zikkuy*[244] word for word: "However, all this is only if we know with absolute certainty that it[245] is an advantage for the husband, for example, when he is subject to life imprisonment and is a G-d fearing person who would not want to leave his wife an *'agunah* or, for example, if he went to a country from where it is not possible to return and it is also impossible for his wife to reach him. Similarly with one whose wife has become insane and he has already taken another wife and similar situations. This is not the case in our situation where the husband has apostatised and the wife has fled and he does not want to divorce her – who can say that that this would be an advantage for him? How much more so if the husband is protesting and saying that he does not want to divorce her. Even according to the Rashba who says that in a case of 'absolute advantage' (*zekhut gamur*) even a protest would be ineffective[246] how do we know [in our case] that it is a *zekhut gamur*? Furthermore, even in a case of *zekhut gamur* all the *Rishonim* disagree with the Rashba.

30.8.15 "Regarding that which the Sefaradi sage wrote in his work *Zekhut Mosheh* which his Honourable Excellence cited in his *quntress*, that where there is a spiritual advantage[247] it is considered an advantageous [situation regardless even of protests to the contrary] there is an apparent contradiction to this from *Ketubot* 11a where they said[248] 'You might have thought that the gentile prefers moral

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243 In biblical law this is always true although in many cases there may be a biblical prohibition to do so - see *ET* . Even in the case of Ashkenazim after the adoption of the ḥerem of Rabbenu Gershom, an unjustified divorce issued by the husband against the will of his wife would, *post factum*, be effective.

244 S.v. *Mihu' kol zeh*. In the "Committeee" edition these paragraphs appear in section 33 of the *responsum*.

245 The *get zikkuy*.

246 See, however, below, note 254.

247 To the wife, whose *get* is to be received by *zikkuy* or to the servant whose document of manumission is to be received by *zikkuy* or to the gentile whose conversion is to be performed by *zikkuy*.

248 Rav Huna there says that the *bet din* can oversee the immersion of a gentile for conversion although it is impossible to elicit consent from a minor due to his mental immaturity. The Talmud notes that Rav Huna is informing us that an act that is advantageous to another – in this case conversion to Judaism of the gentile – can be performed on that other's behalf without his consent. The Talmud then asks why Rav Huna needs to tell us this as we are informed of it in the Mishnah (*'Eruvin* 7:11) to which the reply is that one might have thought that since the gentile might well prefer to enjoy material pleasures unburdened by the multifarious controls of Jewish Law, one cannot act on the assumption that conversion is advantageous to the minor and therefore Rav Huna informs us that the probability that the gentile prefers his freedom applies only to an adult who has tasted those pleasures but a child is still sufficiently innocent not to miss them so for him conversion may be presumed to be an advantage.

license…..therefore he informs us that that only applies to an adult who has tasted prohibited pleasures[249] but for a minor it is an advantage.' Now the only advantage in [his] conversion is that he is brought 'beneath the wings of the Divine Presence' which is an entirely spiritual advantage yet in the case of an adult this is not accounted an advantage because he wants unbridled pleasure and does not want this spiritual advantage.[250]

30.8.16 "One also cannot bring a proof from that which we read in *Sotah* 25a: 'In the absence of evidence to the contrary, one can assume that a person agrees to the will of the *bet din* and we therefore do not fear that the husband will forego the warning'[251] because there it is different since he has, as yet, not protested against the issuing of a warning and we therefore say that he probably will not protest. If, however he did protest, the warning is not a [valid] warning as Rashi wrote there. Furthermore, this applies only to a decent person who would indeed agree to the will of the *bet din* but not to a sinner who has apostatised".

30.8.17 It is clear from here that neither Rabbi Herzog nor Rabbi Weinberg would have considered permitting a *bet din* to write a *get zikkuy* on behalf of an unwilling husband.[252]

Comment on 30.8.2

30.8.18 Morgenstern argues that halakhic justification of giving a *get* for the husband, even when he is protesting, can be found in *Ḥiddushey Rashba*, *Qiddushin* 23a.

30.8.19 The Rashba in *Qiddushin* is speaking of a 'Canaanite servant' whose freedom can be gained, for example, through a payment by him to his master (*kessef*) or through the delivery by the master to him of a document of manumission (*get shiḥrur*). There is a discussion in the Mishnah and Talmud there as to whether these methods operate directly between master and servant or whether they could also be orchestrated in the absence of the servant using the method of *zikkuy*.

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249 I.e. pleasures prohibited for Jews.

250 It seems to me that if this applies to a pagan it will all the more so apply to an apostate Jew. There is evidence for this in the Talmud and the *Posqim* where we find that an apostate is considered worse than a pagan. For example, the Mishnah (*'Avot* 2:14) requires us to "know what to answer to an unbeliever" which the Gemara' (*Sanhedrin* 38b, R. Yoḥanan) interprets as referring to a gentile unbeliever but a Jewish heretic should not be answered because he will only react to the answer with recalcitrance and become even more entrenched in his denial. Similarly, in *Yad, 'Edut*, 11:10 and *SAḤM* 34:22 we find that *mosrim*, *'epiqorsim* and *mumarim* are worse than pagan idolaters and are unfit for testimony. In the *Be'er HaGolah* there the additional comment of the Rambam is cited: "…for these (Jewish *mosrim* etc.) have no portion in the World to Come and therefore the Sages did not need to include them (in the list of invalid witnesses) whereas the righteous of the gentiles do have a portion in the World to Come".

251 Just as there the Talmud says that the *bet din* can issue a warning (*qinuy*) to an errant wife (see Numbers 5:14) without the husband's knowledge since we may assume his agreement and we may therefore act as his agent through the method of *zikuy*, so we should be able to issue a *get* on behalf of an absent husband since we may assume his agreement and act as his agent by means of *zikkuy*.

252 I furthermore found in *Responsa Peney Mosheh* (I:33) of Rabbi Mosheh Benveniste that one cannot use a *get zikkuy* in a case where the husband is willing to give the *get* and the *get* will be of maximum spiritual benefit to the wife (saving her from adultery and her future children from bastardy) if the wife makes clear that she does not want it. Indeed, he writes that the Rif is of the opinion, based on the *Yerushalmi*, that even if she did **not** object to the *get* and the *get* was given by *zikkuy*, it would not be effective until it reached her hand. Even according to the other *Rishonim* who maintain, in accordance with the *Bavli*, that when the *get* is an absolute spiritual advantage to her (as in this case) it can be given by means of *zikkuy* and takes effect when the appointee recipient accepts it on her behalf, if she objects to the *get* the *zikkuy* will not be effective. True, the Ra'am (no. 67) says that the spiritual advantage overrides the temporal disadvantage (so the *zikkuy* would be effective) but the Redakh (*bayit* 9 *ḥeder* 12) disagrees with the Ra'am and brings proofs from the Talmud that a spiritual gain does not, in cases of this nature, override temporal loss. The *PM* goes further and argues that even the Ra'am meant only that **presumed objections** of the wife, such as her probable unwillingness to lose her marital status (*tov lemetav tan du milemetav armelu*), would be overridden by definite spiritual gain but where she is explicitly objecting to the divorce even the Ra'am will agree that it is not possible to give her a *get* by means of *zikkuy*.

30.8.20 The Rashba summarises the halakhic conclusion in which he states, *inter alia*, that in the case of a *get shiḥrur*,[253] *zikkuy* may be used even if the servant explicitly objects on the grounds that freedom from servitude endows the recipient with the privilege of being subject to all the commandments and to that of being permitted to marry a (free) Jewish woman. This is an 'unqualified advantage' so that even if the servant was known to be implacably opposed to freedom and openly voiced his objections thereunto, we would ignore him using the principle that 'his mindset is cancelled against the backdrop of the mindset of all humanity (*batlah da'ato*)'.

30.8.21 The Rashba continues: "Although we find that one cannot acquire by *zikkuy* against the will of the intended recipient even if the acquisition is an unqualified advantage as, for example, [an acquisition of] renounced property (*hefqer*) or [of] a found article (*metsi'ah*)[254] or [the conversion] of a gentile minor,[255] nevertheless, since the master is empowered to free him [even] against [the servant's] will when [the servant] is present, he can [also] free him [even] against his will in his absence, since it is an [unqualified] advantage.[256] For another reason [the *zikkuy* must work, namely] so that the master should not be a servant to his servant losing his own will because of the obstinacy of the servant".

30.8.22 It is, in my opinion, impossible to deduce from here that Rashba would agree to delivering, let alone writing and signing, a *get* on behalf of an objecting husband. A servant, when present, can be forced from servitude against his will but a husband, even when present, cannot be forced to divorce his wife (except in certain limited cases **and even then we require an 'enforced consent'**). Hence, it is possible to employ *zikkuy get* against a servant's objections but it would never be possible to do so against a husband's objections **even if the case could be definitely adjudicated as being one of unqualified advantage for the husband** – see above, 30.8.14.

The argument from the Rosh

30.8.23 Morgenstern argues that halakhic justification of giving a *get* for the husband even when he is protesting can be found in Rosh 12 on *Sanhedrin* 60b. I do not know to what this refers. In the Rosh's halakhic summary of *Sanhedrin* printed at the end of the talmudic tractate there is no reference whatsoever to page 60b. Furthermore, 60b is in the seventh chapter of *Sanhedrin* and the paragraphs in

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253 Regarding *zikkuy* of freedom against the express wishes of the servant through payment of money by others to the master, see the summary of views and reasons in *ET* XII col. 169 at notes 352 and 353.

254 In circumstances where the article would belong to the finder. Note that the Rashba does not give the simpler example of a person wanting to give a gift to someone by *zikkuy* as this is not, in his opinion, an unqualified advantage as it involves the possible problem of שונא מתנות יחיה - Proverbs 15:27 - which applies to neither the case of *hefqer* nor to that of *metsi'ah*. I note, by the way, that it is clear from here that the Rashba agrees that we cannot use *zikkuy* against the express wishes of the intended recipient even in cases of unqualified advantage save in the case of manumission of a servant. This accords with the understanding of Rashba's view presented in the comentary of Rit AlGazi to *Bekhorot*, chapter 1, number 7 and contradicts the opinion expressed in *Responsa 'Eyn Yitsḥaq*, *EH* I:1 that Rashba would discount even explicit objections by the recipient in cases of unqualified advantage.

255 To which the gentile can object when he reaches his maturity. See *SAYD* 268:7.

256 Clearly, in the case of two freemen (A and B), it is not possible for A to acquire anything by *zikkuy* for B against B's wishes since A could not force B to accept any item from him **even directly** (without *zikkuy*) no matter how unqualifiedly advantageous. In the case of freedom from servitude, however, the master could impose freedom **directly** upon the servant and so should be able to do so indirectly by *zikkuy*. The problem is that as *zikkuy* is an extenstion of agency we cannot appoint an agent for a person against that person's wishes and in this, a servant is no different from anyone else. To this problem the Rashba says that as the agency/*zikkuy* presents the servant with the unqualified advantage of freedom we regard his objections to the *zikkuy* as untrue so the document of freedom in the hands of the agent appointed by *zikkuy* is, from a legal standpoint, in the hands of the servant and once that has happened the freedom has been imposed on him directly and takes effect even against his express wishes. In the case of the two freemen, however, even if we were to say that we ignore the objection to the *zikkuy* and it would be considered as if the found article, for example, in the hands of A was, from a legal point of view, in the hands of B, it does not follow that it would actually belong to B because B cannot be made to acquire anything against his expressed wishes even if it is in his hands and even if we do not believe that he really objects.

the Rosh to that chapter do not reach 12. I tried consulting the *Tosefot HaRosh* which does have a number of comments on this page but none of the material has anything to do with *zekhiyah*.

The argument from the Ran

30.8.24 He cites also the Ran, *Gittin* chapter 4, regarding *prozbul*, adding: "He states that even if the recipient of the gift suffers some negative consequences as long as most of the consequences are positive the *bet din* can still acquire the gift or other benefit for him or her", his point being that the same should obtain in the case of a husband objecting to the *get* being given on his behalf to his wife. The Ran is referring to the rule that a *prozbul* can only operate where the borrower possesses land and that if the borrower does not own any land, the lender may assign some[257] to him by *zikkuy* – see *Gittin* 37a. Of this *zikkuy* the Ran writes: "It is logical that if the borrower was present[258] and objected to the *zikkuy* it would not work because a person does not acquire against his will. However, if he was not present, it seems that it [the *zikkuy*] would work. From here, it seems to me that the rule that we can acquire a benefit for a person in his absence [and without his knowledge] applies so long as the **acquired object itself** is to the recipient's advantage [and] **even if there follows from this a disadvantage that is more excessive than the advantage**, the *zikkuy* is effective[259] because here [regarding *Prozbul*] when he [the lender] assigns him [the borrower] the tiniest piece of land he thereby becomes liable to repay as the Seventh Year will not [now] cancel his debt yet we nevertheless say that it [the *zikkuy*] is effective. However, it is possible to dismiss [the argument] by saying that this is another of the leniencies of *prozbul*." The Ran proceeds to discuss what would be the law in the case of *prozbul* if the borrower was unaware of the *zikkuy* and protested as soon as he heard of it. The Ran implies that this later protest would also render the *zikkuy* invalid but that nevertheless, at least according to Rashi, as opposed to Rabbenu Shimshon, the *prozbul* would probably be effective.

30.8.25 I find it remarkable that Morgenstern diminishes the power of his case by citing the Ran incorrectly. The Ran is prepared to allow a *zikkuy* "where the acquired object itself is to the recipient's advantage even if there follows from this a disadvantage that is **more excessive** than the advantage" but Rabbi Morgenstern cites him as saying that the *zikkuy* may be used if the recipient of the gift suffers some negative consequences only **as long as most of the consequences are positive**. On the other hand, Rabbi Morgenstern is stretching the Ran's words way beyond their meaning when he suggests that they have relevance to the writing of a *get* by *bet din* as a *zikkuy* for a recalcitrant husband in spite of his protests. Firstly, the Ran says that even in the case of *prozbul* the *zikkuy* will not work against the express wishes of the borrower. Secondly, the Ran admits that it may not be possible to extrapolate from *prozbul* to other cases of *zikkuy* because the fact that we can – in the case of *prozbul* - acquire a benefit for a person in his absence [and without his knowledge] by means of *zikkuy* so long as the acquired item itself is to the recipient's advantage even if there follows from this a disadvantage that is more excessive than the advantage, may be due to the generally lenient approach which operates in the area of *prozbul*.

The argument from the Maḥaneh Efrayim

30.8.26 Rabbi Navon in *Maḥaneh Efrayim*, Laws of *Zekhiyah* and *Matanah*, section 6 writes as follows. In matters of *zekhiyah* there are cases where we would accept the efficacy of a *zikkuy* even if, when the recipient hears of it, he protests. These are cases where the Sages estimate that the acquisition is one of unqualified advantage. In such cases, if the recipient, on hearing of the *zikkuy*, registers a protest without a satisfactory explanation why, in that particular case, he objects to the transaction, we would discount his objection and validate the *zikkuy* on the grounds that at the moment of acquisition he did indeed want it and it is only now – too late - that he has changed his mind.

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257 This piece of land does not have a minimal measurement and is only symbolic. See Ran there for elucidation.

258 Presumably, the same would apply if he was absent but aware of the proceedings and protesting against them.

259 Except, that is, if the recipient was protesting against the *zikkuy*.

30.8.27 In cases of *get* refusal, the objection of the husband has been registered even before the attempt at *zikkuy* and there is no reason to doubt that Rabbi Navon will agree that a *zikkuy* in such circumstances will fail.[260] Also, we would need proof in each case of *seruv get* that the execution and delivery of the *get* are considered in law "unqualified advantage" for the husband and this we rarely have – see above, 30.8.14.

The argument from the 'Igrot Mosheh

30.8.28 Rabbi Feinstein in *'Igrot Mosheh* [*EH*] IV:120 discusses a case sent to him by Dayyan Apfel of the Leeds *bet din* in which a married woman had committed adultery with a gentile. The *bet din* had, at the husband's request, arranged a *get zikkuy* for the wife (she had refused to come to the *bet din* to receive a *get*) and the husband had then remarried. The question arose, when the husband died without children, whether the first wife would need *ḥalitsah* before she could marry another Jewish husband.

30.8.29 Rabbi Feinstein agreed with Dayyan Apfel that *ḥalitsah* was not necessary. Firstly, because it is highly questionable whether a wife who had committed adultery requires *ḥalitsah* and secondly because it is highly likely that the *get zikkuy* was effective so that at the time that he died she was no longer his wife. Even if the *Posqim* were equally divided on both questions we would have a *sefeq sefeqa* which is sufficient for a lenient ruling even if we are dealing with Torah Law. In this case, where a clear majority of the *Posqim* direct us to a lenient ruling on both questions, all the more so is it that we should rule leniently.

30.8.30 Rabbi Morgenstern's interest is in Rabbi Feinstein's discussion of the *get zikkuy* apparently made against the wishes of the wife. Rabbi Feinstein upholds the validity of this *get zikkuy* because, although the wife refused to come to *bet din* to receive the *get*, which implies that she does not want it, the fact is that it is an unqualified benefit for her[261] in that it saves her from the transgression of the prohibition of adultery and renders her sexual acts merely harlotry of an unmarried woman which is a much lesser transgression even if she is a *niddah* and he even if he is a gentile.[262] The fact that she cannot, due to her lack of knowledge, see this and thinks the *get* an irrelevance in no way decreases its advantage to her even if she is an apostate and an idolater. Rabbi Feinstein maintains his position in spite of the ruling in *Responsa Panim Me'irot* cited in *Pitḥey Teshuvah* (*EH* 140:5 sub. para. 7) that where she says she does not want the *get*, *zikkuy* cannot work. Rabbi Feinstein proceeds to argue that in the case with which he is dealing, if it is possible to explain her refusal to come to *bet din* in some way other than by saying it was due to her objecting to the *get per se*,[263] so that if she had been offered the alternative of someone

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260 The reasoning in *ME* is that the post-*zikkuy* negative response is regarded as a change of mind from an **assumed** positive frame of mind at the time of *zikkuy* when no **actual** reaction had yet taken place. In the cases of *seruv get* dealt with by Rabbi Morgenstern however, the objections of the husband have been well aired long before the *zikkuy*.

261 It also causes her no loss since she is anyhow forbidden to her husband and he has no longer any duties towards her.

262 The penalty for experienceing sexual relations with a *niddah* before her period has ended (or even after that if she has not yet immersed in a *miqweh*) is excision (*karet*) and/or flogging (*malqut*). A sexual relationship between a Jew and a gentile in the context of a "marriage" is, according to Rambam (*'Issurey Bi'ah* 12:1) and *Shulḥan 'Arukh*, (*EH* 16:1) prohibited by Torah Law and carries a penalty of *malqut*. The *Tur*, though disagreeing on technical points, as noted by the Rema there, is in basic agreement with this. Sexual encounters between Jew and gentile outside a marriage structure, whether occasional or regular *zenut*, are, in most cases, prohibited only rabbinically (but see *Be'er HaGolah EH* ibid. 3) except if the gentile woman was married when there would be a biblical transgression of a positive commandment (see *Bet Shemuel* ibid. sub-para. 2). As a general rule the gentile (*goy*) mentioned in Talmud or *Halakhah* is, in the absence of evidence to the contrary, a non-Jew who does not observe the Noaḥide Code (*Ḥazon 'Ish*, *Bava' Qamma'*, 10:15 s.v. *Katav haRitva*). The source for the prohibition of sexual liaison between a Jew/Jewess and an observant Noahide is not clear-cut. See *Minḥat Ḥinnukh* no. 427 who assumes that a *ger toshav* or *ben Noah* are virtually the same, as regards intermarriage and related questions, as any other gentile.

263 For example, her refusal may have been due to the fact that she was not willing to expend any time, money or effort to attend the *bet din*.

accepting the *get* on her behalf she would have agreed, even the *PM* would rule that the *zikkuy* is valid.

30.8.31 Again, there is no way one could deduce from here that Rabbi Feinstein would even contemplate allowing a *get zikkuy* to be issued against the wishes of a wayward husband. Even if we discard the view of the *PM* and accept the more lenient view of the *IM*, we can only allow *get zikkuy* from a willing husband to an unwilling wife and even then only where the *get* is an unqualified advantage for her.

Comment on 30.8.3

30.8.32 Here, Morgenstern notes that both Rabbi Herzog and Rabbi Weinberg "have their reservations" about *get zikkuy* and adds that nevertheless "the *Taz*, *Yoreh De'ah* 293:4 and *'Even Ha'Ezer* 17:15 rules that in order to free an *'agunah* we can depend even on a minority ruling" and "We use *get zikkuy* only as an adjunct coupled with 30-40 other procedures to free the *'agunot* from eternal prison".

30.8.33 Rabbi Herzog rejected *get zikkuy* even where there was **every reason to suppose the husband's agreement** (see above, 30.8.5-13) so it is not acceptable to speak, as Rabbi Morgenstern does, of the former merely having "reservations". Even Rabbi Weinberg, who was willing to consider *get zikkuy* when the husband's potential agreement was a certainty, would never for a moment have entertained the possibility of employing one when there was any doubt about the husband's acquiescence and certainly not if the husband was known to be in opposition (see above, 30.8.14-16). Again, then, it is grossly misleading to speak of Rabbi Weinberg having "reservations".

30.8.34 Rabbi Morgenstern continues by reminding us that "the *Taz*, *Yoreh De'ah* 293:4 and *'Even Ha'Ezer* 17:15 rules that in order to free an *'agunah* we can depend even on a minority ruling". This *Taz* has been referred to earlier in Rabbi Morgenstern's work (see above: 3.1) and the *Taz* actually permits relying on even a single opinion not just a minority view (see above 3.2.1). However, in the case of issuing a *get zikkuy* against the husband's wishes we do not have even one permissive opinion.

30.8.35 He concludes: "We use *get zikkuy* only as an adjunct coupled with 30-40 other procedures to free the *'agunot* from eternal prison". On the evidence presented by Rabbi Morgenstern, I cannot see any advantage in the writing of a *get zikkuy* in opposition to the husband's will. One could say that since there are always at least 30[264] other arguments for leniency in every case (according to Rabbi Morgenstern), writing the *get zikkuy* cannot do any harm since the woman is permitted to remarry even without it.[265] Nevertheless, I would still be concerned that such a practice might lead to gravely undesirable consequences as Rabbi Herzog has pointed out (see above, 30.8.9).

Comment on 30.8.4

30.8.36 Rabbi Morgenstern here tries to demonstrate that giving the *get* in accordance with the ruling of *bet din* is in the interest of the husband because "a husband who refuses to give his wife a *get* would have been beaten until he agreed to give a *get* or [would be] killed by beating". He should have added that this applies only to cases where the law is that coercion should be applied.[266] He should also have added that the coercion would have had to stop short of killing him as there is doubt as to whether the *Halakhah*

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[264] See above, 5.1 and 5.2, where I discuss Morgenstern's claim that in every case of *mamzerut* with which he has dealt there was a minimum of 20 doubts and a maximum of 30. Here he speaks of a minimum of 30 and a maximum of 40 'procedures' which he uses to free *'agunot*. I suspect that the doubts and the procedures are the same things and that the solution for the *mamzerim* and for the *'agunot* amount to the same thing also. How, then, did the minimum of doubts/procedures grow by fifty percent and the maximum by thirty-three and one-third percent and why are we never presented with a list of these doubts/procedures?

[265] I.e. אם לא יועיל לא יזיק - see *Shevet Musar*, chapter 9.

I.e. cases of *kefiyyah*.

allows us to take his life.[267]

30.8.37 Recognising that this argument is not valid nowadays, Morgenstern continues: "Even though it is forbidden by civil[268] law to do this today, nevertheless the community can withhold any aid, even medical aid, from such a husband. See *Yoreh De'ah* 158:1. Such a husband in a sense has kidnapped his wife by imprisoning her and preventing her from going on with her life and having normal sex. For this, it is permitted not to save his life. By giving a *get* for the husband and freeing his wife, the husband, in effect, again becomes eligible to have his life saved".

30.8.38 The *Shulḥan 'Arukh, Yoreh De'ah* 158:1, rules that it is forbidden to save the life of a Jew who consistently transgresses the Law of the Torah if he acts out of spite. Such a person is categorised as *mumar lehakh'is*. However, if he transgresses to satisfy the lust for some pleasure forbidden by the Law, such as is usually the case with theft and sexual transgressions, he is in the category of *mumar lete'avon* and one must, should he be endangered, save his life. Morgenstern considers the husband refusing to divorce his wife as belonging to the former category. However, it seems to me that *get*-refusal is usually driven by a criminal **desire for revenge** for percieved wrongs committed by the wife or by the **lust for money** that can be extorted by means of '*get*-refusal blackmail', which would place a husband so acting in the latter category so that this law in *YD* would be largely irrelevant in cases of *get*-refusal.

30.8.39 Morgenstern could have referred instead to the *harḥaqot* of Rabbenu Tam which may be applied not only when the *Halakhah* permits coercion but even when it does not do so but, at least, regards the issuing of a *get* as obligatory.[269] Accordingly, it would be possible, as the Rema states in *EH* 154:21, to decree, indirectly, **any stringency** against the husband This would apparently include forbidding the Jewish community to save him even in a life-threatening situation. It is true that there has been some reluctance in some *batey din* to order the application of these *harḥaqot* (in Israel where this is a practical possibility) but it does seem that it is halakhically acceptable to do so.[270]

30.8.40 However, in addition to the possibility that the issuing of the *get* may not be classified in many cases as an unqualified advantage to the husband,[271] the application of the *harḥaqot* was meant to be a lever to **bring about his agreement** to a *get* and **to avoid coercion**. Indeed, Rabbenu Tam proposed *harḥaqot* for cases where **there was no justification (in his opinion) for coercion** but where the *bet din*

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267 See my "Critique of *Za'aqat Dalot*", 7.8, note 52, where I have recorded the varying opinions as to whether the Talmud's ruling that "we flog him until his life departs" (*Ketubbot* 86b, *Ḥullin* 132b) if he refuses to adhere to the ruling of *bet din* and grant his wife a *get*, means up to and including his demise or up to but not including it. Rabbi A. L. Ginzberg (= 'the *Qetsot HaḤoshen*') in his response in *Meshovev Netivot* to *Netivot Ha-Mishpat*, *Ḥoshen Mishpat*, 3, sub-para. 1, understands it as inclusive whereas Rabbi Meir Simḥah of Dvinsk in *'Or Same'aḥ* to *Yad, Gerushin* 2:20 takes it as exclusive. See also Rabbi Ḥayyim Sofer, *Responsa Maḥaney Ḥayyim, 'Oraḥ Ḥayyim* II, 21:3 s.v. ובזה from where it seems that Ramban took it as inclusive and Rabbi Yitsḥaq Leon Ibn Tsur (the '*Megillat Ester*' – 16th c.) understood it as exclusive.

268 Should not this read 'criminal'?

269 See Rema, *SAEH*, 154:21.

270 See "Critique of *Za'aqat Dalot*" 6.10, where I refer to Maharibal as the source of the objections to applying the *harḥaqot* even where Rabenu Tam permitted their use i.e. in cases where divorce is obligatory but not subject to coercion. Maharibal is cited in *Pitḥey Teshuvah, EH* 154, sub-para. 30, as saying: **1.** Rabbenu Tam said that in cases where we cannot apply physical coercion we can also not use excommunication (*ḥerem* or even *niddui*). **2.** Nowadays people fear the *harḥaqot* more than *niddui*. **3.** Therefore, today there is more reason to forbid *harḥaqot* than *niddui* (which is certainly forbidden). Rabbi Ovadyah Yosef (*Yabia' 'Omer* VIII *EH* 25:3-4) strongly objects to this *ḥumra'* and argues powerfully for a full application of the *harḥaqot* wherever they would be sanctioned by Rabbenu Tam. The latter's point, he observes, is not that *harḥaqot* are less painful than *niddui* but rather that they are not imposed **directly** upon the recalcitrant husband but upon the rest of society who are being ordered by the Jewish authorities to totally separate themselves from a wicked man until he stops sinning. They thus affect the husband only **indirectly** and that is permitted. (In that particular case Rabbi Yosef, together with Rabbi Waldenberg and Rabbi Kolitz, ordered the application of *harḥaqot* against the recalcitrant husband.)

271 See above, 30.8.14.

regarded the *get* as obligatory. Neither Rabbenu Tam nor anyone else – to my knowledge – has yet said that the *harḥaqot* create a situation in which the issuing of the *get* becomes so unqualified an advantage to the husband that it may be written over his protests. Furthermore, even where coercion is sanctioned according to all opinions we still require his statement "*Rotseh 'ani*" and we cannot proceed, by means of *zikkuy*, without it.

30.8.41 In consideration of all the above, I can see no advantage in employing a *get zikkuy* over the protests of the husband. I do not think that it would even contribute a *safeq* towards leniency and there is good reason to fear that it would lead, sooner or later, to the commission of serious error in that some *batey din* may start to think of their will as a valid halakhic substitute for the will of the husband and may rely on *get zikkuy* as a method of freeing an *'agunah* even where there is no other halakhic justification for leniency as indeed almost happened in a *bet din* in Italy – see above, 30.8.9.

31.0 **II B 15-16.**

31.1 Morgenstern here informs us that since he has the approbation of Rabbi Pikarski on his works on the four parts of the *Shulḥan 'Arukh*, he is to be classified as one of the Sages of Israel and, therefore, his *bet din* is qualified to annul marriages. He bases this on the principle enunciated in the Talmud and the *Posqim* that God granted authority to the Sages of Israel to uproot Torah Law when this was necessary.

31.2 See above, 9.0 – 9.3.3, where Morgenstern already tried this approach. In my conclusion there I wrote: "Hence, as a solution for any *'agunah* problem, the uprooting of Torah Law, as Morgenstern terms it, would certainly need a *bet din* of *Gedoley HaDor* acceptable to all sects and communities because permission to remarry without a *get* has possible future repercussions on the entire Community of Israel. Therefore, Rabbi Morgenstern's implied claim that, on the authority of the sources he quotes in this instance, his *bet din* can alleviate the problems of the *'agunah* by abrogation of commandments of the Torah, cannot be accepted". This time round, I shall add another point against Rabbi Morgenstern's argument – see 31.4.

31.3 His sources for the argument that a Sage, to be classified as such, must be expert in all practical areas of Jewish Law are *Yerushalmi*, *Nedarim* 10:8, *Yerushalmi*, *Ḥagigah* 8:4 and Rambam, *Sanhedrin* 4:8. I must immediately say that the second reference is impossible because there are only 3 chapters in *Ḥagigah*! The *Nedarim* and (Rambam) *Sanhedrin* references are correct. They speak of the authorities appointing judges[272] to answer questions raised by members of the public in specific areas of law and lay down the rule that to be fit to be appointed to deal in one area of law a judge must be expert in every area of law.

31.4 However, neither the Talmud nor the Rambam say that because a sage is fully qualified halakhically to rule in any area of Jewish Law that such a sage is empowered to uproot Torah Law **by himself**, without the support of, and, indeed, even in opposition to, his peers. When the Talmud speaks of the power of the Sages to annul the *Halakhah* it has in mind all the leading sages, or at least a majority of the leading sages, at any moment of history. Even if we accept Rabbi Morgenstern's claim to be a judge of sagacious expertise of a standard that would have been acceptable to the Talmud and the Rambam, that does not confer upon him and his *bet din* the authority to overrule the opposition of the vast majority of today's *posqim* and, as I understand it, of all the *Gedolim*, to the annulment of marriages by means of the abrogation of *Halakhah*.[273]

32.0 **II B 17-18.**

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272 For example, Rabbi Yehudah *HaNasi* appointing Rav (Abba Arika).

273 Morgenstern refers to abrogation because he has in mind annulments even in cases where there is no mention of *'afqe'inho* in the Talmud or the *Posqim*.

32.1 Here Rabbi Morgenstern repeats his claim that *me'is 'alai* is sufficient to allow us to enforce a *get*. He cites many sources for this with which I have dealt at length above – see above, #12. He also mentions his oft-repeated claim that since we cannot nowadays apply coercion because of the Civil[274] Law, we can annul the marriage instead. I have demonstrated above, #10, that the sources he quotes for this prove no such thing. Towards the end of p.18 he writes that the *Ḥatam Sofer* rules that where there is no other way to free the *'agunah* the rabbinical court is authorised to confiscate retroactively the ring given by the husband to acquire the wife in marriage and the transaction is a gift. Consequently there is no marriage – *Ḥatam Sofer*, *'Even Ha'Ezer* [I] 108 and 109.

32.2 These *responsa* are addressed to Rabbi Avraham Eliezer of Trieste and deal with the grave problem created by the edict of the contemporary Kaiser, Joseph II, regarding marriage law according to which any couple who went through a marriage ceremony that was not conducted in accordance with the Kaiser's new enactment[275] were not to be considered married so that if the woman concerned were then to want to marry another man she would be permitted to do so without any divorce from her first "bridegroom" and the local rabbi would be forced, if necessary, to be present at the wedding and to recite the requisite blessings.

32.3 To obviate this problem Rabbi Avraham Eliezer suggested a communal enactment that would declare *hefqer* any item given as *qiddushin* in a situation not approved of by the Law of the Land.[276] Rabbi Sofer (see end of 32.1) preferred an enactment that each community instruct, on threat of *ḥerem ḥamur*, that every Jewish father should teach his daughters to pronounce a vow *'al da'at rabbim*[277] forbidding to themselves any benefit from any item given for *qiddushin* – even if the daughter were to accept it willingly - not sanctioned by the secular law. The *Ḥatam Sofer* discusses these suggestions at length and points out that they will not be of avail once the first intercourse has taken place.

32.4 It is clear that in neither of these *responsa* does the *Ḥatam Sofer* even refer to an *'agunah*. He deals only with the possibility of declaring annulled, either by means of *hefqer* of the ring or due to its being prohibited to the bride by vow, such *qiddushin* as have taken place **in violation of a prior communal enactment or vow**. Even then, he does not apply the annulment **if an act of intercourse has already taken place**. In addition to this, as regards the solution by retrospective confiscation to which Rabbi Morgenstern here refers (though that is **not the solution proferred by the *Ḥatam Sofer***), the ruling of Rabbi Mordekhai Yaffeh in the *Levush*[278] is quoted at the end of *responsum* 108, s.v. *Hayotsay*, that although *hefqer bet din* is effective in theory, **in practice a *get* must be obtained**.

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274 See note 268.

275 This was the *Ehepatent* of 1783 which stated that every Jewish marriage must be publicly announced in the Synagogue on three preceding Sabbaths just as every Christian marriage must be similarly announced in the Church and, corresponding to the Priest who must conduct a church wedding, there must be an officially appointed Rabbi who must supervise a synagogue wedding. Furthermore, any person under the age of 24 would not be allowed to marry without the consent of a farther or guardian. The law also imposed on the Jews the prohibition of marriages whose consanguinity was forbidden in Canon Law though permitted by the *Halakhah* such as the marriage of an uncle and niece. Any marriage conducted in violation of any of these provisions – even if the marriage was fully valid from the point of view of the *Halakhah* - was to be declared null and void and if either party to such a marriage later wished to marry another person the Rabbi would be forced to officiate at such a marriage even if no *get* had been issued. The vociferous objections of the Jewish Communities moved the Kaiser to seek the opinion of Rabbi Yeḥezqel Landau who explained the problematic aspects of the new law vis-à-vis *Halakhah* (1785) in accordance with which the government committee suggested several amendments to obviate the difficulties. However, the Kaiser was obstinate and the new regulations passed into law in 1786. (Freimann, *Seder Qiddushin weNissu'in* (*SQN*) 312-13)

276 It is important to note that both Rabbi Ḥayyim Yitsḥaq Musafia (author of *Responsa Ḥayyim waḤesed*) and Rabbi Yosef Ḥ ayyim David Azulai (the *Ḥida*) approved of this solution – see Freimann, *SQN* 316.

277 See *SQN*, 318, line 13. Such a vow can never be annulled - see "The Plight of the *'Agunah* and Conditional Marriage", note 30.

278 *Levush HaBoots weHa'argaman* 28:23.

32.5 Rabbi Morgenstern, however, wants to conjure up from this *responsum* the possibility of freeing an *'agunah* from a marriage where was **no prior communal enactment or vow**, even though **intercourse has taken place**, by means of retrospective confiscation of the ring (**not advocated by the *Ḥatam Sofer*** though cited on his name) **without the issuing of a *get* (in practice** as well as in theory)!

33.0 **II B 19-20**

33.1 Morgenstern argues that if women knew what awaits them when a marriage dies they would never have agreed to a halakhic wedding. Hence, their *qiddushin* must be classified as *miqaḥ ta'ut* and the dissolution of their marriage will not require a *get*. He writes: "The Rashba, *Ḥiddushey Gittin* 88b, 600-700 years ago, ruled that no woman would have an halakhic marriage if the rabbinical court would not force her husband to give her a *get* when the marriage dies." This might be taken to imply that the Rashba supports Morgenstern's argument that every woman entitled to a *get* but denied one would have had her marriage declared *miqaḥ ta'ut* by the Rashba.

33.2 The Rashba is explaining why the judicial powers of the later courts which lacked ordination and that were acting on behalf of the earlier, ordained courts (שליחותייהו קעבדינן), were exercised only in some areas of law and not in others. He points out that the main reason given in *Sanhedrin* for non-ordained courts acting in the case of loans etc. is the consideration that if they would not act no-one would ever obtain a loan. Similarly, says Rashba, if they would not act in matters of compelling divorce in those cases where the ruling in the Talmud is *kofin* no woman would agree to marry. One could argue from that that if a woman married thinking that in emergency circumstances[279] the court would enforce a *get* and she discovered too late that the *get* would not be enforced, that such a situation constitutes *miqaḥ ta'ut.* However, the Rashba's words extend only to cases of coercion, not to those of obligation (*ḥiyyuv*) or recommendation (*mitswah*), so Morgenstern's deduction, even if correct, would be limited to those circumstances where the Rashba would agree to coercion.

34.0 **II B 20-35**

34.1 Section 1 (pp. 20-21)

34.1.1 Rabbi Morgenstern extends the power to annul marriages from his court, which has mastered the four parts of the *Shulḥan 'Arukh*, to any court that has not achieved this supreme level of expertise. These courts would work on the principle that they are agents of Rabbi Morgenstern's court just as the Talmud speaks of the later courts acting on behalf of the earlier ordained courts (שליחותייהו קעבדינן).

Comment

34.1.2 This proposal of agency would be of benefit only if the other courts recognised Rabbi Morgenstern's authority and that of his *bet din* as being sufficient to abrogate the *Halakhah* and, thereby, to annul marriages and, again, only if they agreed to act as his agents. I am unaware of any such courts.

34.2 Section 2 (pp. 21-22)

34.2.1 Here we read that if no court will help the *'agunah* because, due to their perceived lack of authority, they do not see themselves as empowered to annul and also are not willing to act as agents of the Morgenstern court (that is, even if they consider his court as possessing the authority to annul), then her marriage, declares Morgenstern, is a *miqaḥ ta'ut* so she is anyhow free to remarry. Although the *'agunah* sees before her a halakhic conflict with Rabbi Morgenstern and his supporters (who declare her

[279] For example, where her husband refuses her a *get* in any of the cases where the *Halakhah* says *kofin.*

marriage annulled or a *miqaḥ ta'ut*) in the minority, she can say *qim li* (I hold) like Rabbi Morgenstern.

Comment

34.2.2 This type of *miqah ta'ut* argument has been dealt with in 33.2. As to the argument of *qim li*, this is only applicable to financial cases[280] where a claim is made by A that B owes him money and B, for whatever reason, is unwilling to pay. If there are but 2[281] *posqim* according to whom B is exempt then the *bet din* must rule accordingly although according to all other *posqim* B is liable. The reason for this is that B is in possession of the money and to overrule his possession we must have definite proof. Where a doubt is created by the support of even just 2 *posqim* for B's position, we juxtapose the minority view to B's possession of the property[282] and this combination is sufficient to make B's possession unassailable by the majority. Such an argument is possible only in cases involving money or property[283] where it is possible to identify possession. In all other types of cases[284] *qim li* is clearly inapplicable.[285]

34.3 Section 3 (pp. 22-26)

34.3.1 Rabbi Morgenstern now goes further and actually personally declares annulled the marriage of any *'agunah* who cannot find a better solution to her predicament. Not only does he do this for *'agunot* alive at the moment but also for *'agunot* in the future even if they have not yet been born. Even if we concede, says Rabbi Morgenstern, that this last extension of authority is going too far, we can instead abrogate the halakhic requirement that only rabbis who have mastered the four parts of *Shulḥan 'Arukh* can annul marriages so that any *bet din* can solve the *'agunah* problem (even without having to act as the agents of the Morgenstern *bet din*). Besides, adds Morgenstern, there are many reasons to free an *'agunah* which are recorded in his volumes and on his tapes and if any of those reasons apply the *'agunah* is free without the annulment of a *bet din*.

Comment

34.3.2 Morgenstern's declaration here is reminiscent of that of Rabbi Shapotshnick, the self-styled Chief Rabbi of London who proposed that all marriages be performed in accordance with the conditions that he set down in his pamphlets[286] so that he, or his representatives, would have the authority to annul all marriages so entered into. This proposal and proposals like it were responsible for the decision by Rabbi Ḥayyim Ozer Grodzynsky to have the pamphlet *'Eyn Tenai BeNissu'in* published.[287]

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280 Although this is obvious (see rest of this paragraph)

281 Some say that even 1 is sufficient if that *poseq* is one of the pre-eminent, classical authorities such as the Rif, Rambam, Rosh, Rashba, Ran etc.

282 סמוך מיעוטא לחזקה

283 דיני ממונות

284 דיני אסור והתר

285 For some of the parameters of *qim li*, such as that one cannot claim *qim li* against the *Shulḥan 'Arukh* (this rule was not accepted in the communities of the Ottoman Empire), see Rabbi O. Yosef, *Yeḥawweh Da'at*, I, *Killeley HaHora'ah*, pp. 33-34, numbers 16-22. The final reference (no. 22) is particularly interesting. In it Rabbi Yosef states that although in those cases where the *Shulḥan 'Arukh* reports first one opinion in an unqualified manner (*setam*) and then adds a dissenting opinion under the heading 'and some say' (*weyesh 'omerim*; such a presentation is known as '*setam weyesh*') he means to rule like the *setam*, nevertheless, in monetary cases a person is entitled to claim *qim li* like the *yesh* for this is not considered as *qim li* against the *Shulḥan 'Arukh* because the *yesh* is mentioned therein.

286 *Ḥerut 'Olam* (London, 5688) and *Liqro la'Asirim Deror* (London, 5689).

287 See "The Plight of the *'Agunah* and Conditional Marriage" VIII.5. In the introduction to *'Eyn Tenai BeNissu'in*, p. VI, the editor, Rabbi Waranowsky, writes of "that lunatic in London who has built a factory to release chained women…and has raised his hand in fearsome insolence to release all the *'agunot* in the world in one go….". The reference is to Rabbi Shapatshnik – see Freiman, *SQN* 390.

Another type of abrogation

Morgenstern's next proposal is that if (i) Rabbi Morgenstern's annulment of the marriages of yet-to-be-born *'agunot* is a step too far and (ii) other *batey din* believe that they lack authority to abrogate *Halakhah* and to annul *qiddushin* and (iii) they are also not convinced that Rabbi Morgenstern can abrogate *Halakhah* and that they can act as his agents, then the solution is to abrogate instead the *halakhah* that requires the mastering of the four parts of the *Shulḥan 'Arukh* as a *sine qua non* for abrogation of *halakhah* (for example, by annulling *qiddushin*), as a result of which all future *batey din* will be able to annul marriages.

Comment

Why the *batey din* who do not accept Rabbi Morgenstern's authority to abrogate one *halakhah*[288] should accept his authority to abrogate another[289] Rabbi Morgenstern does not tell us.

34.4 Section 4 (pp. 26-29)

34.4.1 These pages are devoted to Rabbi Morgenstern's assessment of what he and his *bet din* have done to help *'agunot*. He regards these achievements as having created "a legacy in deeds and in halakhic literature" in the style of Rabbi Mosheh Feinstein, Rabbi Mosheh Rosen, Rabbi Mosheh Zweig, Rabbi Eliyahu Klatzkin, Rabbi Yitsḥaq Elhanan [Spektor], and Rabbi Yeḥiel Mikhal Epstein, the author of the *'Arokh HaShulḥan*, and in the style of other halakhic literature of the last 4,000(!) years. Although he rules like the strictest opinions in all other areas of *Halakhah*, he rules as leniently as possible in the area of *'iggun*.

Comment

34.4.2 I respect Rabbi Morgenstern's attempts to help *'agunot* in every possible way but I think it is bizarre for him to place his work on a par with that of the classical masterpieces that he lists in this paragraph.

34.5 Section 5 (pp. 29-35).

34.5.1 Here, Rabbi Morgenstern approves of women, too, mastering the four parts of the *Shulḥan 'Arukh* and thereby becoming capable of acting as *dayyanim* with the authority to annul marriages. He then veers somewhat away from the subject and discusses the possibility of women acting as witnesses but not, he emphasises, for *gittin* and *qiddushin*.

Comment

34.5.2 There is no doubt that all would agree that a woman should, if possible, master all four sections of the *Shulḥan 'Arukh* - at least in the areas that apply to women.[290] Indeed, Rabbi Ovadyah Yosef rules that one must rise out of respect for a woman who has reached the status of *talmid ḥakham*.[291] Rabbi Shemuel Archivolti,[292] author of the famous grammatical work *'Arugat HaBosem*, rules that the prohibition on

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288 The *halakhah* regarding abrogation of the laws of *gittin* and *qiddushin*.

289 The *halakhah* regarding identification of the individuals fit to carry out such abrogation.

290 Cf. ***Taz*** to *Oraḥ Ḥayyim* 47:14 sub-para. 10 and ***Magen Avraham*** ibid. sub-para 14, both in the name of the *Bet Yosef*.

291 See *Yeḥawweh Da'at* III 72.

292 *Mayyan Gannim* (Venice 1553) - see R. Barukh Epstein, *Torah Temimah* on Deut. 11:19. See also M. Meiselman, *Jewish Woman in Jewish Law* (Ktav Publishing House - Yeshiva University Press), New York 1978, chapter 7, p. 38 at note 22.

women learning the oral law (though not pratical *halakhah*) does not apply once it becomes apparent that a woman is properly motivated in her studies. Rabbi H.Y.D. Azulai, the Ḥida,[293] suggests the same idea to explain the extraordinary Torah knowledge of Beruriah.[294] A number of *Rishonim*[295] say that a woman of sufficient sagacity is fit to sit as a judge in *bet din.*

The point, however, is that even if we had *batey din* staffed by women fit to sit as *dayyanot*, we would still have to overcome the basic problem of there being no consensus, or even majority, of competent authorities who agree to the abrogation of the *Halakhah* vis-à-vis *gittin* and *qiddushin*. Maybe Morgenstern's point is that with a sufficient number of such female *dayyanim* a consensus would eventually come about!

35.0 **II C**

35.1 This section consists of two pages on which there is one claim – often repeated by Rabbi Morgenstern – that whenever coercion is warranted but cannot be carried out the rabbinical courts can annull the marriage. I have referred to this claim above[296] and shown it to be incorrect.

36.0 **II D**

36.1 This section deals with conversions and is not relevant to the problem of *'Iggun.*

37.0 **II E**

37.1 On pages 1-12, Morgenstern continues his dissertation on conversion and the type of rabbis fit to serve on the *bet din* for the conversion. Relevant to us is his statement on page 9 where he says that the acceptance of all the commandments (*qabbalat mitsvot*) can be done only in the presence of a rabbinical court where all the members are observant of all Jewish laws which leads him to inform us that the *qabbalat mitsvot* would not be valid if the relevant *bet din* was composed of Orthodox rabbis "**who are dishonest and fraudulently keep married women sexually enslaved in a dead marriage spouting their ignorance that they commit adultery if they have a relationship with another man after we have annulled their marriage. They also frighten them that their children from man #2 will be illegitimate**." He proceeds to describe his disputants as **profiting from others' misery**, as disqualifying conversions of other orthodox rabbis who "are not members of their club **in order to charge a second fee**" and declares them **one million per cent worse than non-observant Jews who do not accept that Jewish Law is divine**. "At least," he says, "the non-observant Jews are considered *shogegim*, unwitting violators of Jewish law."

Comment

37.2 I am astonished that Rabbi Morgenstern cannot see any valid justification for any point of view but his own in this matter, as a result of which he has been carried on a wave of righteous indignation to the point where he accuses his opponents (who include, on any scale of reckoning, men of great learning and

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(The reference in the end note to Rabbi Rakvalti is an error for Archivolti.) For references to Archivolti in well known classical sources, see R, Yom Tov Lippman Heller, *Tosefot Yom Tov* at the end of Mishnah, *Tamid* and R. Yedidyah Shelomoh Norzi, *Minḥat Shai* to Genesis 9:21 *inter alia.*

293 *Tov 'Ayin*, section 4.

294 See Meiselman ibid., chapter 7, for an extesive discussion and for additional authorities who adopt the approach of Archivolti and Azulai.

295 See the first answer in: *Tosafot, Bava' Qamma'* 15a s.v.*'Asher* and in *Tosafot, Niddah* 50a s.v. *Kol hakasher*; *Ḥinnukh* 77, towards the end, in the name of 'some commentators'; Ritba, *Qiddushin* 35a, s.v. *'Asher*; first answer in Rashba, *Bava' Qamma'* 15a s.v.*'Asher* - as per *ET* II, p. 254, col. 1, n. 459.

296 #10 and #31.1

integrity) of fraud, ignorance and psychological terrorism, of conducting profiteering rackets, and of being the lowest of the low of the Jewish people.

Change of subject – without warning

37.3 Pages 12-19 of this section deal with the rule of הפה שאסר הוא הפה שהתיר in a case where a woman, of whom nothing is known and who therefore would have been believed had she said she was unmarried, appears in a community and declares that she had been married and was now divorced. Morgenstern discusses scenarios in which she identified the rabbi who officiated at the *get* as Conservative or Reform. The presentation is unclear and interlaced with much repetitious material from earlier parts of the book resulting in a text that is almost unreadable. Basing himself on Rabbi Feinstein's ruling[297] that an Orthodox, observant rabbi is not disqualified simply because he studied in a non-Orthodox seminary or took a post in a non-Orthodox synagogue, Rabbi Morgenstern concludes (pp. 17-18) that: "If the non-Orthodox want to accommodate Torah, then they can participate in conversions, marriages and divorces that will be universally recognized as valid".

Comment

37.4 As this last proposal would require the non-Orthodox rabbinate to be proficient in *'Even Ha'ezer* and to follow the minutiae of *Halakhah* in their personal lives as well as in the marriages and divorces at which they officiate and to profess the truth of 'Torah from Heaven' (in accordance with its Orthodox interpretation) – as Rabbi Feinstein states and Rabbi Morgenstern agrees[298] – it is not likely that any significant percentage of the Reform or Conservative rabbinate will be coming on board.

Reversion to conversion

37.5 In this last section, Rabbi Feinstein's aforementioned *responsum* has expanded and metamorphosed so that Rabbi Morgenstern can tell us that *post factum* **all** conversions – Orthodox **or not** – are acceptable "as explicitly discussed above"!

Comment

37.6 Surely Rabbi Morgenstern is aware that Rabbi Feinstein says exactly the opposite [299]

38 .0 **II F**

38.1 These 7 pages are headed: **The War Against the Jews – ISRAEL'S WAR FOR SURVIVAL**.

Comment

38.2 It is difficult to see in this section any connection with the *'agunah*. Perhaps Rabbi Morgenstern is drawing some comparison between this and the next section which is headed: **The War Against the Jews conducted by our critics and other similar minded individuals** thus intimating that he sees his *bet din* surrounded by enemies on all sides as being in a similar situation to that of Israel surrounded on all sides by the threat of genocide.

39.0 **II G**

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297 *'Igrot Mosheh EH* I 135.

298 16 (end) – 17 and 18 (end) – 19.

299 *IM*: *YD* II 125; *EH* III 3; *EH* IV 78.

39.1 This is an attack on 'ignorant zeal' amongst *ḥaredim*.

Comment

39.2 Though I cannot comment on the specific examples Rabbi Morgenstern cites (which are shocking), there is no doubt that such a thing exists. It has been condemned by leading *ḥaredi* rabbis who, indeed, have also suffered from it. For example, Rabbi Y. S. Elyashiv's car was stoned because certain *ḥaredim* did not approve of a lenient halakhic ruling that he had handed down. Similarly, an effigy of the late Lubavitcher Rebbe (reciting a recorded *siḥah*) was once burned in *Me'ah She'arim*!

40.0 **II H**

40.1 This section begins with a bitter criticism of those who want to impose observance on other Jews. There is also criticism of the hypocrisy of a certain American halakhic board who, amongst other things, threaten excommunication to women participating in a women's prayer group but who remain silent when a rabbi permits a man who has not yet divorced his wife to marry another woman. Rabbi Morgenstern further points to a case where one British rabbinic authority removed its certification from a restaurant whose owner refused to give his wife a *get* only to find that another rabbinic organization certified the restaurant's kashrut instead, leaving the *'agunah* in chains. Only after the personal intervention of Chief Rabbi Sacks was the *get* given.

41.0 **II I**

41.1 These three pages deal with the squalid treatment women receive when the husband refuses to issue a *get* unless his demands for money, custody and/or release from child support are met. Morgenstern complains that the rabbinical courts tend to advise the woman to comply as otherwise she will remain an *'agunah* forever. He maintains – as he has done throughout his book – that it is the duty of the court in such cases to annul the marriage. I have already outlined the halakhic problems of this approach.[300]

42.0 **II J**

42.1 These 4 pages are headed "Commercialization of Orthodoxy" though their contents say nothing about commerce until the very end. In them, Rabbi Morgenstern criticises certain rabbis who, on the one hand, refuse to save *'agunot* by annulling marriage yet, on the other, have been guilty of sweeping under the carpet the sexual victimization of young women by a rabbi over several decades.

He goes on to blame, ultimately, the *'agunot* themselves for not standing up to the rabbis who, in Rabbi Morgenstern's opinion, are persecuting them. He warns them of all the dangers they face if they sign an arbitration agreement with any *bet din* without the advice of a rabbi and an attorney both of whom they know they can trust.

He reports that a certain rabbinic committee placed a ban on him for his *'agunah* work and encouraged young men who saw him in the street or in the synagogue to call him *rasha' rasha'*. He reports that similar bigotry was displayed 20 years earlier against Rabbi Shorr who was forced to leave his Yeshivah post after 40 years and who died shortly afterwards. (Rabbi Shorr, he says, as well as Rabbi Feinstein, had ordained him.) He also bemoans the absence of representatives of the *Bet Din* of America at the 90th birthday anniversary of Rabbi Rackman especially as the BDA is the *bet din* of the RCA which organization was founded by Rabbi Rackman.

[300] See, for example, above, #10.

Comment on 40-42

43.0 Again, I cannot comment on the specifics raised by Rabbi Morgenstern of which I have no knowledge. Suffice it to say that the mere fact that a person is dressed in ultra-orthodox garb and speaks ultra-orthodox language and maintains an apparently ultra-orthodox lifestyle and is called rabbi or dayyan is no guarantee of anything. I could illustrate this with many anecdotes but I will limit myself to two. I remember as a *baḥur yeshivah* that my *Rosh Yeshivah*, Rabbi Yehudah Ze'ev Segal *zatsal*, once told us that he always used to advise his *rebbetzen* (who at that time had passed away) that when she was in the house alone she must never allow a stranger in even if he was a collector for an ultra-orthodox charity. A beard and side-locks, he then observed to us, provide no proof of probity.

Similarly, it is told of Rabbi Yo'el Teitelbaum *zatsal*, the Satmarer Rebbe, that he was seen by his *ḥasidim* to be extending much honour to a clean-shaven Jew. This surprised them. Eventually, one or two of them plucked up the courage to question the Rebbe's conduct. Why, they asked, does a pre-eminent Ḥasidic leader show such respect for a beardless Jew? The Rebbe replied that when this Jew comes to the next world he will be asked, "Jew, Jew where is your beard?" but when **they** come to the next world they will be asked, "Beard, beard, where is your Jew?"!

One could summarise the criticism of parts of ultra-Orthodox society by simply referring to the warning of the Talmud in *Sotah*[301] where it is noted that one need not worry about the Pharisees[302] or the Sadducees[303] since one knows exactly where one stands with them. The ones to beware of are the hypocrites (*tsevu'im*) who "perform the deeds of Zimri and seek the reward of Pinḥas".

44.0 **II K**

43.1 Here, Rabbi Morgenstern tells us that the Jewish Week in 2002 wrote that had he been alive at the time of the Sanhedrin he would have been adjudicated a *zaqen mamre'* – a rebellious elder. Considering the intellectual and spiritual standard required before a scholar could be ruled *zaqen mamre'*, Morgenstern takes this as a compliment!

45.0 **II L**

45.1 The claim is made here by Rabbi Morgenstern that much of the criticism of his court is due to the fact that his annulments are depriving certain rabbinical corts of vast sums of money. He writes as follows (p. 2):

> "The rabbinical establishment link the granting of a *get* to a woman to her accepting their arbitration in all matters of the domestic dispute. As a rule of thumb the rabbinical courts favour the husband and the woman ends up with a fraction of the child support and alimony necessary for her to survive and may also lose custody of some or all of her children. If the woman refuses to accept the rabbinical court's arbitration she will be condemned to remain celibate for eternity. For this service five rabbis each receive $200 minimum per hour. There are three rabbis in the court. There is a rabbi who represents the husband and a rabbi who represents the wife. Thus these five rabbis receive a total of $1000 per hour. Minimum time to adjudicate all matters of the domestic dispute is ten to fifty hours. Thus each chained woman is worth $10000-$50000 of revenues to the rabbinical establishment.

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301 *Sotah* 22b.

302 In modern terminology the sincere Orthodox.

303 In modern terminology the Reform.

> That is the reason these critics had to destroy the reputation of Rav Rackman and Rav Morgenstern. They freed over 300 women. They are slowly approaching 400 women set free. At this rate this represents over $3 million of lost revenues.
>
> Not all these critics are dishonest, irresponsible, uncaring and corrupt. But one can fault all these critics for not doing anything from the standpoint of Halacha to annul the marriages of the chained women."

Comment

45.2 I am relieved to see that Rabbi Morgenstern admits that not all his critics are immoral. As to his complaint about the failure to annul, the fact is that there is only minority support amongst the *Posqim* for annulling marriage nowadays (in circumstances other than those specifically described in the Talmud) once the *qiddushin* have taken place correctly.[304]

46.0 **II M**

46.1 This chapter is devoted to the removal of the stigma of bastardy and deals with an actual case brought to Rabbi Morgenstern. The husband (H) claimed that the son born to his wife (W) is not his but the product of his wife's adulterous relationship with another man. Later, a DNA test showed that the boy's DNA did not match that of H. Nevertheless, H wants to adopt the boy whom he loves very much. The couple are now halakhically divorced.

Is the boy a *mamzer* because of the DNA mis-match?

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[304] For discussion of this topic see R. Shelomoh Riskin, "*Hafqa 'at Qiddushin - Pitaron la'Aginut*" *Teḥumin* (22), 191-209 and the response of R. Zalman Nehemiah Goldberg, "*Hafqa 'at Qiddushin ' Enah Pitaron la'Aginut*" *Teḥumin* (23), 158-160. In my "Synopses of *Teḥumin*" (17-18), I added at the end of Rabbi Goldberg's article as follows. Rabbi Goldberg does not address the one explicit example of apparent post-betrothal annulment without a *get* that Rabbi Riskin quotes in the name of Rema (see above, p. 14, no. 23). Possibly he did not think this necessary because (i) Rema is not sure of the reasoning of "the great authorities of that time", (ii) the case did not involve a prohibition as grave as adultery and (iii) there is doubt nowadays about the priestly status of all *kohanim* – see *Ba'er Hetev*, *EH* 6:2. See, however, Rashi, *Shabbat* 145b s.v. *Le'Edut 'Ishah* and *Teḥumin* (4), p. 3, no.4.

It should also be noted that this very discussion took place almost 600 years ago (c. 1470) between Rabbi Shemuel ben Ḥalath and Rabbi Yosef (Ḥayyun?) – of the sages of Portugal. The former mustered a number of arguments to prove that the *bet din* even nowadays has the authority to annul marriages and he maintains that this is so even **after the *qiddushin* have taken place in conformity with *Halakhah* and communal enactment** if this is necessary to save a woman fron '*iggun*. Rabbi Yosef dismisses Rabbi Shemuel's ruling pointing out that whereas marriages **improperly contracted** may be dissolved if there is a communal enactment to annul them, those which have been correctly effected can be later annulled only in the cases where there is a *get* (that is disqualified by Torah law but accepted by Talmudic law as explained in the Talmud). See Freimann, *SQN* 80.

Also recorded there (113) is the following statement from "a very ancient scroll" in which were gathered the customs and practical *novellae* of the early rabbis of Jerusalem from the time of the Nagid Rabbi Yitsḥaq Ha-Kohen Sulal and his company from the year 5269….It is stated in section 94 of the scroll as follows. 'In *Yevamot*, ch. *Bet Shammai*, " אפקעינהו רבנן לקידושין מיניה" – the Sages annulled his marriage - because everyone who betroths does so only with the consent of the Sages. Thus when he betroths improperly the Sages annulled his betrothal. I asked כמהרש"ג **[**his identity is unknown**]** why they did not, accordingly, release the *'agunot* in one go and he answered me that the *Ge'onim* said that in a case of a woman already **[**properly**]** married that they should persuade him to divorce and it is proper to be concerned [about the leniency of annulment and it is, therefore, better to obtain a *get***]**. Nevertheless, if the Sages would agree to annul marriages **[**without a *get*, even after they have been properly contracted**]** that would be halakhically acceptable but past cases where she was already properly married before any such agreement we lesser mortals could not annul.

See also Berkovits, *Tenai BeNissu'in UvGet* chapter 4 (pp. 119-164) and especially p. 162: "We have also shown that there is no difference between anulment of the marriage immediately after the *qiddushin* and annulment at a later time, for example, at the time of the divorce. [i.e. Both are possible nowadays even in cases not mentioned in the Talmud provided that there was a prior enactment specifying annulment in given circumstances and the enactment was agreed to by all the rabbinic authorities.] Such a distinction was drawn from the words of the Rashba but we have demostrated that…[this is not the meaning of the Rashba.]" See futher my paper "*Hafqa'ah, Kefiyyah Tena'im*" Section A.

46.2 Morgenstern lists many reasons to free the child of the impediment of *mamzerut*.
1. DNA testing is not reliable.
2. One cannot be sure of the honesty of those performing the test. Perhaps they were aware of the husband's claim and agreed to support his position vis-à-vis his wife and child.
3. Perhaps they made mistakes when carrying out, or reading the results of, the test.
4. Since W was having relations with H throughout the period prior to the conception and until the birth she may well have become pregnant from H.
5. Even if she did become pregnant from another man who says that man was Jewish?
6. The *Halakhah* countenances the invention of far-fetched (though not impossible) scenarios to avoid the imposition n of *mamzerut* on a child.

46.3 He then indicates (as regards 1, 2 and 3 above) that the majority position amongst today's *posqim* is that we do not lend weight to modern scientific evidence that would, in effect, overrule halakhic precedents – see Dr. Avraham Sofer, *Nishmat Avraham - Hilkhot Refu'ah* beginning of chapter 4.[305] This is the position of Rabbi Eliezer Waldenberg and of Rabbi Shelomoh Zalman Auerbach. Thus, if she was living with her husband at the time of the suspected adulterous union, we will follow the majority of acts of intercourse which the *Halakhah* presumes to be always with the husband[306] rather than the paramour (this relates to point 4 above) and we will disregard the DNA test.

46.4 Morgenstern then takes up point 5 saying that even if we could prove halakhically that the boy was indeed born from another man, that man may not have been Jewish and the child of the adulterous union of a married Jewish woman and a non-Jew is not a *mamzer*. He cites for this last point *EH* 4:19.

46.5 Thus, when we discount the DNA test, we are left with a double doubt: Maybe the child was indeed fathered by H and even if he was fathered by another man maybe that man was not Jewish.

46.6 On this basis, Morgenstern now writes: "It is only when we are 100% certain that the father of the child was a Jew, other than the husband, that the child becomes a *mamzer*, and only if this fact is publicized." He then cites *Bet Shemuel*, *EH*, 4:43.

Comment

46.7 I have no quibble with Rabbi Morgenstern's comments in 46.2-5. However, I am perplexed by his claim (in 46.6) that "It is only when we are **100% certain** that the father of the child was a Jew, other than the husband, that the child becomes a *mamzer*, and only if this fact is publicized." He himself has just stated that a *sefeq sefeqa* is sufficient to remove the stigma of *mamzerut*. This means that one *safeq*, would not be enough because, although the Torah permitted a *safeq mamzer*, there would still remain a rabbinic prohibition. I also do not know the meaning of "only if this fact is publicized." How public is publicised? Besides, I have pointed out previously that even if just one person has proof that a specific individual is a *mamzer* he is not at liberty to keep it to himself – see above, 25.2. He then cites *Bet Shemuel*, *EH*, 4:43 which, as I discovered on examination, provides no support whatsoever for the aforesaid claims of Morgenstern.

Unlikely situations

46.8 He next approaches point 6 – the employment of far-fetched scenarios. He begins by telling us that a charge of illegitimacy can only stick if the state of bastardy is proven beyond doubt just as in the case of

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305 This should read: *Nishmat Avraham*, III: *EVEN HAEZER AND CHOSHEN MISHPAT*, Chapter 1, *Siman* 4. In the English edition (New York 2004) pp. 29-34.

306 רוב בעילות אחרי הבעל – Morgenstern cites *EH* 4:15.

the legal principle that one is innocent unless proven guilty. For this he cites: *Maggid Mishneh, 'Issurey* (*Izroh*) [*Bi'ah*] 20:1, *EH* 4:14, 11:4 and *Pitḥey Teshuvah* [*EH*] 11:15,16,17,18.

Comment

46.9 ***Maggid Mishneh, 'Issurey* (*Izroh*) [*Bi'ah*] 20:1**. This discusses the reasons for the Rambam's ruling that *kohanim* nowadays are not certainly priests but only presumed to be such and that they are permitted to eat only rabbinic *terumah*. To be a certain *kohen* (*kohen meyuḥas*) one would require the testimony of two valid witnesses as to the *kohen*'s ancestry to establish thereby that this *kohen*'s ancestors had officiated at the Temple altar. This shows that to establish a definite status where doubt has arisen one needs proof. In the absence of proof the doubtful status remains. Hence in Morgenstern's case where a doubt of bastardy has arisen one would require proof (or at least a *sefeq sefeqa*) to remove the stigma. Without proof the individual would remain a *safeq mamzer*. This would seem to produce a result opposite to that which Morgenstern needs. It is true that everyone is innocent until proven guilty but once a doubt of innocence – recognised as a valid doubt in law – has arisen the individual can no longer be said to be definitely innocent.

46.10 ***EH* 4:14**. This says that if a husband is absent for more than 12 months and his wife gives birth more than 12 months after the husband's departure, the child is a *mamzer*. This is the first opinion (= that of the Rambam) which Maran records anonymously. He then cites, as a *yesh 'omrim*, a second opinion (= *Halakhot Gedolot*) which regards the child as *kasher* on the assumption that the husband came to her secretly and this child is from him. The *SA* therefore rules that the child is a *safeq mamzer*. I cannot see how this proves that a state of bastardy must be proven beyond doubt. On the contrary, in this case there is clearly an element of doubt and according to Rabbi Morgenstern the child should be fully *kasher* yet the *SA* rules that he is a *safeq mamzer*.

46.11 **[*EH*] 11:4**. This paragraph records the law that witnesses who accuse a married woman of adultery must be fully cross-examined by the court. How this proves that the status of *mamzer* cannot exist in doubtful form I do not know.

46.12. ***Pitḥey Teshuvah* [*EH*] 11:15-18**

46.12.1 ***Pitḥey Teshuvah* [*EH*] 11:15.** This is a short piece in which Rabbi Eisenstadt cites conflicting sources as to whether '*edut meyuhedet*[307] of an act of adultery is sufficient to forbid a woman to her husband.

46.12.2. ***Pitḥey Teshuvah* [*EH*] 11:16**. This is a synopsis of a section of a *responsum* of Rabbi Yehezqel Landau[308] in which he concludes that if one of two witnesses to an act of adultery could not answer a question regarding the date of the occurrence the testimony still suffices to forbid her to her husband.

46.12.3 ***Pitḥey Teshuvah* [*EH*] 11:17**. Here Rabbi Eisenstadt quotes differing opinions as to whether we can accept a married woman's claim that she was unaware that a man had committed adultery with her because she was asleep at the time.

46.12.4 ***Pitḥey Teshuvah* [*EH*] 11:18**. This piece reverts to the *responsum* of Rabbi Landau[309] and discusses the question of testimony of adultery being heard in *Bet Din* by the judges in the absence of the woman. Although this should not be done, it is effective *post factum* as far as forbidding her to her husband is concerned.

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307 = two people witnessed her commiting adultery but the two witnesses were not together in one place at the same time. See *Makkot* 6b, *Yad Edut* 4:1, *Tur HM* 30, *SAHM* 30:6. *'Edut meyuhedet* is acceptable in monetary cases.

308 *Noda' BiHudah* I *EH* 72 s.v. *Setirat Heter HaRishon*.

309 Ibid. s.v. *Setirat Heter HaRevi'i*.

Not one of these four last sources has anything to do with Morgenstern's present claim.

Morgenstern - further strategies

46.13 One may even employ a hypothesis of fantasy, says Morgenstern, to legitimize the child. He then cites *'Igrot Mosheh* (see below, 46.9) and *Yabia' 'Omer* (see below, 46.10) who present possible, though unlikely, scenarios according to which the child is of the husband. Rabbi Morgenstern himself presents us with an incredible scenario. We would say, he writes, in a case where a woman fell pregnant while her husband was away in China for over 12 months, that he flew in on a magic carpet, employing qabbalistic powers using G-d's name, and made her pregnant!

Comment

46.14 Morgenstern cites no source for so extravagant a ruling but he undoubtedly has in mind the statement in *Yevamot* 116a and *Makkot* 5a that there is a possibility of *qefitsah* (literally 'jumping') which is miraculously speedy travel by the power of a Divine Name.

Proof from the 'Igrot Mosheh?

46.15 Rabbi Feinstein (*IM* [*EH*] III 9), we are told, "legitimises a child born to a woman remarried civilly but lacking a *get*. He posits that she reconciled with her first husband, had relations with him and got pregnant, though she was married to man #2".

Comment

46.16 In *'Igrot Mosheh EH* III 9 Rabbi Feinstein removes the stigma of bastardy from a girl whose mother admitted that she had been adulterous with three men, one of them a gentile, and she had also obtained a civil divorce – but not a *get* - and married a second husband. Throughout most of this time her first husband had been hospitalised with depression but she would meet him in a hospital room and he would occasionally visit her at home and, when she remarried, in the home of the second husband. She had kept her adulterous relationships a secret from her first husband but not from the second who was old and infirm and totally impotent as a result of which he did not object to his wife's sexual encounters with her first husband or with her paramours. He had married her only to have someone to take care of him and she had agreed only for the money. At this later stage she became pregnant with this daughter and she says that the daughter is definitely from her first husband.

46.17 Rabbi Feinstein argues that the daughter is not tainted with *mamzerut* beause of the Gemara's ruling[310] that, wherever it is possible to say so, we presume that the majority of sexual encounters[311] of an adulterous woman is with her husband. He says that this would have been his ruling even if the mother had said that this daughter was not from her husband because the *Halakhah* is that a woman is not believed to declare her offspring illegitimate. How much more is this so in this case where she had said with certainty that the child was from her husband.

46.18 Nowhere in this *responsum* is there any reliance on a 'hypothesis of fantasy' as Rabbi Morgenstern claims.

Proof from the Yabia' 'Omer?

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310 *Sotah* 27a.

311 Rabbi Feinstein explains that this means sexual encounters **that could result in a pregnancy** because this is a result that both parties to an adulterous intercourse usually try to avoid.

46.19 Similarly, Rabbi Morgenstern informs us, Rabbi Yosef in *Yabia' 'Omer* VII [*EH*] 6 argues for the *kahsrut* of a child born to a mother who had remarried (civilly) without a *get*, on the basis of the fact that the first husband had visited the home of his former wife in order to see the children so that it is reasonable to accept the possibility that the father of the child is the first husband. Morgenstern writes that the halachic principle is that in the majority of cases, a woman would agree to become pregnant only if the resulting child will not be stigmatized as a *mamzer*. Thus, if she decides to have another child she will have relations with her first husband not using protection. If she has relations with her new husband she will use protection before or after having relations. Thus, writes Morgenstern, we will claim that the father of the new child is the first husband.

Comment

46.20 In Rabbi Yosef's *responsum* a woman had said that she had once been married with *ḥuppah* and *qiddushin*, had separated from her husband without a *get* and had married a second husband civilly and during this second marriage a daughter had been born. This daughter became observant and was asking if her background was an impediment to her marrying in the Orthodox tradition.

46.21 Rabbi Yosef's permissive response was based on a *sefeq sefeqa*. The first doubt is – did the first marriage actually take place? The only evidence was the word of the mother which is insufficient to delegitimise her offspring and the signature of an orthodox rabbi on a document in the court archives which, being written rather than spoken evidence and being the evidence of a single witness only, is invalid on two counts. At the most this constitutes an equally balanced doubt – *safeq hashaqul*. The second doubt is whether this child was from the first or second husband. The second husband assumed from the start that it was his child but the mother claims that it is the child of the first husband who, unbeknown to her second husband, used to be intimate with her when visiting his children (who were living with their mother) and when bringing to her the payments for the children's upkeep. She explained that she kept this knowledge (of her intimacy with her former husband and of the true parentage of the daughter) secret until now (the time of the daughter's marriage) for fear of making her second husband ill. These are the doubts constituting the *sefeq sefeqa* and they are, says Rabbi Yosef, enough to permit the daughter's *ḥuppah* and *qiddushin*.

46.22 Rabbi Yosef then cites the rule of the Gemara' that the majority of acts of intercourse of an adulterous woman are presumed to be with her husband. In the present case this might apply to the second husband with whom, after all, she is living and this would mean that the daughter is a *mamzeret*. He disposes of this problem by explaining the principle of *rov be'ilot aḥarey haba'al* similarly to Rabbi Feinstein (see note 308) so that in this case we would presume the child to be of the first husband and therefore *kasher*.

46.23 He also notes the extreme leniency we meet in cases of this nature in the Talmud such as the (accepted) ruling of Rabbah Tosfa'ah in *Yevamot* 80b that if a married woman gave birth up to 12 months after her husband went abroad we can accept her claim that the child was conceived from her husband and was overdue by three months. We similarly accept a married woman's claim that her husband came from abroad – even if this would require his travelling by a *gamla' parḥa'*[312] - to visit her unseen by anyone else and her pregnancy is from him. (The remainder of the *responsum* deals mostly with the rules of *sefeq sefeqa'*.)

Comment

[312] Literally a flying camel (= a dromedary? See Jastrow's *Dictionary of the Talmud*) The meaning is extremely swift transport. Cf. *Yevamot* 116a, *Makkot* 5a.

46.23 Morgenstern does not mention that Rabbi Yosef employed a *sefeq sefeqa* in this *responsum* though he is correct in his assertion that the single argument of *rov be'ilot aḥarey haba'al* would have been sufficient to save the child as Rabbi Yosef indeed notes in the said *responsum* in section ד.

The possibility of the father being a gentile

46.24 Rabbi Morgenstern then points to another possible way of explaining her pregnancy without stigmatizing the child as a *mamzer*, namely that she might have had relations with a gentile and the child of an adulterous union between a married Jewish woman and a gentile is not a *mamzer – 'Even Ha'Ezer* 4:19. (Cf. 46.4/5)

Comment

46.25 This argument is regularly used as a unit of a *sefeq sefeqa* by the *Posqim* in their search for leniency in cases of *mamzerut* – for example, in that very *responsum* of Rabbi Yosef, section ג.

Morgenstern's grand finale – a list of heterim.

46.26 There follows what looks like a list of reasons for accepting the legitimacy of the child. Firstly, as Morgenstern has just established (on the basis of the*YO*), there exists a *sefeq-sefeqa* since the child may have been born from the first husband and, even if not, it may have been born from a gentile. (Cf. 46.4/5/24!) This is followed by the following arguments:
1. Since no proof exists that the child is a *mamzer*, by default the child is legitimate. (Cf. 46.6.)
2. In the absence of a DNA test of the mother, we cannot be sure that this woman is the mother and it is thus possible that the baby was switched in the hospital at birth and is therefore not a *mamzer*.
3. The wife could have become pregnant by artificial insemination in which case, again, the child would not be a *mamzer*.
4. The first marriage can be annulled on the basis that it was a fraud since the husband would never have married a woman who is so promiscuous that she would become pregnant from a stranger. After all, she did admit to adultery and the DNA testing of the father which showed that he had not fathered this child is 'circumstantial' evidence that she is telling the truth (see *EH* 115:6, Rema). We can assume that the promiscuity of the wife occurred immediately after the wedding not only when she became pregnant. Therefore it is a *miqaḥ ta'ut* and the marriage is null and void.
5. Besides *miqaḥ ta'ut*, says Morgenstern, we will apply 20-30 strategies listed in *Hatorot Agunot* chapters 1-12.
6. Just as the husband can claim *miqaḥ ta'ut* in this case, so can the wife. She would never have married him had she known that he was so suspicious a character as to accuse her of infidelity with every man she met even if that man was married and had children and that is why she stopped having relations with her husband after the child was born. If only she could turn the clock back, says Morgenstern, and annul this marriage, she definitely would. (He goes on to inform us that his *bet din* did it for her.)
7. Another *senif* for annulment is that the husband had never abused his wife physically or emotionally. He had acted as a Jewish husband must behave but she, rather than appreciate such a wonderful husband[313] committed infidelity and walked out after 10 years of marriage. Had the husband known of such [potential?] behaviour, that was always [potentially?] existent, *kan nimtsa' kan hayah*,[314] he would never have agreed to marry her.
8. The Ran at the end of *Nedarim* says that a wife who claims that she had an adulterous relationship and is therefore forbidden to her husband is not believed because she would thus be freeing herself from her husband's authority on the basis of her own word. "Thus," writes Morgenstern, "if she got pregnant it is the child from the husband. If she is telling the truth, then we will annul the marriage *ab initio*. So when

313 Can this husband be the same as the one described in the previous paragraph?

314 See Mishnah, *Ketubot* 75a-b and Gemara' thereon; *ET* XXI cols. 316-355.

she got pregnant, she was not a married woman and the child is not a *mamzer*. She is permitted to go back to the husband since she was not a married woman at the time of the alleged adultery…. If she was in fact lying and had no lover, then she is certainly permitted to go back. See *'Even Ha'Ezer* 115:6 for a similar ruling."
9. A further reason for declaring her marriage non-existent is the fact that the witnesses do not recall the date of the marriage. He cites for this *'Igrot Mosheh EH* IV 20, *Yabia' 'Omer* III [*EH*] 8 and *Bet Shemuel, EH* 17:63. (Cf. 8.1 and 8.2.)
10. Another argument forwarded by Morgenstern is that a woman, in the talmudic view, is understood to prefer [almost] any marriage to spinsterhood – *tav lemetav tan du milmetav armelu*. One reason given for this is that once she is married it is possible for her to have affairs with other men and to pass off any children she has from them as her husband's. When a husband demands a DNA test to check the status of his wife's child he is robbing her of this opportunity and she can therefore claim *miqaḥ ta'ut*. Not only promicuous women would object to DNA testing of their children; even decent women would object to such testing every time they gave birth. Morgenstern compares this situation to the case described at the beginning of *Sotah* in which a man locked up his wife to make sure that she had no lovers and the Sages forced him to divorce her.
11. A final reason for annulment, argues Morgenstern, is that a husband who harbours such fears about his wife committing adultery with every man has a serious problem and needs therapy[315] and this constitutes grounds for annulment [due to *miqaḥ ta'ut* of the wife].

These strategies to declare annulment of her marriage (numbers 4-11) automatically remove the stigma of *mamzerut* from the child even if he was fathered by a Jew other than her husband since, according to these arguments, she would have been unmarried at the time of the child's conception.

Observations on Rabbi Morgenstern's 11 reasons for leniency

46.27
1. "Since no proof exists that the child is a *mamzer*, by default the child is legitimate." This was first stated in 46.6 and has been dealt with above, in 46.7.

2. "In the absence of a DNA test of the mother, we cannot be sure that this woman is the mother and it is thus possible that the baby was switched in the hospital at birth and is therefore not a *mamzer*." If there were a halakhically valid doubt as to this child having been switched at birth in the hospital then according to Morgenstern's own words above (46.3) even a positive identification by DNA test would be of no avail. See, however, the view of Rabbi S. Z. Auerbach reported in *Nishmat Avraham* (see note 302) 32, end of col.1, who is willing to accept halakhically the reliability of an HLA test (and, I presume by *qol waḥomer*, a DNA test) to establish parenthood in a case where two babies were inadvertently interchanged (though he agrees that a mis-match cannot establish *mamzerut*). Accordingly, Morgenstern's wording ("In the absence of a DNA test of the mother…") is correct.

However, in Morgenstern's case, where there was no reason to suspect that any babies had been interchanged, I do not know if the highly unlikely possibility that such a thing had happened could be used (even as a *senif*) to remove the stigma of bastardy.[316]

3. "The wife could have become pregnant by artificial insemination in which case, again, the child would not be a *mamzer*." This is undoubtedly correct.[317]

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315 Is this still the same husband?

316 For a discussion of HLA and DNA testing vis-à-vis various areas of the *Halakhah* see *Nishmat Avraham* 29-34. For some of the problems that can arise where children of unknown or uncertain parentage are concerned see, *inter alia*, *'Igrot Mosheh*: *EH* I 7, *YD* - I 162, II 126, III 104; *Yabia' 'Omer* X *EH* 10.

317 See, *inter alia*, *IM EH* I 10 where it is made clear that even if the donor was a Jew (as a result of which the child would be forbidden to marry, for example, that Jew's son/daughter) since it is not possible to ascertain the donor's identity the child

4. Morgenstern's argument that her adultery can be believed by the husband (and therefore constitutes a *ta'ut* in the *qiddushin*) reads: "After all, she did admit to adultery and the DNA testing of the father which showed that he had not fathered this child is 'circumstantial' evidence that she is telling the truth (see *EH* 115:6, Rema)". The quotation from the Rema is correct but I do not know if the DNA test would be accepted as corroration of her admission of adultery vis-à-vis the marriage (though not, of course, vis-à-vis the child).

The rest of this paragraph reads: "The first marriage can be annulled on the basis that it was a fraud since the husband would never have married a woman who is so promiscuous that she would become pregnant from a stranger….We can assume that the promiscuity of the wife occurred immediately after the wedding not only when she became pregnant. Therefore it is a *miqaḥ ta'ut* and the marriage is null and void." Firstly, what right or reason do we have to assume that her promiscuity began earlier than the time for which we have proof? Secondly, even according to Morgenstern's assumption that the promiscuity began "immediately after the wedding" we still cannot say that this woman was promiscuous before or at he time of the wedding and *miqah ta'ut* must be based on **actual** serious flaws in the party to the marriage that existed at the time of the marriage not upon potential ones. If this were not so, there could not be such a thing as adultery because every marriage in which a wife had relations with another man would be declared a *miqaḥ ta'ut*.

5. "Besides *miqaḥ ta'ut*, says Morgenstern, we will apply 20-30 strategies listed in *Hatorot Agunot* chapters 1-12." See above, 5.1, 5.2, 22.5.1, 30.8.25.

6. "Just as the husband can claim *miqaḥ ta'ut* in this case, so can the wife. She would never have married him had she known that he was so suspicious a character as to accuse her of infidelity with every man she met even if that man was married and had children and that is why she stopped having relations with her husband after the child was born. If only she could turn the clock back, says Morgenstern, and annul this marriage, she definitely would." As Morgenstern has just told us that this wife was clearly promiscuous from the start why should she be surprised that her husband is suspicious of her? Is it now to b ethe case that even decent, even wonderful, husbands (as Morgenstern describes this husband in his next paragraph) are also to be classified as *miqaḥ ta'ut* for not being tolerant of adultery in their wives?

7. "Another adjunct for annulment is that the husband had never abused his wife physically or emotionally. He had acted as a Jewish husband must behave but she, rather than appreciate such a wonderful husband[318] committed infidelity and walked out after 10 years of marriage. Had the husband known of such [potential?] behaviour, that was always [potentially?] existent, *kan nimtsa' kan hayah*, he would never have agreed to marry her." This is the same argument as that of paragraph 4 above though it adds more force to the *ta'ut* argument in that it describes the husband in such glowing terms. However, it suffers from the same flaw because the promiscuous behaviour **actualised** only after the marriage.

A novel argument inserted here is that of *kan nimtsa' kan hayah* which is quoted, apparently, as a support to the argument that behaviour present in this woman **was always there**. However, this is totally misleading. Indeed it proves the very opposite of Morgenstern's claim.

The principle *kan nimtsa' kan hayah* is found in the Mishnah and Gemara' of *Ketubot* 75a and a full halakhic summary can be found in *ET* XXVI cols. 316-355. In the realm of monetary transactions it means that where a flaw is discovered in an acquired item and it is not provable whether the fault was present before the sale when the item was still in the possession of the vendor or whether it occurred after

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will be permitted to marry any man/woman on the majority principle and, in the case of a daughter, she will be permitted to marry a *kohen*.

318 Can this husband be the same as the one described in the previous paragraph?

the sale in the possession of the buyer we assume that it occurred – *hayah* - in the same location as that in which it was found – *nimtsa'*. Hence, if the flaw was discovered when the item was already in the possession of the buyer – *kan nimtsa'* - we will assume that it occurred in his possession – *kan hayah* - and he must bear the loss. If it is discovered in the possession of the vendor – *kan nimtsa'* - but it is not known whether it had been damaged before or after the *qinyan*, we will assume that it was already flawed in the vendor's possession – *kan hayah* - before the *qinyan*, so the vendor must bear the loss.

Similarly, in the case of marriage, we assume that a blemish discovered by the husband in the wife after the marriage – *kan nimtsa'*, came into existence only then - *kan hayah*, so that she would, on divorce, receive her *ketubah* payment and she would certainly need a *get* to remarry. Similarly (it seems to me), we would assume that a blemish discovered by the wife in the husband after the marriage – *kan nimtsa'*, came into existence only then - *kan hayah*, so that the marriage would be perfectly valid. This is exactly the opposite of what Morgenstern is arguing.

8. The Ran at the end of *Nedarim* says that a wife who claims that she had an adulterous relationship and is therefore forbidden to her husband is not believed because she would thus be freeing herself from her husband's authority on the basis of her own word. "Thus," writes Morgenstern, "if she got pregnant it is the child from the husband."
I do not know why Morgenstern singles out the Ran when this ruling was not issued by the Ran but by the Mishnah.[319] No Tanna or Amora (to my knowledge) disputes it and it is therefore accepted by all the *Posqim*. On the other hand, even if she were believed and therefore forbidden to her husband[320] the child would still be kasher because a mother's word is insufficient to render her child a *mamzer*/*mamzeret*. Thus, Morgenstern is mistaken in listing our rejection of her claim as a reason for not branding the child a *mamzer*/*mamzeret*.

"If she is telling the truth, then we will annul the marriage *ab initio*. So when she got pregnant, she was not a married woman and the child is not a *mamzer*. She is permitted to go back to the husband since she was not a married woman at the time of the alleged adultery…."
We could only accept her word if there were independent evidence of her guilt.[321] Even then we would not believe her vis-à-vis the child because of the rule of *rov be'ilot*.[322] As regards her marriage, however, we would say that her husband should divorce her but we would not – and could not – annul the marriage. Obviously, in those cases where we cannot coerce the divorce (see note 321) we cannot annul the marriage. Even in cases where we can coerce the divorce we do not find any authority for annulment. On the contrary, since the law is that he must **divorce** her (and so certainly cannot take her back) it is clear that we do not annul the marriage.
Hence, Morgenstern is wrong in saying that annulment can be applied in this case. He is also wrong in suggesting that such an annulment would contribute to saving the child from *mamzerut* because the child would anyhow be *kasher*.

"If she was in fact lying and had no lover, then she is certainly permitted to go back." This is obviously true but I do not see the point. In every case of uncorroborated confession of adultery she is treated as a liar and permitted to stay with (not go back to) her husband (unless he believes her – see not 321) which is exactly what Morgenstern quoted from the Ran above!

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319 *Nedarim* 11:12 = 90b. Morgenstern may be referring to **the reasoning** suggested by the Ran for the Mishnah's ruling (s.v. *we'ikka' lemedaq*, final interpretation (*wa'aḥerim tertsu*)) but that is irrelevant to the halakhic discussion in which Morgenstern is here involved.

320 See next note.

321 This would not have to be two acceptable witnesses to the act of adultery. Even if we had, in additon to her confession, testimony only to her having been secluded with another man or we had one witness to her adultery or we had nothing but her word coupled with its acceptance by the husband, he would have to divorce her – though he could not be compelled as coercion can be applied only if there were two competent witnesses to the act of adultery. See *EH* 115:6.

322 See above, note 311.

"See *'Even Ha'Ezer* 115:6 for a similar ruling."
This is the record in *SA* of the undisputed ruling of the Mishnah to which I referred above.

9. Morgestern argues that a further reason for declaring her marriage non-existent is the fact that the witnesses do not recall the date of the marriage. He cites for this *'Igrot Mosheh EH* IV 20, *Yabia' 'Omer* III [*EH*] 8 and *Bet Shemuel*, *EH* 17:63.

See above 25.3 - 25.8 where I have already shown that neither the *'Igrot Mosheh* nor the *Yabia' 'Omer* provide any evidence for this claim of Morgenstern. In *BS EH* 17:63 I cannot find any mention of the validity of witnesses of a marriage and their being required to recall the date of the wedding.

10. Another argument put forward by Morgenstern is that a woman, in the talmudic view, is understood to prefer [almost] any marriage to spinsterhood – *tav lemetav tan du milmetav armelu*. One reason given for this[323] is that once she is married it is possible for her to have affairs with other men and to pass off any children she has from them as her husband's. When a husband demands a DNA test to check the status of his wife's child he is robbing her of this opportunity and she can therefore claim *miqaḥ ta'ut*. Not only promicuous women would object to DNA testing of their children; even decent women would object to such testing being carried out every time they gave birth. Morgenstern compares this situation to the case described at the beginning of *Sotah*[324] in which a man locked up his wife to make sure that she had no lovers and the Sages forced him to divorce her.

Firstly, the citation from *Sotah* proves that a *get* is required and can be coerced but it provides no support for declaring the marriage a *miqaḥ ta'ut*. Secondly, the husband, on Rabbi Morgenstern's own arguments (46.3), has not robbed his wife of her opportunity to play the harlot with impunity because DNA testing is not halakhically acceptable! Thirdly, what proof have we that the husband was so "seriously flawed" **at the time of the marriage**?

11. A final reason for annulment, argues Morgenstern, is that a husband who harbours such fears about his wife committing adultery with every man has a serious problem and needs therapy[325] and this constitutes grounds for annulment [due to *miqaḥ ta'ut* by the wife].

However, it was not the case here that the husband was obsessed by irrational suspicion of his wife. Only in this particular instance did he suspect her, apparently with good reason (see 46.26, number 4). Besides, even if a husband is shown to be suffering from irrational fears of his wife's infidelity can we be sure that he was already so flawed at the time of the *qiddushin* and was it the case here that the wife left the marriage as soon as possible after discovering this fault in the husband?

A final observation on the above (46.1-2t)

46.28 I would say that in spite of all Rabbi Morgenstern's arguments (46.1-27), in this case since the father said from the start that the child born to his wife is a *mamzer* (46.1) he is believed in accordance with the ruling of Rabbi Yehudah in the Mishnah (*Qiddushin* 4:8 = 78b) like whom the *halakhah* is fixed.[326]

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323 *Yevamot* 118b, *Ketubot* 75a.

324 I have failed to locate this report.

325 Is this still the same husband?

326 *Yad, Naḥalot* 2:14; *Tur HM* 277; *SAHM* 277:12.

47.1 This is the last chapter of the book and contains 9 pages. It reports a judgement rendered by Rabbi Morgenstern in a case where a meddling father-in-law had interfered in the marriage of his daughter and son-in-law to the extent that the daughter had been turned by her father against her husband and could no longer bear him (*me'is 'alai*). The husband maintains that his marriage was made a living hell by his father-in-law. The husband argues that the marriage was a mistake (*miqaḥ ta'ut*) because he did not realise that when he married this woman her obnoxious father would be included in the package. The wife wants a *get* which the husband refuses to give her.[327]

47.2 In the last two years the wife has refused to have sexual relations with her husband whom she has forced to sleep in another bedroom and she has recently obtained a court order to have him evicted from the family home. The husband is willing to restart the marriage provided the father is excluded. The wife refuses to return saying she no longer loves her husband and demands a *get* which he still refuses. The husband, wife and father all approached Rabbi Morgenstern for help.

Coercion

47.3 Rabbi Morgenstern's decision is given on pages 4-8. His first argument is that as we have before us a case of *me'is 'alai* a *get* may be coerced.

Comment

47.4 I have already dealt with this argument above (see above, 12.2.7-14) and shown it to be false.

Annulment

47.5 He then argues that since we may not coerce nowadays we can annul the marriage instead.

Comment

47.6 This argument was dealt with in 10.1 – 10.2.3 and also shown to be false.

Mistaken transaction

47.7 He furthermore argues for *miqaḥ ta'ut* on the part of the husband because the husband was a saint yet the wife grew to despise him.

Comment

47.8 I doubt if that would satisfy the requirements of *miqaḥ ta'ut* because she by no means despised him at the time of the *qiddushin* nor did he leave her after her attitude to him had changed.

Get

47.9 When the husband heard that the Morgenstern annulment was always accompanied by a *get zikkuy* which the *bet din* gave on his behalf, he approved. In addition, the husband ultimately agreed to the writing and delivery of [another] *get* which the *bet din* received on behalf of the wife.

Comment

[327] It seems bizarre that the husband claims the marriage was a mistaken transaction (and is therefore non-existent) but at the same time refuses to accede to his wife's request for a divorce.

47.10 The first *get zikkuy* must, by definition, have been given on behalf of the husband before his approval had been obtained. I doubt if such a *get* can be considered valid – see above, 30.8. As regards the second *get zikkuy*, I do not understand why the wife did not receive it directly or through an agent of reception (*sheliaḥ qabbalah*) since she clearly wanted a divorce. Nevertheless, I think that the second *get zikkuy* would be effective since she stands only to gain from it and, apparently, still wanted it at the time of the *zikkuy*.

Remarriage to a kohen

47.11 Morgenstern then turns to allowing the couple to remarry as the husband is a *kohen*. He declares this permissible because if the annulment worked the first marriage never happened so she is not a divorcee and can live with him with *ḥuppah* and *qiddushin* and if it did not work and she is a divorcee they can now live together in *pilagshut* instead of matrimony. The wedding should, therefore, be conducted on a condition that it is either *qiddushin* or concubinage.

Comment

47.12 As indicated above, neither annulment nor *miqaḥ ta'ut* will work here, so we must rely on the second *get* (cf. 47.10). The marriage would thus have to be concubinage.

A kohen's concubinage with a divorcee

47.13 That there is no violation in a *kohen*'s concubinage with a divorcee, Morgenstern tells us, is attested in Rambam, *Yad, 'Issurey Bi'ah* 15:1 (with *Maggid Mishneh* and *Kesef Mishneh*) and in *Responsa Melamed Leho'il EH* 8 citing *Noda' BiHudah* 327.

Comment

47.14 The reference for the Rambam should be 15:**2** where he says that a *kohen* who has intercourse with a divorcee does not receive lashes unless he first married her with *qiddushin*.[328] The *Maggid Mishneh* and *Kesef Mishneh* discuss the queries raised against this ruling and their possible solution. They also report opposing views of other *Rishonim*. R. Hoffman similarly states in the cited *responsum*, in the name of R. Yeḥezqel Landau, that it is better for a *kohen* to live with a *giyoret*[329] without, rather than with, *qiddushin*. (The reference should be *Noda' BiHudah* **II *EH* 27**.)

47.15 The problem with these sources is that they do not say that there is "no violation" in a *kohen*'s concubinage with a divorcee. Rambam says no more than that a *kohen* who has sexual relations with a divorcee without prior *qiddushin* is not liable to *malqut*. He does not say that a *kohen* is *ab initio* permitted to engage in such sexual relations. Rabbi Morgenstern also ignores those *Rishonim*[330] who disagree with Rambam and rule that a *kohen* is liable to *malqut* for intercourse with a divorcee even when there has not been any *qiddushin*.

47.16 Similarly in the case of the *Noda' biHudah*, Rabbi Landau stated that he was allowing the marriage of the *kohen* and the possible *zonah* only because of the emergency situation that had arisen and he advised that the marriage be performed on condition that she is not a *zonah* so that if she was in fact a

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328 I am surprised that Rabbi Morgenstern failed to report other *Rishonim* who agree with Rambam's ruling: *Ḥinnukh, mitswah* 274 and *Tosefot Ri HaZaqen, Qiddushin* 78a.

329 Who is forbidden to a *kohen* as a *zonah* in exactly the same manner as is a divorcee.

330 Rashi, *Qiddushin* 78a, s.v. *Sheney Shemot* and s.v. *Umodeh*; Me'iri, ibid. in the name of "all the *Ge'onim*"; Ritba ibid; Ra'avad, gloss to *Yad, 'Issurey Bi'ah* 17:2. See the presentation of three opinions on this question in *ET* VI cols. 344-5 at notes 17-31.

zonah the *qiddushin* (and *nissu'n*) would not take effect as a result of which, writes Rabbi Landau, at least according to the Rambam and the *Maggid Mishneh* there will be no **biblical prohibition** involved in this relationship. Clearly, this is not something that Rabbi Landau considered permitted *ab initio*. The same applies to Rabbi Hoffmann's case – it was also an emergency situation and far from what one could consider permitted *ab initio*.[331]

The problem of concubinage

47.17 As to the the question of *pilagshut* for a commoner (anyone but a king), Morgenstern says he will rely on those who take a lenient view and he cites *She'elat Ya'bets* II:15, *Responsa Maharam Padua* 19 and *Responsa Rashba* attributed to Ramban 284.

Comment

47.18 The *responsum* of Rashba which is, as Rabbi Morgenstern says, found amongst those attributed to Ramban,[332] was in fact written by Ramban and not Rashba! It was addressed to Rabbenu Yonah and in it Ramban tells him that **there is no doubt that concubinage is permitted according to the *Halakhah* and he argues that this is the view of Rambam also!** It should, however, be pointed out that at the very end of the *responsum* he advises Rabbenu Yonah to warn people **not** to take concubines because if they hear that it is permitted to do so people will become indisciplined in their sexual conduct with their concubines and will copulate with them during the period of their menstrual defilement.

47.19 The *responsum* of Maharam Padua[333] permits a concubine who had left her husband and been married to another man with *qiddushin* and then divorced, 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*.[334]

47.20 In *She'elat Ya'bets* II:15, Rabbi Ya'aqov Emden argues vociferously and at great length for the reintroduction of concubinage and expresses astonishment at those who limit its acceptability to Kings.

47.21 Rabbi Morgenstern might have added the following considerations.
1. Most *Posqim* permit *pilagshut*.[335]
2. Radbaz says that even the Rambam considers *pilagshut* only rabbinically forbidden.[336]
3. The *Noda' biHudah* says[337] that the Rambam prohibits a layman to have a concubine only when her liaison with her husband is one of concubinage **only** but if the couple enter into conditional *qiddushin* then even if the condition is broken and the *qiddushin* retroactively annulled, the Rambam agrees that there is no prohibition whatsoever.

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331 See *Minḥat Ḥinnukh*, *mitswah* 266 (p. 193b col. 1, lines 45-7), who writes: "…if he does not marry her [before intercourse] he transgresses….. ..the prohibition of…. *gerushah* [because] although one does not receive *malqut* for intercourse alone, **there is certainly a prohibition**…" The wording implies a biblical prohibition. Similarly, the *Ba'al HaḤinnukh* himself writes (*mitswah* 274, p. 201a, lines 14 -16): "…but if he copulated with a *zonah*, *gerushah* or *ḥalalah* without [prior] marriage, **although this is forbidden to him** he does not become liable to *malqut*…" The *Ḥinnukh* is referring to a *Kohen Gadol* but states clearly that the same applies to a *kohen hedyot*.

332 Known as *HaMeyuḥasot leRamban* and often referred to briefly as *HaMeyuḥasot*.

333 Rabbi Meir Katzenellenbogen of Padua.

334 Cf. "The Plight of the 'Agunah and Conditional Marriage" IX.9.

335 Cf. R. Naftali Schwartz, *Bet Naftali*, no. 45, part 1, s.v. *Wa'afilu*. This particular *responsum* was written by Rabbi Yosef David Sinzheim author of *Yad David* and head of Napoleon's "Sanhedrin" in Paris.

336 Radbaz, *Responsa* IV 225.

337 *Noda' BiHudah* **II *EH* 27**, approaching the end of the final paragraph.

4. A similar conclusion is arrived at in *Responsa Bet Naftali*[338] though he says that, to avoid the problem of *biat zenut*, it must be agreed at the time of the conditional *qiddushin* that if the condition is unfulfilled and the *qiddushin* accordingly retroactively annulled, the liaison being entered into shall be one of concubinage. He also adds that it could well be that the Rambam would still prohibit concubinage even in such circumstances but says that we can permit such conditional marriage, **even when taking the Rambam's opinion into consideration**, for the following reason. Even if we accept that the Rambam's position is that concubinage for a layman is prohibited by biblical law nevertheless, when a marriage is entered into on a condition, so that it will be retroactively annulled on the breaking of the condition and converted to concubinage, there is, at the time of the marriage, no certainty that the couple are entering concubinage because it may well be that the condition will never be broken and the liaison will prove to be *qiddushin* and not *pilagshut*. The situation is thus one of doubt – is this arrangement *qiddushin* (which is, of course, permitted) or *pilagshut* (which is, according to the current understanding of the Rambam's position, forbidden by biblical law)?

Rabbi Sinzheim continues: The Rambam considers any doubtful biblical prohibition as only rabbinically proscribed so that to enter into such a matrimonial partnership would be, even according to the Rambam, only a rabbinical prohibition. Hence, from our point of view, even if the *Rishonim* were evenly split on the question of the permissibility of *pilagshut* for a layman, we would be dealing, in the case of conditional marriage, with a **doubt** (the 50-50 split of the *Posqim* concerning definite *pilagshut*) of a rabbinic prohibition (the **possible** biblical prohibition of conditional marriage that might prove to be *pilagshut*) and *safeq derabbanan lequla*'! How much more so is it possible to rule leniently considering that a majority of the *Posqim* permit *pilagshut*.

He also mentions that Mahardakh[339] suggests in a *responsum* that the Rambam would permit retroactive concubinage created as a by-product of a marriage annulled due to a broken condition – as argued above by the *Noda' BiNudah*.

47.22 However, in this case where the husband was a *kohen*, I do not think that it would be possible to permit remarriage of the divorcee by using *pilagshut* for the reasons outlined above in 47.14-15.

48.0 Relevance of this last section to the problems of conditional marriage

48.1 One of the repeatedly voiced objections in *ETB* to conditional marriage is that the marital status brought about by retroactive annulment is one of promiscuity (*bi'at zenut*) which is forbidden according to all opinions (biblically according to some and rabbinically according to others). Others argue that even if the marital status after annulment is considered concubinage which, according to the Ramban and his school, removes the stigma of promiscuity, the problem remains that the Rambam and his school forbid concubinage for anyone but a monarch (some say biblically, and some say rabbinically). It was additionally argued there that even if the condition were never broken the uncertain quality of the marriage, its feeble bonding, would render it an improper relationship – *zenut* or *pilagshut*.

48.2 Rabbi Berkovits in *TBU* argued that the above opposition of the *Gedolim* to the French Rabbinate's condition was based on the fact that the wife could so easily obtain a civil divorce, thereby breaking the condition and bringing the *qiddushin* to an end, that the marital bond was too weak to be considered real *qiddushin* and had to be viewed as *zenut* or *pilagshut*. This was all the more the case if the marriage did in fact end in civil divorce thereby retroactively annulling it and creating an actual situation of *zenut* or *pilagshut*.

338 Ibid., s.v U*ve'emet lo'* and s.v. *Wa'afilu*

339 ***M****orenu* ***HaR****av* **Da**vid **K**ohen.

48.3 Berkovits maintains that if the condition had been more reasonable from a Jewish halakhic and moral point of view the *Gedolim* would not have rejected it. For example, if the condition had laid down that the marriage would be annulled only if the *bet din* had ruled that the husband should grant a *get* and the husband refused without explaining his refusal to the satisfaction of the *bet din*, then the marriage bond would surely be considered valid as it could only be broken when a *bet din* ruled that it should be. The question remains, however, what if the condition is ultimately broken, so that it becomes apparent that they have been living together without *qiddushin*, does this mean that the liaison has been one of *zenut* or *pilagshut* and, worse still, would there be a fear that in order to overcome this problem the couple would mutually agree to cancel the condition?

48.4 Berkovits argued that the conditional marriage he was proposing could not possibly be considered promiscuous or concubinous for many reasons the most obvious ones being that its dissolution was dependent on the Jewish authorities and that, so long as the condition had not been broken, she could not leave the marriage without a divorce Even if the marriage was retroactively annulled due to the transgression of the condition, says Berkovits, it would still not be viewed as having been *zenut* or *pilagshut*. All his arguments are summarised in "The Plight of the Agunah and Conditional Marriage", IX.20-69.

48.5 It seems to me that the above mentioned *responsum* in *Noda' BiHudah* (cf. 47.21, no. 3) supports Rabbi Berkovits. Rabbi Landau states that if the couple enter into conditional *qiddushin* then even if the condition is broken and the *qiddushin* retroactively annulled, **the Rambam would agree that there is no prohibition whatsoever**. This means (by *qol wa*ḥ*omer*) that there is no problem of *zenut*.

48.6 He does not explain why there is no question of *zenut*, but he presumably means that where a marriage is retroactively annulled due to the non-fulfilment of a condition, the partnership is **automatically** retrospectively viewed as *pilagshut* rather than *zenut* because the couple wanted to live, **and did in fact live**, in a formal, decent relationship. If the condition stands, the relationship is matrimony. If it is broken, it is concubinage. Due to its formal, decent and legally binding (if only as a *safeq*) nature, it cannot possibly be retrospectively considered promiscuity.

48.7 However, Rabbi Landau goes further than this and boldly asserts that the Rambam prohibits concubinage only when entered into as such but **not where the concubinage was only a retroactive by-product of annulment by the breaking of a marriage condition**. (I have noted above that the same opinion is expressed by Rabbi David Kohen.)

48.8 He offers no proof-texts for this, but I would suggest that he is applying simple logic. The objection to concubinage (for a layman[340]) is that it would allow the couple to live together without any of the halakhic parameters that create the sanctity of the marriage bond. She could simply walk out at any time – without a *get* - and find herself another husband. Even an act of adultery during her concubinage would not be punishable. She could revert from a second husband to the first one. None of these things are possible in the case of a conditional marriage where, unless and until the condition is broken, all the stringencies of unconditional marriage apply. It therefore stands to reason that the Rambam and his school would not object to retrospective concubinage which is more in the nature of a legal fiction than a fact.

48.9 These (amongst others) are the very arguments rallied by Rabbi Berkovits in *TBU*. See "The Plight of the Agunah and Conditional Marriage", IX.20-69.

[340] None of these objections could be raised in the case of a concubine of a King. See "The Plight of the Agunah and Conditional Marriage", IX.55-60.