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A Critique of *Za'aqat Dalot*

1.0 In 2006, The Schechter Institute of Jewish Studies published in Jerusalem *Za'aqat Dalot. Halakhic Solutions for the Agunot of Our Time*, by Rabbi Monique Susskind Goldberg and Rabbi Diana Villa of The Centre for Women in Jewish Law. The work was edited by Rabbi David Golinkin, Rabbi Richard Lewis and Professor Moshe Benovitz.

1.1 The following observations on this work were concluded in September 2006 at the Agunah Research Unit of the Centre for Jewish Studies at the University of Manchester. I have commented upon all but the first two chapters, which deal with various types of prenuptial agreements.

2.0 Chapter 3 Conditional Marriage (pp. 119-147)

2.1 **P.120:** "The doubled condition is a condition crafted on the model of the condition of the Gadites and Reubenites as mentioned in the Book of Numbers 32:21-23."

Comment: The verses quoted for the Gadite and Reubenite condition are incorrect. They should be Numbers 32:29-30 as in Mishnah *Qiddushin* 3:4. This is also logically necessary because 32:21-23 do not present us with a negative apodosis in the latter part of the condition because "…if you do not cross over….you will have sinned etc." is not an indication that they will, in those circumstances, be deprived of the east bank of the Jordan, only that they will have sinned and will be punished. In the case of vv. 29-30 this resultant deprivation due to their failure to observe the condition is clearly spelt out - "…if they[1] will not cross over…they shall acquire possession …in the Land of Canaan [only]".

2.2 **P.130:** "Rabbi Yosef Caro records this question [of a condition to avoid *yibbum* being a condition against the Torah] in *Bet Yosef, 'Even Ha-'Ezer* 157 s.v. ואני תמה:

> 'Now I am astonished at this: Since the permission [to make a condition to avoid *yibbum*] is not explicit in our Talmud and in the Jerusalem Talmud it is explicitly prohibited how is it possible to be lenient in this matter? [Undoubtedly] because of this the idea has disappeared into oblivion and we have not seen or heard of anyone making such a condition'."

Comment: I would add here that Rabbi Yosef Ḥazzan in *Ḥiqrey Lev* expresses astonishment at Rabbi Caro's astonishment. How can he say that the possibility of making a condition to avoid *yibbum* is not made clear in the *Bavli*? *Bava' Qama'* (110b-111a) states that, were it not for the argument of Resh Laqish,[2] we would have presumed that a woman who finds herself before a leprous brother-in-law would not have married her late husband had she known[3] that she would find

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1 Mosheh is addressing El'azar and Yehoshua' regarding the Gadites and Reubenites.

2 טב למיתב טן דו מלמיתב ארמלו.

3 One could ague that, accordingly, we refer to a case where the leprosy developed after her marriage or, if it was present at that time, she was unaware of it but if she knew of the existence of the leprous brother-in-law at the time of her marriage we would apply סברה וקבלה. See, however, *Responsa Maharam Mintz*, number 105, quoted in *Responsa Seridey 'Esh* III 25, p. 71, in the second column, last paragraph but one, s.v. *mashma'* (I 90 *'anaf* 3, 40, pp. 270-71) which discusses the application of אדעתא דהכי to a woman married to one whose brother apostatised and says that from Maharam, quoted in *Mordekhai*, *Yevamot*, *siman* 30, it seems that it makes no difference whether the levir was an apostate when she married his brother or apostatised only later – in both cases we can say that she accepted the *qiddushin* on the understanding that

herself in such a situation and so she would be exempt from *yibbum* entirely since she would be considered as if she had, indeed, not married her husband and this leper is, therefore, not her brother-in-law. Now the whole legal argument of reasonable presumption, says the *Ḥiqrey Lev*, is built on the law of conditions. Our presumption that she would not have married him is effective in annulling her marriage only because the situation is considered equivalent to her having stipulated at the time of her marriage a condition that should she find herself liable to levirate marriage she is not now getting married. If the condition is not effective, how much more so would the presumption be ineffective.

2.3 P. 131, n. 226: In this footnote reference is made to a *responsum* of Rabbi Waldenberg[4] in which he argues at length that if a condition annuls a marriage during the husband's lifetime retroactive promiscuity will always result [and though, if a couple wanted, in spite of this, to make a condition in *nissu'in*, the condition would be valid, it is forbidden to introduce such a condition as the norm].

Comment: It is important to see if Berkovits's arguments in *Tenai Be-Nissu'in Uv-Get* (*TBU*) answer satisfactorily the points made by Rabbi Waldenberg.[5] See my paper: The Plight of the *'Agunah* and Conditional Marriage, section IX paras. 20-35.

2.4 P.134, n. 230: "See *Ḥatam Sofer*, vol. IV (*'Even Ha-'Ezer* 2) number 68. The very fact that the *Ḥatam Sofer* concerns himself with the cancellation of the condition and not with promiscuity demonstrates that he accepts the distinction of the Redakh and the *Bet Shemuel* that illicit intercourse (even according to Rav in *Ketubot*) applies only in cases of a condition that can be clarified by the time of the *nissu'in*. Where the husband is prepared to be the woman's spouse as from now even if in the future it will be clarified that the condition was not fulfilled, his intercourse is not promiscuous."

Comment: It is important to note that the *Hatam Sofer* speaks only of the condition of Mahari Bruna when he declares that even in the event of annulment there would be no retrospective *zenut*. Berkovits (*TBU* 54-56) argues that *Hatam Sofer* would say the same to his condition also but see above, §2.3.

2.5 P. 136, second paragraph: "There were rabbis who argued that such a condition [as proposed by the French rabbinate] was a condition against that which is written in the Torah and was, therefore, void." **N. 233:** "See Lubetsky: Rabbi Mosheh *Ha-Kohen* Rappoport, p. 25; Rabbi Mosheh Danishevsky pp. 35-6. These rabbis argue that in the usual case of divorce, the woman would not receive a *get* against her husband's wishes. However, when we consider a condition that annuls the marriage without a *get* it is apparent that the marriage is dissolved even against the husband's wishes. The result is the dissolution of the marriage without the husband's agreement – something that could not happen in the case of divorce."

Comment: I do not think that the 1907 proposal that does not refer to *get* could be considered subject to the objection of מתנה על מה שכתוב בתורה. Most of the rabbis (in Lubetsky) who mention this problem refer to his giving a *get*[6] implying that it was his act of divorce performed under duress (he has to do it if he wants his marriage to have existed), as prescribed in the 1887 suggestion, that drew their fire not the automatic retroactive annulment making a *get* irrelevant as in

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circumstances of *yibbum* to an apostate levir would never arise (and such an understanding is possible even if she knew at the time of the marriage that there was an apostate brother-in-law 'waiting in the wings') and that therefore she is free to remarry without *ḥalitsah*. See the discussion there in *Seridey 'Esh.*

4 The reference is given as *Tsits Eli'ezer* I 26, para. 2. In fact, it is I 2**7**, para. 2. The discussion of the problem of *bi'at zenut* actually extends throughout the *responsum*.

5 *TBU* was published in 1966. This *responsum* of Dayyan Waldenberg was written in 1936.

6 Even those who do not mention the *get* probably have it in mind.

the 1907 proposal. Though the latter was considered anathema this was not due to the problem of מתנה על מה שכתוב בתורה

2.6 **P. 137, top:** "To be on the safe side, many of those who propose the condition add that the husband should swear an oath that he will never cancel the condition. However, objections were raised to this point also." **N. 235: "**See Lubetsky, 49 (Hungarian Rabbinate protest): '..something which is altogether impossible nowadays'."

Comment: The Hungarian rabbinate's expression "דבר שאי אפשר כלל בימינו אלה" refers to the repetition of the condition, in the hearing of two witnesses, before intercourse rather than to the oath.

2.7 **P. 137, ו):** "There were some who argued that the fact that we are no longer expert in the laws of conditions could lead to a serious mishap." **N. 238:** "… Rabbi S.M. Shapiro".

Comment: This should read **M.S.** Shapiro. Lubetski (p. 17) reports this problem as having been noted by Rabbi D.Z. Hoffmann also.

2.8 **P.143, n. 255:** "In the letter quoted below in note 256 there is evidence that Rabbi Kasher himself was enthusiastic at first about the proposal of conditional marriage. Perhaps pressure was exerted on Rabbi Kasher by stringent circles."

Comment: Marc Shapiro, *Between the Yeshivah World and Modern Orthodoxy* 191, n. 83, 3rd paragraph, states that he is in possession of a copy of a letter sent by Kasher to Berkovits congratulating the latter on the publication of *TBU*!

2.9 **P.143, last 3 lines of text:** "Rabbi Kasher's claim is extremely astonishing in the light of another letter that was sent by the assistant of Rabbi Weinberg to Rabbi Eliyahu Jung[7] in New York in 1965. This letter is published here for the first time."

Comment: This letter has already been published in Shapiro, *Between the Yeshivah World and Modern Orthodoxy*,[8] 191, n. 83, 4th paragraph.

2.10 **P. 145, s.v. בנוסח התנאי at the end:** "However, it is likely that according to the *Ḥatam Sofer* himself it[9] is merely an extra-halakhic stringency."

Comment: Why only **likely**; does not the *Ḥatam Sofer* say so explicitly, as recorded in *Za'aqat Dalot* (*ZD*) itself, p. 145, note 260?

2.11 **Pp. 146-7, Summary:** The problems involved in conditional marriage have all been shown to have solutions.

Comment: One problem not mentioned in this chapter is that indicated by Rabbi D. Z. Hoffman: perchance she may receive *qiddushin* from another man before the dissolution of her present marriage. In addition to Berkovits's response to this (see Berkovits, *TBU*, Jerusalem 1966, 66 end and Abel, "The Plight of the *'Agunah* and Conditional Marriage" §§IX.93-94) the problem could be obviated by the bride declaring, straight after the *qiddushin*, a vow forbidding to herself any benefit

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7 Grandfather of Diana Villa – see *ZD* 143, n.256.

8 First published in 1999.

9 The repetition of the condition after the *qiddushin* in the case of the apostate brother.

from anything given to her as *qiddushin* before the certain end of this marriage. See Freiman, *Seder Qiddushin we-Nissu'in*, Jerusalem 1964, 316-17 where this suggestion is recorded as having been made by the *Ḥatam Sofer* (based upon Rema and Rashal and ultimately on Rashba) to Rabbi Avraham Eli'ezer Ha-Levi, rabbi of Trieste (though not in a case of conditional marriage).

3.0 Chapter 4 - Appointing an Emissary at the Time of the Marriage to Write a *Get*

3.1 To my mind, the problems with Rabbi Epstein's solution are by far the most complex, and its halakhic foundations are the least stable, of all the proposals in *ZD*. Just two observations may be made.

(1) Even Rabbi Berkovits regarded this proposal as unacceptable and even as "worse than any type of conditional marriage". In context this means even worse than the conditions proposed by the French rabbinate.[10]

(2) Rabbi Yosef Eliyahu Henkin proposed the **delivery** of a conditional *get* at the time of *qiddushin* and, in addition, a communal enactment declaring that every marriage shall be on condition that if the *get*, when required to avoid *'iggun*, would be lost, destroyed or halakhically invalid, the *qiddushin* shall not take place (which Rabbi Henkin expresses by saying that "the *qiddushin* will be retroactively annulled").[11]

3.2 Rabbi Berkovits bemoans the fact that Rabbi Henkin abandoned his proposal because it was brought to his notice that the *Gedolim* of the previous generation had, in *'Eyn Tenai BeNissu'in* (*ETB*), proscribed the use of any condition in *nissu'in*. The truth is, writes Berkovits, that the opposition recorded in *ETB* was aimed at the French condition only and **never** is it there suggested that it is forbidden to apply **any** condition to *nissu'in*. There was, therefore, no reason for Rabbi Henkin to withdraw his proposal.[12] Can it not be resurrected?

4.0 Chapter 5 Concubinage (pp. 205 - 234)

4.1 **P. 210, n. 423.** Radbaz *Responsa* IV 225 says that Rambam forbids concubinage (for a layman) only as a rabbinic prohibition.

Comment: As the Rambam is the leading protagonist amongst those who forbid concubinage to anyone but a king, this interpretation of his ruling is important in the argument for leniency though it must be said that the Radbaz himself prohibits concubinage absolutely. See §4.7 below, for Rabbi Emden's opposing view.

4.2 **P. 212,** ד״ה כבר בהשגותיו Towards the second line of this paragraph: "…because according to the Rambam 'Wherever the Torah refers to *zonah*…it means a woman who engaged in relations

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10 *TBU* 169, final para.

11 *Perushey 'Ibra'*, 5: 25.

12 *TBU* 170-71 where Berkovits brings many proofs that the ban on conditional *nissu'in* in *ETB* was targeted only at the French proposals and was never intended to be a general ban on conditional marriage *per se*. See also the approbation of Rabbi Yeḥiel Ya'aqov Weinberg to *TBU* (second and third paras.) where he points out that Berkovits never intended, G-d forbid, to dispute the prohibition of the earlier *Gedolim* but was arguing that since we find ourselves in an emergency situation far worse than anything which obtained in the previous generation and since the condition he was proposing met all the criticisms of the French condition voiced in *ETB*, there is good reason to believe that those *Gedolim* would have acceded to the Berkovits proposal. Cf. also *Seridey 'Esh* III:25, chapter 3, near the end of the *responsum* s.v. *Umit'oreret* (alternative edition: I:90, *'anaf* 3, 56, first para. For these two editions, see Abel, "Morgenstern", §1.5.1).

with a man with whom *qiddushin* is not possible’.”

Comment: It is clear from note 422 at the foot of p. 210 in *ZD* that the Rambam defines *zonah* as a woman who engages in sexual intercourse without any interest in creating an exclusive and lasting relationship. It is Ramba**n** who explains *zonah* as a woman who has relations with a man with whom *qiddushin* cannot be contracted such as a gentile, a ‘Canaanite’ servant or one of the *‘arayot*. Hence, Rambam, above, must be changed to Ramban.

4.3 P. 213, n. 430, line 7: ומאסו משכבה

Comment: This should read ומאסור משכבה

4.4 P. 219, s.v. 1. The Rema, fifth line. “…but, as is well known, the Rema did not note the sources of his glosses himself.”

Comment: It was the printers of Cracow who supplied this information and they did not always get it right.[13]

4.5 P. 219, s.v. ב. הרב יעקב עמדן Rabbi Emden explains פילגש as פלג אשה, half a wife. In **N. 446:** The Ra’avad explains it as פי שגל = sometimes a sexual partner and sometimes a domestic.

Comment: According to the Ra’avad **פי** has here the meaning ‘portion’ as in Deut. 21:17 et al.

4.6 Pp. 219 – 220. “It is a fact that the Bible[14] calls them after the death of David 'אלמנות חיות' - which implies (to the Rivash) that they had been **wives** (rather than concubines) of David and were therefore called his **widows**. The Rivash insists that all the concubines of David were married to their husband with *qiddushin*.

Comment: Two details need correcting. Firstly, the confinement of these women took place during David’s lifetime – as soon as he returned to Jerusalem after the defeat of Avshalom.[15] Secondly, in the expression 'אלמנות חיות' both words are pointed with *shureq* not *ḥolem* and they therefore mean ‘lifelong widowhood’ (*’almenut ḥayyut*) not ‘lifelong widows’ (*’almenot ḥayyut*). Therefore one cannot say that the Bible calls them 'אלמנות חיות' rather that the Bible describes them as living in a state of 'אלמנות חיות'.

4.7 P. 220, s.v. הריב״ש טוען שלקיחת אשה**.** “The Rivash argues that taking a wife without *qiddushin* constitutes the transgression of a positive commandment. According to Rabbi Ya‘aqov Emden there is no obligation to marry a woman by means of *qiddushin* unless (אלא אם כן) one wishes to take her “with total acquisition”, so that it is impossible to be separated from her without a *get*. According to Rabbi Emden the transgression of a positive commandment will take place where the man and the woman attempt to create a bond of absolute acquisition equal to all the conditions of marriage but they do it by means of a bond of concubinage.”

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13 So writes Rabbi Yoshua Falk Kohen towards the end of his introduction to his commentary *Me’irat ‘Eynayim* on *Hoshen Mishpat* (printed in the standard editions of the *Shulḥan ‘Arukh* before the first volume of *Ḥoshen Mishpat*.) The first edition of the *Shulḥan ‘Arukh* appeared in Venice, 1565. The first edition including the glosses of the Rema appeared in Cracow, 1570.

14 II Samuel 20:3.

15 Ibid.

Comment: It does not seem plausible to say that a couple who create a halakhically valid bond of concubinage are in violation of a positive commandment simply because they thought or declared that they wanted this concubinage agreement to produce a fully fledged marriage. All that would happen would be that their plan would fail. No marriage would be created; they would be left with nothing more than concubinage.

However, Rabbi Emden does not say that "there is no obligation to marry a woman by means of *qiddushin* **unless** (אלא אם כן) one wishes to take her "with total acquisition", so that it is impossible to be separated from her without a *get*", which would imply that if one does entertain that wish there would be an obligation to employ *qiddushin* and the failure to do so would be a transgression of a positive commandment. What he actually says is that "there is no obligation to marry a woman by means of *qiddushin* [ever] **but** (**אלא**) this is what the Torah said: "If a man would take a wife, this is how to do it (*qiddushin*)". Thereby he performs an **optional** positive commandment. If, however, he does not perform *qiddushin* when joining a woman to himself, he has not **transgressed** any commandment, he has simply finished up with a concubine instead of a wife.

5.0 Chapter 6 "In the Manner of Betrothal" in Lieu of Betrothal (235-55)

5.1 P. 245, n. 510. "It must, however, be pointed out that in all the precedents that Feldblum brought and also in the minds of the secular couples who married without 'the agreement of the woman to convey ownership of her body to the groom' (*da'at maqnah*), there was an **intention** to become married with *qiddushin* of the Torah, 'according to the law of Moses and Israel'. The situation would not be so with couples who join themselves to each other 'in the manner of *qiddushin* and *nissu'in*'. Therefore, the case of the minor whose father has gone abroad does not parallel exactly the case of the secular woman who wishes to bind herself to a man in the manner of *qiddushin*. It would be possible to argue that only in cases where the couple really had in mind a state of *nissu'in* is the relationship not considered one of promiscuity but this would not be the case where the couple do not intend at all a state of *nissu'in* according to the Law of Moses and Israel."

Comment: I wouldn't worry. In the performance of every commandment there are two components. The relevant act/statement/thought and the prior intention that the act/statement/thought is about to be performed in order to fulfil the commandment in question (*mitswot tserikhot kawwanah*). It is sometimes possible for the *mitswah* performance to be valid when the act etc. lacks prior intention but never the other way round — when the intention lacks the posterior act! Thus one who reads the *Shema'*, having forgotten to entertain a specific prior intention to fulfil his duty thereby, may, in given circumstances, have fulfilled his obligation (at least, *bedi'avad*) but one who had the required prior intention but then failed to read the Shema', or proceeded to read it missing out even one word, has not fulfilled his duty at all (even *bedi'avad*).

Similarly, the fact that the minor whose father has gone abroad **had in mind** a state of *nissu'in* would in no wise affect the status of her subsequent cohabitation since no act of *nissu'in* was performed. It would be no nearer real *qiddushin* and *nissu'in* than if she had had no intention whatsoever. The operative argument here is that it is not a promiscuous relationship because they **conduct themselves** as man and wife and not as prostitutes.

5.2 P. 247 s.v. "הרי את מקודשת לי" (2 and n.517). Prof. Feldblum מיוחדת suggested instead of מקודשת. The footnote indicates that the usage of מיוחדת would create doubtful *qiddushin* and necessitate a *get* out of doubt and directs us to *Yad, Ishut* 3:6 for a better alternative.

Comment: I agree entirely and would add that a declaration like "Behold I am your husband by this

ring" would be ideal in that not only does it **definitely** not create a state of *qiddushin*[16] but also because of the **reason** that it fails to do so. This reason is that "Behold I am your husband" is said to imply that, instead of **his** acquiring **her** and **her** agreeing to transfer **herself** to **him**, **he** is transferring **himself** to **her** and **she** is acquiring **him**. This would be a counter-balance to the implication of the halakhic theory of regular *qiddushin* considered problematic by some in modern Western society as mentioned elsewhere in *ZD* - "No woman knows the demeaning nature of the technicality of Jewish marriage – being 'acquired' by the husband".[17]

5.3 **P. 247 העדים 3)** No (valid) witnesses are required and perhaps it is even better if the witnesses are unfit for testimony.

Comment: If the witnesses are to be non-observant and so unfit for testimony by Torah law, even 'real' *qiddushin* and *nissu'in* will be invalid and no *get* will be required. In other words, we would finish up with 'in the manner of betrothal' (or concubinage). On the other hand, if Rabbi Feldblum bases himself on the halakhic precedents of 'in the manner of betrothal', can we be sure that those precedents did not employ two valid witnesses and if they did, can we do less and still call our arrangement 'in the manner of betrothal'? See, for example, *'Even Ha-'Ezer* 37:14 where Maran quotes two opinions regarding a minor (bride) married to an adult (groom) by her mother/brothers in the father's absence (though during his lifetime). According to the first, she is considered rabbinically married and requires *me'un* and even if her father returns she needs no new *qiddushin* – clearly then we are speaking when the *qiddushin* took place before two valid witnesses. The second view maintains that no *me'un* is required because such an arrangement is not recognised as even rabbinic marriage yet nevertheless, the cohabitation is not promiscuous and is allowed to continue – even if the father objects to it.

In the absence of evidence to the contrary, it is a given that two opinions quoted side by side refer to the same situation. Thus, this second opinion, which is one of Feldblum's sources for '*derekh qiddushin*', must also be speaking where there were two valid witnesses to the arrangement.

Of course, some distinction will have to be made to mark the ceremony as *derekh qiddushin*. In the cases referred to in *Shulḥan 'Arukh* it is the minority of the participant(s) that assures this. The best way to achieve the same result with two adults while allowing the ceremony to imitate that of real *qiddushin* as much as possible would probably be to vary the groom's declaration – see previous comment.

5.4 **P. 248, top.** Just as R. Feinstein assents to a traditional *ketubbah* for a deaf-mute, Rabbi Feldblum proposes one for a case of 'in the manner of *qiddushin*'. Rabbis Pitkowsky and Goldberg argue that "the comparison is not so accurate because the deaf-mute's marriage enjoys rabbinic status [whereas marriages 'in the manner of *qiddushin*' while they may not be promiscuous enjoy no halakhic recognition as marriages at all].

Comment: I don't think there is any problem in the comparison. The point is that we see from Rabbi Feinstein that even where there is no obligation to have a *ketubbah* it is permitted to take the obligation upon oneself. Once that has been established, I don't see why it cannot be extended from cases of rabbinic marriage to cases of permitted cohabitation. After all, there is nothing in the

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16 *Yad, 'Ishut*, 3:6 and *EH* 27:6.

17 See §7.8 below. It is made clear in *EH* that declarations of *meyuḥedet li* and the like bring about doubtful *qiddushin* only if he had been speaking to her of *qiddushin* just prior to his declaration. Otherwise, they are to be totally disregarded. However, if they were to be used for establishing *derekh qiddushin* one might argue that even if he was careful not to speak to her about *qiddushin* beforehand the very fact that the words would be uttered in the context of a marriage ceremony may be enough to create doubt. The matter requires research but, obviously, an alternative, with no problematic strings attached, is to be preferred.

Halakhah to stop a person taking upon himself obligations that have not been imposed by the Torah or the Sages.

Having consulted this *responsum* of Rabbi Feinstein I discovered that in fact a deaf-mute cannot take the *ketubbah* obligations upon himself and even were he to write a *ketubbah* to his wife it would not be binding due to the fact that he is not considered legally mentally competent.[18] It is, however, possible for a *bet din* to draw up a *ketubbah* for him and Rabbi Feinstein tells us that he did once do so and he records the wording of the document for future reference. Hence, in the case of the fully mentally competent, where there is no problem in taking obligations upon oneself, there is every reason to think that a document similar in form to a *ketubbah* could be introduced for those cohabiting in *derekh qiddushin*.

5.5 P. 250, n. 533. Feldblum thinks that rather than introduce civil marriage it is better to have "*derekh qiddushin*" because the latter will keep the unobservant Jewish community in touch with Jewish tradition and the rabbinate. In the footnote the point is made: "....but it seems doubtful to us whether a ceremony like that which he proposes would perform the task of attracting 'most of the people' to Jewish tradition and to the rabbinate."

Comment: I don't think Feldblum actually claimed that it would. Rather the other way round, that ditching his idea and replacing it with civil marriage will sever one of the few links, perhaps in some cases the only one, which secular Jews have with Judaism. It is important to keep all links intact and the fewer the links the more important it is to do so.

5.6 P. 254 paragraph beginning אף על פי, 5th line. "Although not every situation of concubinage is a situation of 'in the manner of *qiddushin* and *nissu'in*', it is possible that 'in the manner of *qiddushin* and *nissu'in*' creates a situation of concubinage."

Comment: Which case of concubinage would not be 'in the manner of *qiddushin* and *nissu'in*'?

5.7 Ibid. Final paragraph. Does the nature of things change? More to the point – are **natural** qualities described in the Bible or the Talmud (such as *tav lemetav*) subject to change? Rabbi Bleich and the community he represents seem to say no; Rabbi Feldblum and his school say yes.

Comment: It is quite clear that many of the scientific observations in the Talmud do not match the facts which present themselves to us today. The two main approaches to this in the world of Orthodoxy are as follows.

1. The talmudic Sages did not pronounce on these matters through Prophecy or the Holy Spirit but simply in accordance with the knowledge available to them at the time. Such knowledge was not always accurate and sometimes far from it. This is the opinion of Rav Sherira Gaon,[19] Rav Hai Gaon,[20] Rambam,[21] his son R. Avraham,[22] Ramban[23] et. al.

2. The talmudic Sages were always right and if natural facts do not accord with their teachings

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18 Cf. *ET* XVII col. 520 at notes 346-351.

19 *'Otsar Ha-Ge'onim*, *Ḥeleq Ha-Teshuvot*, *Gittin* 68b, *siman* 376.

20 As quoted in the introduction to Rabbi Al Naqawah's *Menorat Ha-Ma'or*.

21 *Guide*: II 8, III 14 (end).

22 *Ma'amar 'al 'odot Dirshot Ḥazal* which is printed at the beginning of *'Iyun Ya'aqov*.

23 *Wiqu'aḥ*, sec. 39. See Chavel (ed.) *Kitvey Ramban* I, Jerusalem 5723, 308. It should be pointed out that some of the sources quoted in notes 19-23 refer to *'Aggdah* rather than science or medicine but as *'Aggadah* is a general term for all rabbinic discourse that is not *Halakhah* it inevitably includes all the multifarious scientific material of the Talmud.

that is because nature has changed. This is the approach of Rabbenu Tam[24] et al.

The second view is more commonly heard in the 'ultra-Orthodox' (for want of a better word) communities (many of whose members have never even heard of the first approach and regard it, when hearing of it for the first time, as heresy[25] – at least until they find out who said it and even then they will sometimes adopt the 'forgery approach') whereas the first is generally adopted by the more broadly educated 'modern Orthodox' (though this is, of course, not a hard and fast rule).

It is interesting to note that the first approach could not be used (in the Orthodox world) to explain an unscientific statement in the Bible (should such a thing be discovered) as the entire contents of the Bible derive either from Prophecy (Pentateuch and Prophets) or the Holy Spirit (Hagiographa) but the second approach (as well as others) could be so utilised. Thus, even if the Bible itself described the nature of woman as preferring *Tan du* to *'armelu* there is nothing in the Orthodox tradition to say that this can never change.

The problem is, however, in those cases where the Talmud **bases a *halakhah*** on a scientifically incorrect premise. It seems that the Rambam himself rules that although the premise was a mistake, and the *halakhah* based upon it was, therefore, also an error, the *halakhah* in question cannot be changed.[26]

It would seem, *a fortiori*, that those who adopt the second approach (Rabbenu Tam et al.) would not countenance any halakhic change based upon changes in nature (where the Talmud bases the *halakhah* on a scientific premise) since they maintain that the *halakhah* itself was **correctly** decided at the time (since nature was then different).

See, however, R. Yitsḥaq Lampronti, *Paḥad Yitsḥaq*, *'erekh tsedah*, where a limited argument for changing the *Halakhah* in the light of new scientific knowledge is put forward.[27]

The matter requires much research and deliberation especially because of its possible repercussions on *tav lemetav*.

6.0 Chapter 7 Coercion (pp. 259-306)

6.1 P. 265, s.v. עילות נוספות לכפיית גט: Reference is made here to the ruling of the *Ḥatam Sofer*[28] based on the Rosh[29] that coercion can only be applied where all the *Posqim* agree that the circumstances of the case merit such treatment. We then learn that the *Ḥazon 'Ish* disputes this and writes in *'Even Ha'Ezer* (*EH*) 69:23 that "it is impossible to accept the ruling of the *Ḥatam Sofer*".

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[24] Quoted in *Shittah Mequbetset* to *Ketubbot* 13b, s.v. השבתנו על המעוברת and in the glosses of Rabbi Aqiva Eiger to BT *Pesaḥim* 94b. Cf. *Ḥazon Ish EH* 12:7 who cites *Tosafot* Avodah Zarah 24b s.v. *Parah*. See further the discussion in A. S. Abraham, *Nishmat Avraham* (English), III (*'Even Ha'Ezer* and *Ḥoshen Mishpat*), New York 2004, 38-39 and in Ḥanina ben Menaḥem, Natan Hecht & Shai Wosner (eds.), *HaMaḥloqet BaHalakhah* II (Jerusalem 1993) 967-1070.

[25] As I can attest from personal experience.

[26] In the aforementioned *Ma'amar*, Rabbi Avraham mentions, as an example of talmudic scientific error, the ruling in *Shabbat* 66b that a woman is permitted to walk in the public thoroughfare on the Sabbath wearing an ' *'even tequmah*' – a type of stone that protects against miscarriage. This stone is now known, says Rabbi Avraham, to be ineffective. Thus, as neither use nor ornament, one would expect it to be forbidden by Torah law to transport it in the public domain. In spite of this, Rambam (who was surely aware of its lack of therapeutic potency) permits a woman to wear such a stone on the Sabbath even in the public domain. See Prof. A. S. Abraham, *Lev Avraham* (Medical *Halakhah*) II, Jerusalem 5738, ch. 14, para. 4 (p. 60), n. 11.

[27] See further sources (for and against halakhic change) and discussion in M.M. Kasher, *Mefa'ne'aḥ Tsefunot*, Jerusalem 5736, 171-72, and especially note ב ibid.

[28] *Responsa Ḥatam Sofer* III (*EH* 1) no. 116.

[29] Quoted in *Tur EH* 154.

Comment: The *Ḥazon 'Ish* in *EH* 69:23 is referring to a completely different ruling of the *Ḥatam Sofer* in which the latter had said that a man who had married without his bride knowing that he was an epileptic and whose wife now says she cannot stand cohabiting with him any longer may be forced to give her a *get*. *Ḥatam Sofer* derives this from a *responsum* of the Rosh in which the ruling was handed down that the husband of a woman who claimed *me'is 'alai* may be forced to divorce her since it was clear that he had tricked her into marrying him and that he is hopelessly unworthy of a woman of her standing – his intention having been to make a laughing stock of her or to blackmail her for the *get* she would undoubtedly want. The *Ḥazon 'Ish* argues that the two cases cannot be compared. In the Rosh's case there is no question that the woman wanted nothing to do with this man, so the very validity of the marriage was questionable. Adding to this the opinion of those *posqim* who say that one may coerce in a case of *me'is 'alai*, the Rosh supports coercion if a *get* is not forthcoming. In the *Hatam Sofer*'s case it is not at all clear that the woman would have rejected this man had she known that he was an epileptic. Many women enter marriage with a sick man determined to overcome the problems thrown up by the illness.

Ḥatam Sofer did not, it is true, advocate straightforward coercion in his case. He rather said that the father, who had taken money belonging to his son-in-law, could hold it until his daughter had received the *get* she was entitled to. The *Ḥazon 'Ish* questioned this also. Surely, he argues, withholding a person's belongings until he gives a *get* is no better than any other type of coercion.

It is impossible — says the *Ḥazon 'Ish* — to accept this ruling of the *Ḥatam Sofer* .

6.2 **P. 272, top:** "From the 10th century the Ge'onim rule explicitly that one can force a *get* out of a husband whose wife claims that he is repulsive to her."

Comment: I take this to mean that although the enactment of coercion is said to have been initiated by the Saboraim the earliest written records we have of this do not ante-date the 10th century.

6.3 **P. 274, n. 570.** In this note there is mentioned the ruling of Rabbi Shemuel ben Ali (Babylon, 12th century), quoted in the *responsa* of Maharam of Rothenburg, no. 443, who says that "**We give her** (the *moredet*) a *get* immediately". Riskin understands the meaning to be coercion.

Comment: This is an unusual expression for coercion. Cf. B.S. Jackson, *Agunah and the Problem of Authority: Directions for Future Research*, University of Manchester 2004, 24. In the edition of this *responsum* that I consulted[30] the ruling was quoted in the name of Rabbi Sherira Gaon not Rabbi Shemuel ben Ali.

6.4 **P. 277, end of top paragraph:** "…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*…"

Comment: It is not clear what the last phrase means. I found the explanation in Maharash Rosenthal's gloss[31] unintelligible. Elon[32] (who also cannot understand Rosenthal's meaning) says that Rabbenu Tam is referring to the Rashi quoted in *Shiltey Ha-Gibborim* on the Rif to *Ket.* 63b, s.v. א. כתב סמ"ג בשם ר"ת. 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

30 דפוס פראג מהדורת בלאך, נדפס מחדש בתל אביב, תשכ"ט.

31 *Sefer Ha-Yashar le-Rabbenu Tam, Ḥeleq ha-She'elot weha-Teshuvot….we'im ha'arot me'et Rabbenu Shraga Rosenthal*, Berlin 5658; new ed. Jerusalem 5732, number 24, note 12.

32 *Ha-Mishpat Ha-'Ivry*, 543, n.79.

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.

6.5 P. 278, n. 581: "Elon, *Ha-Mishpat*, p. 546 notes that 'According to the majority of the halakhic sages the legislative authority of the Ge'onim was not limited to monetary matters only (as Rabbenu Tam thought) but remained in its full force even as regards the institution of marriage and divorce'."

Comment: Elon indeed mentions this on pages 543, 544 and 546 but he cites only Ramban and Rosh as saying so.

6.6 P. 278, end of paragraph beginning 'Rabbenu Tam': "Even the [mere] cancellation of the 12 month waiting period turns the coercion in the case of the *moredet* into an illegal coercion. Nevertheless, after 12 months it is possible that the coercion would be acceptable."

Comment: It is clear that there is a contradiction in *Sefer HaYashar* – at first Rabbenu Tam is represented as saying that he agrees with coercion in a case of *me'is 'alai* but objects to anticipating it by 12 months. Later, he argues that there is no such thing as coercion in such a case even after 12 months. I have not yet come across discussion of this in the halakhic literature. I note also that Elon, ibid., 543, quotes only the first version of Rabbenu Tam's view. The second version, which rejects coercion entirely in cases of *me'is 'alai*, accords with the report of Rabbenu Tam's view in *Tosafot, Ketubbot* 63b, s.v. *'aval 'amrah*.

It is possible that we have here a merging of two opinions of Rabbenu Tam into one text. The first (permissive) view, according to which coercion may be applied in cases of *me'is 'alai*, reflects Rabbenu Tam's earlier opinion. The second (restrictive) view is the one he held later. The fact that Rabbenu Tam changed his mind in this matter is recorded in *Yabia' 'Omer* III *EH* 19:15 where R. Yosef cites *Responsa Maharibal* III:13: "…this custom, to coerce divorce due to the claim *me'is 'alai* was the accepted practice in the (Babylonian) academies for 400 years[33] and **even Rabbenu Tam practised it at first**…"[34]. Rabbenu Tam's strident criticism of the enactment of the Ge'onim as recorded in *Sefer HaYashar*[35] reads as follows: "Ravina and Rav Ashi marked the conclusion of legislation. Granted, the Geonim were empowered to enact…monetary regulations but we do not have the authority to validate an invalid *get* since the days of Rav Ashi [and will not have such authority] until the days of the Messiah." It is interesting to compare this with his attitude towards the decision of the Geonim to add to the text of the Talmud and thereby change the *Halakhah* in another area. In *Yabia' 'Omer* VII, *'Oraḥ Ḥayyim*, 44:6, Rabbi Ovadyah Yosef discusses the law of the annulment of *ḥamets* on Pesaḥ. Most *posqim* say that there is no such annulment and so rules the *Shulḥan 'Arukh*. However, it is well known that both Rav Aḥai Gaon and Rabbenu Tam said that *ḥamets* on Pesaḥ is annulled in 60 like any other prohibited food and the word *bemashehu* was a later addition to the talmudic text. Amongst many other sources he cites *Shibboley HaLeqet* (217) who writes: "…we are not to read in the Gemara *bemashehu* for it is not of the original Talmud that Rav Ashi redacted but it is an interpretation of the Geonim which they added into the text. Nevertheless, even Rabbenu Tam said that one should not conduct oneself so in practice because **one must not deviate from the words of the Geonim to the right or to the left**." This seems to contradict the attitude of Rabbenu Tam himself in the matter of coercion of the husband of a *moredet* where he overturned the ruling of the Geonim which had been practised for somewhere between 300 and 600 years (see note 33).[36] It is possible that he accepted the variant rulings of the Geonim in rabbinic law (non-annulment of *hamets* on Pesaḥ) but not in biblical matters (coercion of

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33 Some sources give 300 years, some give 500 and some 600 - see *Yabia' 'Omer* III *EH* 18:6.

34 At least after the 12 month waiting period – see above, 6.4.

35 *Teshuvot Rabbenu Tam* no. 40 (Jerusalem 5732, p. 40 , lines 8-15).

36 See Abel, "Halakhah – Majority, Seniority, Finality and Consensus" III.20.

gittin) or that he acquiesced in their rulings when they were being stricter than the Talmud (non-annulment of *hamets* on Pesaḥ) but not when they were being more lenient than the Talmud (coercion of *gittin*). However, I think it more likely that Rabbenu Tam originally maintained a position of unquestioning acceptance towards the Geonim and later revised his attitude just as we have seen that he originally practised coercion in cases of *moredet* and later forbade it. This may be related to the differing views of Rambam and Ramban regarding whether the period of the Geonim formed a superior 'halakhic epoch' with whom later sages agreed not to argue, the former denying this and the later affirming it.[37] Rabbenu Tam may have at first held the same view as Ramban and later as Rambam.

6.7 P. 284, s.v. *Ha-Tashbets*. Rabbi Duran in *Tashbets* II 256 concludes: "However, this [rejection of the ruling of the Rambam] is only *ab initio* but if it occurred [that a *get* was coerced in a case of *me'is 'alai*] in any of the places that conduct themselves according to his [the Rambam's] works *zal*, the Rosh *zal* has written that we do not reverse the situation. I say that applies if she has already remarried i.e. she need not leave but it is difficult to permit her to remarry *ab initio*. It seems correct to me to argue for a legal ruling that [in a case of *me'is 'alai* where the *get* has been obtained through coercion] the ruling is the same for all places:[38] she shall not be allowed to remarry but if she has already remarried she need not leave [the marriage]."

Comment: The Rosh says that he would, *post factum*, accept a coerced *get* in a case of *me'is 'alai*. This clearly means that he would allow the divorcee to remarry *ab initio*. Rashbets, however, is stricter in that he does not permit her remarriage *ab initio*[39] but is willing only to say that if she has already remarried she may remain with her new husband.

On the other hand, Rashbets forbids coercion and remarriage (where coercion had already taken place) **but permits the remarriage to continue** (if it, too, had already taken place) **everywhere** – i.e. even if the coercion was (wrongly) applied in places that do not accept the Rambam's ruling on *me'is 'alai*[40] whereas the Rosh, he understands, permitted remarriage when the *get* had been coerced by a *bet din* resident **"in any of the places that conduct themselves according to his [the Rambam's] works"**. This implies that the Rosh would not accept the *post factum* validity of a *get* coerced for a *moredet* according to the Rambam's opinion if that coercion had taken place in a community that had not accepted the Rambam as its halakhic authority. However, I cannot find such a restriction in the *responsa* of the Rosh. It seems clear, for example, from *responsum* 43:6 that the Rosh meant his ruling for all places (save those where the authority of the Rambam was paramount such as Yemen)[41] **in the future** (= *ab initio*) but if it had happened anywhere **in the past** (= *post factum*) – even in a place that had not accepted the authority of the Rambam – he would accept the validity of the *get*.

In *Bet Yosef*, *EH* 79 s.v. *Umah shekatav wekhen hi'*, at the end, Rabbi Yosef Caro cites the ruling of Rashbets (II 256) quoted above from *ZD* but in the name of Rashbash[42] son of Rashbets. Thus Rabbi Caro's ruling would be in a case of *me'is 'alai* [where the *get* has been obtained through coercion] she shall not be allowed to remarry but if she has already remarried she need not leave [the

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37 See Abel ibid.

38 Both for those that have hitherto relied on the Rambam and for those that have followed Rabbenu Tam.

39 That he is disagreeing with the Rosh rather than interpreting him is made clear by Rabbi Avraham Ibn Tawwa'ah (Rashbets's grandson) in *Ḥut haMeshullash* (printed at the end of *Responsa Tashbets*) *HaTur haShelishi* no. 35, p. 11b col. 2, lines 42-44).

40 It also sounds as if he was advocating the discontinuation of *ab initio* coercion even in the lands of the Rambam ("the ruling is the same for all places") but this is hard to believe. We shall anyhow soon see that Ibn Tawa'ah regarded this ruling as only theoretical speculation and not *halakhah lema'aseh* (a practical law).

41 Where he would agree to coercion *ab initio* - See the discussion *in Responsa Yabia' 'Omer* III *EH* 19:21.

42 The second and third volumes of *Tashbets* were not seen by Rabbi Caro as stated below on this page.

marriage]. In *Darkey Mosheh* there the Rema opines that she should not even be allowed to remain in the marriage.

However, Rabbi Avraham Ibn Tawwa'ah[43] argues on the basis of other *responsa* of Rashbets[44] that R. Duran in practice agrees entirely with the ruling of the Rosh that if **any** *bet din* – even in a place where it is not the custom to follow the Rambam regarding coerced divorce in the case of the *moredet* - relied on the Rambam and coerced a *get* in a case of *me'is 'alai*, though the *bet din* acted incorrectly, the woman may, on the basis of that *get*, remarry *ab initio*.

It is known that *Maran* saw only the first volume of *Tashbets* and the tradition is established that had he seen the other volumes thereof and found in them some contradiction to his rulings in *Shulḥan 'Arukh*, he would have retracted his decision in favour of that of R. Duran, even if this would have meant adopting a lenient in place of a stringent ruling and even if the case were one of *gittin* and *qiddushin* – see *Responsa Yabia' 'Omer*, X, *Ḥoshen Mishpat* 1, s.v. *Teshuvah*. Thus it can be argued that if Maran had seen *Tashbets* II:69 and II:180 and the arguments of Ibn Tawa'ah, he would have accepted the position of the Rosh – and the final position of Rashbets - as being that though a *get* must not be coerced in cases of *me'is 'alai* if it was coerced the woman may remarry *ab initio*.

Therefore, one must consider whether the situation regarding *get*-refusal today is one of compelling need (*she'at deḥaq*) so that we can apply the rule that whatever is normally permitted only *post-factum* is, in a *she'at deḥaq*, permitted even *ab initio*, so that in our situation the Rashbets – and *Maran* - would allow, in a case of *me'is 'alai*, coercion (and, obviously, remarriage), even *lekhatḥillah*![45]

6.8 P. 286 end – 287 top. Rabbenu Tam argues that if coercion is allowed in a case of *me'is 'alai* it should be included in the list in the Mishnah (*Ketubbot* 7:10). Rabbi Herzog[46] responds that Rambam has forestalled this question in his commentary to the Mishnah. (This commentary was not known to the Tosafists and had not then been translated into Hebrew.) On *Yevamot* 14:1 Rambam writes that whenever the Mishnah refers to *get*-coercion it always means the enforcement of *get* **with payment of *ketubbah***. Cases of *me'is 'alai* which do not involve payment of the *ketubbah* are, therefore, not to be expected in the Mishnah's list. Thus, the absence of such cases from the list does not prove that they are exempt from coercion.

Comment: In Rabbi Herzog's *responsum* the reference for the Rambam's comment is not given. In *ZD* it is said to be Mishnah *Yevamot* 14:1 but I could only find it on the final Mishnah of chapter 13. In the Kafaḥ edition this is mishnah 11, in other editions it is mishnah 13.

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43 *Hut haMeshullash, HaTur HaShelishi* no. 35, p. 11b col. 1, s.v. *umikol maqom*.

44 I:4, II:69&180. It is interesting to note the nuanced differences between these *responsa*. In I:4 he says that the Rambam permits coercion, the French rabbis and the Ramban do not and the Rosh says that one must not coerce *ab initio* but *post factum* the *get* is valid. In II:69 he says that some of the French rabbis and the Rambam allow coercion, Rabbenu Tam, the Ramban and all the later authorities forbid it and the Rosh says that *post factum* the *get* is valid. In II:180 he mentions the Rambam's view and says that although the later authorities *zal* disputed him and wrote that one cannot coerce, that is only *ab initio* but *post factum* if they did coerce him the Rosh *zal* has written that she would be divorced. It seems that Rabbi Duran is moving closer to the Rambam's opinion as indeed the Ibn Tawa'ah argues in *Ḥut haMeshullash, HaTur HaShelishi* no. 35, p. 11b, col. 2, lines 36-7. In I:4 we have the Rambam alone against the French rabbis and the Ramban and only the Rosh agreeing with Rambam *post factum*. In II:69 we have **some of the French rabbis** adopting the position of the Rambam while Rabbenu Tam, Ramban and all the later authorities are opposed to him and again the compromise of the Rosh. In II:180 we are told that although the later authorities disagreed with Rambam they would **all** adopt the position of the Rosh and rule that *post factum* the *get* would be valid.

45 See also §6.9 below, and cf. the final paragraph in the aforementioned *responsum* of Ibn Tawwa'ah.

46 *Responsa Hekhal Yitsḥaq, EH* I 2:3.

Although the Tosafists may well have been unaware of the fact that the Rambam makes this distinction they were definitely aware of the distinction itself, as is clear from *Tosafot* to *Ketubbot* 63b s.v. *'aval* where it is made explicitly.

6.9 P.290, at note 607 in the main text: "Rabbi Ovadyah Yosef is prepared to rule in favour of *get*-coercion when the wife claims *me'is 'alai*." The relevant quotation from *Yabia' 'Omer* (III *EH* 18) then follows.

Comment: The quotation, while perfectly accurate, is misleading because it does not represent Rabbi Yosef's own final ruling. He is building up the argument for coercion but ultimately uses it, in this particular case, only as part of the solution which amounts to a combination of many doubts. He has not yet said that coercion may be applied in a case of *me'is 'alai* where there is no other argument for leniency. Furthermore, this particular *responsum* (which fills numbers 18, 19 and 20) deals with a Yemenite couple and, as Rabbi Yosef reminds us, in Yemen the Rambam's rulings were accepted as the final *Halakhah*. Even so, Rabbi Yosef points to many other reasons to employ coercion in this case.

Nevertheless, it may well be that he would find a way of employing coercion should a situation of *me'is 'alai* arise where no other reason for leniency was present even if the case involved Ashkenazim or Sefaradim as indeed Dayyan Waldenberg (*Responsa Tsits 'Eli'ezer* IV 21 and V 26) and Rabbi Herzog (*Responsa Hekhal Yitsḥaq, EH* I 2) do, as reported in this chapter of *ZD*, 286-90. See also my comments concerning *Tashbets* and Rabbi Yosef Caro above, §6.7.

6.10 P. 303, top. Regarding the sanctions of Rabbenu Tam, Rabbi Villa writes: "Sadly, the rabbinic courts make little use of this powerful instrument which they possess due to our living in an independent Jewish state; no such weapon is available in the Diaspora."

Comment: I suspect this unwillingness to use the *harhaqot* of Rabbenu Tam is, as we find time and again in cases involving *gittin*, the fact that some authority has opposed them. See Rabbi S. Z. H. Gartner, *Kefiyah be-Get*, Jerusalem 5758, 475-89, especially 484 (5) and 489 (5) who examines and summarises all the views. The source of the opposition to employing the *harhaqot* is a *responsum* of Maharibal quoted in *Pithey Teshuvah* to *EH* 154 sub-para. 30. Maharibal argues as follows:

1. Rabbenu Tam said that in cases where we cannot apply physical coercion (such as the case of *me'is 'alai* according to him) we can also not use excommunication (*ḥerem* or even *niddui*).
2. Nowadays people fear the *harḥaqot* more than *niddui*. Therefore,
3. today there is more reason to forbid *harhaqot* than *niddui* (which is certainly forbidden).

Rabbi Ovadyah Yosef[47] strongly objects to this *humra'* and argues powerfully for a full application of the *harhaqot* wherever they would be sanctioned by Rabbenu Tam. The latter's point, he observes, is not that *harhaqot* are less painful than *niddui* but rather that they are not imposed 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.

In that particular case Rabbi Yosef, together with Rabbi Waldenberg and Rabbi Kolitz, ordered the application of *harhaqot* against the recalcitrant husband.

7.0 Chapter 8 Mistaken Transaction (pp. 307-332)

[47] *Yabia' 'Omer* VIII *EH* 25:3-4.

7.1 P. 308. Mishnah *Ketubbot* 7:7&8. 7a speaks of *qiddushin* on condition that the bride has no blemishes resulting, if the condition proves unfulfilled, in "**she is not married**". 7b speaks of a failure to repeat the condition at *nissu'in* (ostensibly with the same woman) resulting, if the condition proves unfulfilled, in "**she shall leave the marriage without [receiving payment of her] *ketubbah***". In **8a**, Rabbi Meir says that if blemishes were discovered while she was still in her father's home her father has to prove that these blemishes appeared after her *qiddushin* [which are therefore valid, and if the father cannot prove it, the groom can argue that they were there before the *qiddushin* which are therefore not valid]. Once she has entered into *nissu'in* the husband has to prove that any subsequently discovered blemishes were there before the *qiddushin* **and his acquisition (of a wife) was performed in error** [and if he cannot prove it the father can argue that they appeared after the *qiddushin*]. In **8b**, the Sages add that this refers to concealed blemishes but in the case of visible blemishes he [the groom] cannot argue [that he was unaware of the blemishes at the time of the *qiddushin*].

Rabbi Goldberg explains in the following paragraph: "If a man marries a woman **on a condition** that she bears no blemishes (or vows) and he discovers after the *qiddushin* that she had blemishes which were in existence before the *qiddushin*, the *qiddushin* **are void and there is an acquisition in error** here. Even if he betrothed her **without a condition**, if he discovered after the *nissu'in* that she bore blemishes, **he can divorce her without paying her *ketubbah***."

Comment: These *mishnayot* are complex and confusing and debated at length in the Gemara. It would have been worthwhile, I think, to give the explanation of them which accords with the Gemara's conclusions and with the *Halakhah*.

In commenting on these *mishnayot* Rabbi Goldberg says:

(i) that where a condition in *qiddushin* proves unfulfilled the *qiddushin* are **void** and there is **an acquisition in error** and

(ii) that even if he betrothed her **without a condition**, if he discovered after the *nissu'in* that she bore blemishes, **he can divorce her without paying her *ketubbah***.

However, in

(i) an unfulfilled condition is sufficient to undo the *qiddushin* and there is no need to introduce the concept of mistaken acquisition[48] which is usually employed to describe cases where **no condition was made** but where error can be presumed and in

(ii) if there was no condition then we are arguing mistaken acquisition. If so, why is any divorce necessary? Furthermore, the wording **he can divorce her without paying her *ketubbah*** seems to be referring to 7b but that Mishnah refers (according to the accepted interpretation) to a case where he **did** make a condition but failed to repeat it before *nissu'in*. This **might** mean that he has foregone the condition. As we are unsure, if the condition proves unfulfilled, she cannot claim her *ketubbah* (because perhaps he did not forego the condition so she was never married to him) but she needs a *get* because perhaps he did forego the condition so she was married to him).

7.2 P. 309. Mishnah *Ketubbot* 7:10. In 10a, coerced divorce is applied by the *Tanna' Qamma'* where the husband has various blemishes whether these were present at the time of marriage or appeared only later. In 10b, Rabbi Meir says that this holds true even if she agreed to a condition of his at the betrothal stating that he is marrying her on the understanding that she accepts his disability because she can argue that she thought she could stand it but has since discovered that she cannot. The Sages disagree and say that she must put up with it except in the case of the leper because she weakens

[48] Even though in this type of condition, which refers to the present status of the bride, an unfulfilled condition means automatically a mistaken acquisition and, indeed, it is so described in Mishnah 8, it is confusing to adopt that terminology nowadays when *miqaḥ ta'ut* is used to solve *'iggun* problems of **unconditional** marriages.

him [thus endangering his life]".

Comment: Again, in the interests of clarity, it would have been worthwhile to explain, for example, whether the Sages refer to only Rabbi Meir or the *Tanna' Qamma'* also. The *Shulḥan 'Arukh*[49] accepts the latter possibility and rules like the Sages so that if the blemishes were in existence at the time of the *qiddushin* and she knew about them she cannot demand coercion later even though he did not make any prior condition with her. Following this, the *Tif'eret Yisra'el* says that when the Mishnah says that if the blemishes were in existence at the time of the *qiddushin* coercion is applied it must mean that she did not know about them. I would suggest that the question needs to be dealt with: if she was unaware of these serious blemishes why is this not considered *qiddushey ta'ut*[50] and if it is so considered surely there is no marriage so why is coercion required?[51]

7.3 P. 309. *Ketubbot* 7:1-5. These *mishnayot* refer to a husband imposing unacceptable prohibitions on his wife and, as a result, being obliged by law to divorce her and pay her *ketubbah*.

Comment: A note explaining how it is halakhically possible for a *neder* made by the husband to be imposed on his wife so as to stop her from visiting her parents' home (for example) would have been helpful.

7.4 P. 310. *Bava' Qama'* 110b-111a. …If so, a sister-in-law faced with levirate marriage to a leper should be freed without *ḥalitsah* because had she known she would find herself in such a position (where she could be legally forced to marry a leper) she would not have married her former husband [so we need not coerce *ḥalitsah* to save her from *yibbum* with him]? [The Talmud answers that] in that case we may be sure [that she would have married even on the chance of finding herself in such a position because] any husband no matter how problematic is acceptable to her as Resh Laqish said, "It is better to live two together than to live as a widow".

This shows that were it not for the argument of Resh Laqish, there would be an argument for mistaken *qiddushin* due to a serious fault in the man.

Comment: It is not clear whether the doctrine of Resh Laqish applies only to a woman's willingness to marry a healthy husband who has a leprous **brother** or even to her willingness to marry a **husband** who is himself leprous. Rabbi Aryeh Leib Zinz,[52] Rabbi Yitsḥaq Elḥanan Spektor[53] and Rabbi Yeḥiel Ya'aqov Weinberg[54] argue the former; Rabbi Avraham Yeshayah Karelitz,[55] the latter.

7.5 P. 311. s.v Ha-Rav Yitsḥaq ben Mosheh. "Rabbi Yitsḥaq ben Mosheh of Vienna in his work *'Or Zarua'* (I no. 761) quotes a *responsum* of [his teacher] Rabbenu Simḥah of Speyer regarding a woman whose husband became blind between the *qiddushin* and the *nissu'in*…..the question was whether we force the husband to give a *get* to his wife. Rabbenu Simḥah replies at the beginning of

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49 *EH* 154:1.

50 According to the general rule laid down by Rabbi Yitsḥaq Elḥanan Spektor cited at the foot of p. 311 of *ZD*. His opinion is shared by Rabbi H. O. Grodzinski *Ahi'ezer* no. 27, Rabbi M. Feinstein, *Iggrot Mosheh* EH I no. 79 and others – see Rabbi D. J. Bleich, "*Kiddushey Ta'ut*: Annulment as a Solution to the Agunah Problem," *Tradition* 33:1, 90-128. Not all authorities agree. See Bleich ibid. n. 27.

51 I would suggest that the Sages apply coercion only if the blemishes appear later. If they are in existence at the *qiddushin* and she knew of them there is no coercion because she has accepted them; if she did not know of them it is a mistaken acquisition and no coercion is needed because there is no marriage. The application of coercion to cases of *hayu* (= they were in existence at the time of *qiddushin* and she knew of them) is only according to the *Tanna' Qama'* and Rabbi Meir.

52 *Responsa Meshivat Nefesh*, II *'Even Ha-'Ezer* no. 15.

53 *Responsa 'Eyn Yitshaq* I *EH* no. 24:41.

54 *Responsa Seridey 'Esh* III no. 25, ch.3, s.v. *Ulgodel hatemiyyah*.

55 *Ḥazon 'Ish, 'Even Ha-'Ezer* 69:23.

his response with the following words:

'When I answered that one can coerce that was only for 'extra security' because, as I see it, she would not have needed a *get* if she was unaware of this blemish in the young man. It would be a marriage in error although it was not contracted on a condition. I clarified my arguments in accordance with the Halakhah'.

At the end of the *responsum* he adds: 'Perhaps she would prefer to live all her life without a husband rather than be married to a blind man'. With this sentence Rabbenu Simḥah says that he does not always accept the well known rule of Resh Laqish – It is better to dwell two together than to dwell as a widow. On the contrary, there are cases in which a woman would prefer to be alone rather than to be married to a man with a certain blemish."

Comment: If the blindness developed between the *qiddushin* and the *nissu'in* (as stated above), there was no error at the time of the *qiddushin*. How then can Rabbenu Simḥah say that she would not have needed a *get* if she was unaware of this blemish in the young man as it would be a marriage in error? In fact, the text of this *responsum* says that Rabbenu Simḥah understood that the groom had been blind **before** the *qiddushin* and the bride had been unaware of this - hence his initial response about annulment through error. Rabbi Yitsḥaq pointed out that the groom had become blind between the *qiddushin* and the *nissu'in*. To this, Rabbenu Simḥah responded that in that case he would apply coercion.

Rabbi Goldberg notes that "Rabbenu Simḥah says that he does not always accept the well known rule of Resh Laqish". I think this could be more appropriately worded as "Rabbenu Simhah says that Resh Laqish did not intend his rule to apply to any blemish no matter how severe".

7.6 P. 313, s.v. הרבה נתונים – 314. "Many data in modern research demonstrate that husbands who are violent towards their wives previously had a natural inclination in that direction which developed during their adolescence. Psychiatric research shows that expressions of violence can issue from a psychological disorder such as Intermittent Explosive Disorder; and even if these disorders did not express themselves until the marriage, the inclination towards these types of conduct already existed in the husband at the time of the *qiddushin*.

Already at the end of the 19th century, Rabbi A.A. Yudlovits reached a similar conclusion. Rabbi Yudlovits had to give a ruling in the matter of a woman whose husband had fled from her with her money about a month after their wedding. When it became clear that, before the marriage with her, her husband had also abandoned his previous wife and their three children, Rabbi Yudlovits released the '*agunah* on the grounds of mistaken acquisition. He writes:

'How is it at all possible that she would have married a man whom she sees with her own eyes is cruel and has no pity on his wife or his three children, who is a robber and a killer. How could she get married to him and how could she trust him so as to be bound to him all her life – on his word, because he now says that he loves her? Surely he is an untrustworthy individual, the words of his mouth have no weight and his very spirit is trickery'.

As in Rabbi Rackman's method, in this case also, the argument of misguided acquisition is based on a psychological fault of the husband not on one of the blemishes in the list of the Mishnah or the Gemara."

Comment: I doubt very much whether Rabbi Yudlovits would have accepted this interpretation of his ruling. It is surely the former crimes actually committed against his first wife that are the crucial factor here not the mere psychological propensity for committing such crimes. Had she known what

he had done to his former wife she would not have married him – that is what Rabbi Yudlovits says. If he had not committed such crimes previously and his second wife had been the first person to suffer from his cruelty, there is no evidence from this *responsum* that Rabbi Yudlovits would have regarded the marriage as having taken place in error on account of the presumed psychological state of the husband at, or before, the time of the marriage.

7.7 P. 325, s.v. הרב פיינשטיין and in n. 669.

"Even when we did have the power and used to force the husband to divorce, there would have been many occasions when the coercion would not help because he would not say 'I agree'…." In the footnote the reference is given as **אגרות משה, אבן העזר, חלק א', סימן ע"ט**

Comment: I could not understand Rabbi Feinstein's statement that in spite of the court's enforcement "there would have been many occasions when the coercion would not help because he would not say 'I agree'". Does not the *Halakhah* lay down that we compel him until he **does** say it - or dies in his intransigence? In the words of the Talmud:[56] "We beat him [if necessary] up to [the point] that his soul departs". However, I subsequently discovered that there is a dispute amongst the *Posqim* as to whether the 'up to' in this expression is inclusive (up to, and including, his demise) or exclusive (up to, but not including, his demise).[57] Rabbi Feinstein clearly follows the exclusivists.

In the note it would have been helpful to add to the reference **ענף ה', ד"ה ואם כן אף** לר"ת especially as it is a very lengthy *responsum*.

7.8 P. 328. s.v. בבית הדין "In the *Bet Din* of America the argument is raised that the method of Rabbi Rackman and his *bet din* removes the foundations of marriage. According to them, the fact that Agunah Inc. say that it is possible to argue mistaken transaction (especially the argument based on the fact that no woman today realises that the *bet din* will not be able to procure a *get* for her though she be entitled to one and the argument based on the fact that no woman knows the demeaning nature of the technicality of Jewish marriage – being 'acquired' by the husband)…….implies that nowadays no woman is married." Rabbi Goldberg then quotes Susan Aranoff who disproves this from the *responsa* of Rabbi Feinstein wherein, in every case of marriage in error, Rabbi Feinstein prefers the procuring of a *get*. Only where that proves impossible does he fall back on mistaken transaction. This shows that even where an error in the *qiddushin* can be demonstrated, the marriage is in existence unless and until, when all hope of acquiring a *get* has been abandoned, release through mistaken transaction is declared.

Comment: There is an accepted methodology of dealing with problems of *gittin* and *qiddushin* nowadays in which every known stringent opinion is taken into account. I have tried to discover the origin of this stringency and found that Maharibal already speaks of the need to abide by 'substantial minority' opinions in matters of *gittin* and *qiddushin*.[58] However, the extreme stringency of taking into account even lone opinions I could find only in more recent times, one oft-quoted source for this being Rabbi Yom-Tov Algazi (18th century). The matter is extensively examined in *Yabia' 'Omer*: I *YD* 3:12; IV *EH* 5:4 & 6:2; VI *YD* 15:5 end; VI *EH* 2:6[59] & 6:2. Rabbi Yosef quotes in

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56 *Ketubbot* 86b, *Ḥullin* 132b.

57 See Rabbi Zvi Hirsch Gertner, *Kefiyah be-Get*, Jerusalem 5758, letter ב, note 17 (p.ל"ד) where it is stated that Rabbi A. L. Ginzberg (= 'the *Ketsot*') in his response in *Meshovev Netivot* to *Netivot Ha-Mishpat*, *Hoshen Mishpat* 3, sub-para. 1, understands it as inclusive whereas Rabbi Meir Simhah of Dvinsk in *'Or Same'ah* to *Yad*, *Gerushin* 2:20 takes it as exclusive. He further refers us to Rabbi Hayyim Sofer, *Responsa Mahaney Hayyim*, *'Orah Hayyim* II, 21:3 s.v. ובזה from where it seems that Ramban took it as inclusive and Rabbi Yitshaq Leon Ibn Tsur (the '*Megillat Ester*' – 16th c.) understood it as exclusive.

58 Rabbi Yosef ibn Lev 1505-1580. See Abel, "Halakhah – Majority, Seniority, Finality and Consensus" §IV.11, at n. 105.

59 P. 274a, beginning on the 17th line above the end of the column [in the large edition (Jerusalem 5746)].

these *responsa* a number of sources in which Rabbi Algazi's ruling is found – eg. *Responsa*: *Qedushat Yom-Tov* no. 9, 15d & *Simḥat Yom-Tov* no. 11, 44c. However, once a situation of *'iggun* has materialised we revert to the usual rule of *rov posqim* and the *Shulḥan 'Arukh*.

Hence, Rabbi Feinstein's preference for a *get* is to be understood as an attempt to take into consideration all opinions.[60] Indeed, in the case of *qiddushey ta'ut* Rabbi Feinsten ruled leniently in opposition to a number of outstanding *'Aḥaronim*[61] and it seems that it is **his** ruling which stood, at the time, as a lone opinion! Hence his preference for a *get*. However, in cases where the procurement of a *get* proves impossible,[62] so that the situation becomes an insoluble case of *'iggun*, Rabbi Feinstein is satisfied that the marriage can be considered annulled.

Thus Rabbi Feinstein's call for a *get* wherever possible in cases where he applies the argument of error does not mean that he considers, even where an error in the *qiddushin* can be demonstrated, that the marriage is in existence unless and until, when all hope of acquiring a *get* has been abandoned, release through mistaken transaction is declared. His call for a *get* is only to satisfy those *posqim* who do not regard the case in question as one where annulment due to error is justified. According to his own view, there never was any marriage and no *get* is required at all.

7.9 P. 329. s.v. גישות אלו In the Orthodox world "these [halakhic] rules are taken as static without the possibility of change or the delvelopment of the [halakhic] structure, so that the law does not react to the social and human reality."

Comment: Rabbi Bleich and the *Bet Din* of America are surely aware of the need to accommodate the law to the society it governs and many post-biblical enactments which serve to override biblical law – both in second Temple, talmudic, geonic and even later times – give eloquent testimony to this. *Halakhah* is not seen by them as being without the possibility of change or development.

The problem in Orthodox society, especially in the area of ritual (as opposed to monetary) law – and this has now been the case for centuries - is the feeling of halakhic inadequacy *vis-à-vis* earlier generations. This, coupled with the splintering of orthodox society into many groups that in some cases delegitimise other groups or at least do not accept the authority of the leaders of other groups,[63] has made it nigh impossible to introduce change even where halakhic theory would make it possible to do so and even though there is general agreement that, for many very good reasons, change needs to be made. The changes brought about by Rabbi Feinstein have been quite exceptional and I think it is no coincidence that neither of the two reasons I suggested for halakhic development becoming moribund applied to him. On the one hand, he did not suffer from any feeling of inadequacy. In spite of his sincere humility he was fully aware of his abilities and fully prepared to use them. This emboldened him to take on even some of the classical authorities of many generations ago. On the other hand, he was broadly respected by all Orthodox groups.

7.10 Ibid. Next paragraph. "Rabbi Rackman and Agudah inc. are of the opinion that modern man

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60 I have attempted to show elsewhere (ibid. pp. 17-20) that Rabbi Feinstein himself does not accept, even in the area of *gittin* and *qiddushin*, the need to take **every single** stringent ruling into account or, indeed, the rulings of an **insubstantial minority** of strictly ruling *posqim* though he would probably reckon with the rulings of a **substantial minority** of stringent *posqim*. Nevertheless, even if the opposition to his rulings in cases of *qiddushey ta'ut* were an insubstantial minority – or even a lone opinion – it surely still makes sense that he should rule to try to obtain a *get* which is always the safest of all solutions so that **no rabbi** would regard the woman on her remarriage as an adulteress or her future children as *mamzerim*.

61 See the discussion in Rabbi Chaim Jachter, *Gray Matter*, np 2000, 43-47.

62 I do not know what Rabbi Feinstein would say in a case that he regards as *qiddushey ta'ut* if a *get* could be procured but at a price.

63 See, for example, Rabbi Ovadyah Yosef, *Responsa Yabia' 'Omer*, I *Yoreh De'ah* 18:11.

sees the reality of the covenant of marriage as a sanctified bond between two equal people. Accordingly, the *ḥuppah* is not a ceremony in which the woman changes into an object which the husband acquires. On the contrary, in this approach, the couple obligate themselves to love and to honour each other and to support each other. When one ill-treats the other and there is no hope of making peace, it is the privilege and the duty of the *bet din* to search in the Halakhah for a way to undo the bond."

Comment: I don't think that this antithesis is fair. It is true, of course, that the halakhic sources describe the theory behind the operation of *qiddushin* in a manner incompatible with modern, democratic views[64] but that does not mean that the Orthodox perspective of marriage negates any of the values or attitudes espoused in the above description of the Rackman vision.

"A sanctified bond between two equal people" - That is why the orthodox practice was always to use the term *mequddeshet* (hence *qiddushin*) for forging the marriage bond as opposed to the many other terms accepted as valid by the Talmud[65] and *Shulḥan 'Arukh*.[66]

"Accordingly, the *ḥuppah* is not a ceremony in which the woman changes into an object which the husband acquires." - No-one ever suggested that any person "acquired" - wife, Hebrew servant, Canaanite servant or gentile servant – actually turns into an **object** which implies the losing of all human rights. I do not want to get drawn here into the – admittedly difficult – area of halakhic '*avdut*[67] but, as regards marriage, let it suffice to say for the moment that when a man takes a wife he takes upon himself 10 legal obligations towards her whereas he acquires, in return, only 4 legal rights from her.[68]

"On the contrary, in this approach, the couple obligate themselves to love and to honour each other and to support each other." - In the Talmud it is stated that a man shall love his wife as himself and honour her more than himself.[69] No orthodox enactment abrogating such duties has, to my knowledge, ever been introduced.

"When one ill-treats the other and there is no hope of making peace, it is the privilege and the duty of the *bet din* to search in the *Halakhah* for a way to undo the bond." - Nothing could have expressed the orthodox viewpoint more accurately!

Actually, although there are undoubtedly cases of *get* refusal in all Jewish communities, their occurrence amongst halakhically observant Jews is less frequent[70] if only because such Jews are more likely to fear disobeying the *bet din* or disregarding its advice, whether this be for spiritual or social reasons or simply in order to avoid the application of corporal coercion. It is the more secular, democratic, westernised Jews, those who might well object to the orthodox, halakhic view of marriage and argue that it is demeaning towards women, who are the main offenders in matters of '*iggun*. I know of one such Jew who refused his wife a *get* on the grounds that its terminology ('sending the woman out of the house') is anti-feminist! On the other hand, I know of one member of an ultra-Orthodox community who abandoned his wife and, having been

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64 For example, the quotation from Bleich beginning at the foot of p. 328 of *ZD*: "The legalistic essence of marriage is, in effect, an exclusive conjugal servitude conveyed by the bride to the groom".

65 *Qiddushin* 5b-6a.

66 *'Even Ha-'Ezer*, 27:1,2.

67 For an excellent survey of Jewish and gentile '*avdut* in the *Halakhah* see Rabbi Immanuel Jakobovits, *Journal of a Rabbi*, London 1967, 86-106. See also the pertinent remarks there on Judaism and Democracy (106-110).

68 Rambam, *Yad, 'Ishut* 12:2,3.

69 *Yevamot* 62b. Cf. Rambam, *Yad, 'Ishut* 15:19.

70 Though it must be added that there are undoubtedly many cases in the orthodox camp where the wife prefers to 'put up and shut up' in order to avoid the embarrassment of the publicity accompanying divorce proceedings.

discovered living abroad by a private detective, was 'visited' by a fully equipped *sofer*, a *dayyan*, a furious father and one or two very powerfully built gentlemen. The *get* was delivered into the hands of a *sheli'aḥ qabbalah* before they left the room!

7.11 **Ibid. s.v.** הרב רקמן רואה**.** The rule of *tav lemetav* must be seen in its social, historical context.

Comment: I don't think anyone has done more than Rabbi Feinstein to release *'agunot* in spite of the counter-argument of *tav lemetav*.

7.12 **Ibid. Final paragraph.** According to the Rackman view of marriage (absolute equality), a situation in which a wife is suffering due to her husband is opposed to the dictates not only of ethics but to those of *Halakhah* also. That is why they have harnessed the idea of acquisition in error to release *'agunot*.

Comment: According to the orthodox view of marriage, is not a situation in which a wife is suffering due to her husband opposed to the dictates not only of ethics but to those of *Halakhah* also? The only question is how far it is possible to take the concept of *qiddushey ta'ut* in order to remedy such situations. The position of virtually all of the orthodox rabbinate is that Rabbi Rackman has stretched it to ridiculous extremes where it can no longer be taken seriously.

7.13 **P. 330.** Susan Aranoff supports the Rackman *bet din* arguing that they are using reason in interpreting the *Halakhah* thereby solving contemporary problems. She bases herself on Rashi's comments to *Devarim* 17:9 where we are told that when difficult legal problems arise we are to "come to the Priests, the Levites and the Judge who will be in those days and you shall ask and they shall declare to you the Word of Law". Rashi explains, [since the words] "who will be in those days" [seem superfluous, as it is hardly possible to approach a judge who is not living at the time, that the sense is "whichever Judge happens to be in those days"] even if he is not like (= on a par with) other judges who preceded him, you must listen to him for you have only the Judge who is your contemporary".

Comment: The verse refers to a problem that none of the scholars of the generation have been able to solve. Such a problem must be brought to the highest court in the land (the *Great Sanhedrin*). This court's ruling must be obeyed even though its members, including its chief justice ('the Judge'), are inferior to the judges of earlier times.

To translate this into contemporary Jewish society we would have to consider who is (are) the chief **halakhic** scholar(s) of our generation. There may not always be certainty in this area, especially after the passing of Rabbi Feinstein, but I would hazard a guess that, with all due respect, Rabbi Rackman does not lay claim to the title. In the face of the monolithic opposition of the Orthodox rabbinate to the methods of the Rackman *bet din*, it is difficult to see any support for him in this Rashi.

8.0 **Chapter 9 Annulment (pp. 333-389).**

8.1 **P. 342, at n. 695 in the main text:** "The words of Rashbam [in *Bava' Batra'* 48b - *talyuha*] are reminiscent of the words of Rashi in the discussion in *Yevamot* 110 [Neresh] where, in order to explain the power of the Sages to annul, he turns to the rule that 'all who marry do so on the terms and conditions of the Sages' although this statement does not appear in the Talmud there. **In the footnote:** The discussion [in *Bava' Batra'*] concerns a woman who was forced to agree to be married and Mar bar Rav Ashi's response is based upon the rule found in *Qiddushin* 2b that 'a man cannot acquire a wife against her will'. There is, thus, no purpose, in this case, in the sentence 'He acted improperly….so they annulled his marriage.' It seems that this sentence was

introduced into the discussion [in *Bava' Batra'* 48b] from the case in *Yevamot* 110. So writes Eliav Shochetman (*Hafqa'at Qiddushin* 355): "There is good reason to say that not only did the discussion in the Gemara in *Bava' Batra'* 48b not include, in its original form, the conversation between Ravina and Rav Ashi but even that the section preceding this conversation – "He acted improperly therefore the Sages treated him improperly and annulled his marriage." – does not belong there. See also Shochetman, *Qiddushin* p.118 and *Diqduqey Soferim* to *Bava' Batra'* 48b (50) regarding the various readings in the manuscripts."

Comment: I thought it possible that in *Qiddushin* she took the *qiddushin* unwillingly but did not confirm her compelled acquiescence verbally - *rotsah 'ani* - whereas in *Bava' Batra'* she was compelled to utter this required formula. Hence in *Qiddushin* there is no marriage bond to be dissolved by the Sages whereas in *Bava' Batra'* the marriage does take place by Torah law and the interference of the Sages is needed to annul it. If so, both the declaration "He acted improperly…" and the Ravina/Rav Ashi conversation are essential to the debate. I later found this very interpretation offered in *Ḥiddushey Maharit* on the Rif to *Qiddushin* 2b.

However, this is not correct because her being compelled to accept the ring is exactly equivalent to her being compelled to say "*Rotsah 'ani*", as the Vilna Gaon notes in his glosses to *EH* 42:1 sub-para. 1. Subsequently, I discovered that Rabbi Shemuel Toibes in *Hagahot we-Ḥiddushin le-Masekhet Qiddushin*,[71] 2b had raised this point against the Maharit. He points to *Ḥoshen Mishpat* 205:1 as proof that so long as the coerced purchaser accepts payment the "*rotseh ani*" declaration is superfluous to requirements – and the same would apply to a woman forced to accept *qiddushin*.

Hence, there is no difference between the *Bava' Batra'* 48b and *Qiddushin* 2b and the latter must be understood as reflecting the former. In other words, *Qiddushin* 2b says that a woman cannot be married against her will [= *talyuha*] because of what the Talmud says in *Bava' Batra'* 48b – *'afqe'inho rabbanan*. I later found such an understanding of *Qiddushin* 2b in Rabbi Pinḥas Ha-Lewi Horovits, *Sefer Ha-Miqnah* to *Qiddushin* 2b, s.v. *Bi-gemara'* in the name of Rabbi Yosef Ibn Ezra in *'Atsmot Yosef*.

Further discussion will be found in Rabbi Shemuel Toibes ibid.

8.2 **P. 353, s.v. *Ha-Ramban*:** "Ramban, when discussing this subject, raises a question which is similar to an argument of modern researchers. According to the quotation in *Shittah Mequbetset* on *Ketubbot*[72] he writes as follows. 'I don't understand this. If the groom betroths in accordance with the will of the Sages, so that his *qiddushin* will be annulled whenever they say so, what was Ravina's problem (it's all right if he betrothed with a ring or the like – the property he used can be retroactively confiscated. If, however, he betrothed by intercourse how can we explain the annulment?) Surely, since he betrothed on condition that the Sages agree there is no need to deprive him of the ring, only to [declare rabbinic dissatisfaction with his betrothal and thereby] effect the invalidity of the betrothal.'

That is to say, once they said '*kol hameqaddesh*', i.e. that the Sages annul marriages on the power of the authority granted them by the husband himself, what is the meaning of Ravina's question?

The Ramban answers: 'One can answer that this is what [Ravina] means – It's fine if he betrothed with money for then he certainly betroths in accordance with their will because *hefqer bet-din hefqer*…so this money is only his by the agreement of the Sages but if he betrothed by intercourse how can they annul? Perhaps, then, he did not betroth in accordance with their will. [Rav Ashi]

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71 Printed amongst the commentaries at the back of the Vilna Talmud.

72 3a, s.v. *Hatinaḥ eqaddesh bekhaspa'*.

responds that the Sages can declare his intercourse promiscuous so he willingly always betroths in accordance with the Sages' will. It is not a matter of requisition of property.'

Ramban is saying that Ravina thought that if a person betrothed with money it is certain that he did so in accordance with the will of the Sages because he knows that it is possible for them to annul the marriage by means of exercising their power to requisition the money of the betrothal retroactively. However, if he betrothed with intercourse perhaps he did not accord his betrothal with the will of the Sages. **Rav Ashi answers that a person always betroths in accordance with the will of the Sages and it is therefore clear that the Sages have the power to change his (licit) intercourse into an act of promiscuity.**"

Comment: The context necessitates the inversion of this last sentence, thus: **Rav Ashi answers that the Sages have the power to change his (licit) intercourse into an act of promiscuity and it is therefore clear that a person always marries in accordance with the will of the Sages**. Alternatively, **and it is therefore clear that** should be deleted and replaced with **because**.

In effect what Ramban is saying is that when a man wishes to contract a marriage he needs the collaboration of the Sages. When he betroths with a ring he needs them to refrain from prior confiscation of the ring or else there will be no marriage. Should he betroth with intercourse he needs them to refrain from turning his intercourse into promiscuity or else, again, there will be no marriage. The Sages agree to do this on condition that **he** agrees to marry on all the conditions that they impose. Thus is every marriage conditioned upon the will of the Sages. Should any situation arise in which the Sages have decided that it is necessary to retroactively undo the marriage they can declare it undone because the husband himself, at the time of the *qiddushin*, agreed that if such a situation ever arose, **he is not now marrying her**.

8.3 **P. 356, top.** In no. 1 of the summary it is stated that the *Tosafot* always understand annulment as working retroactively – not only in those cases where the *qiddushin* were improper but even where the *qiddushin* were in order and the problem is the *get*.

Comment: We do find *Tosafot* acknowledging, in some cases, annulment from the time of the delivery of the problematic *get* – see *Tosafot*, *Gittin* 32a s.v. *Mahu de-tema' 'iglai milta'* - quoted by Rabbi Aqiva Eiger in his gloss to mishnah *Gittin* 4:2, no. 39. The case in the Talmud there concerns 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 he did cancel it, used their authority to **retroactively annul** (**אפקעינהו רבנן לקדושין מיניה**) the marriage 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 and if he did so in front of one person everyone agrees that Rabbi also regards the cancellation as ineffective and the *get* (though certainly cancelled in Torah law) as valid by rabbinic decree and this is the *halakhah*.

The aforementioned *Tosafot* understand the annulment according to Rabbi as non-retroactive (see gloss of Rabbi Aqiva Eiger ibid. for why *Tosafot* interpreted so) and as an example of the power of the Sages to override – within certain parameters – the laws of the Torah (ביד חכמים לעקור

דבר מן התורה יש כח),[73] in this case by bringing about the abrupt ending of a marriage without a divorce from the husband.

8.4 **Pp. 360-62 The position of Rashba regarding annulment in the post-talmudic period. See p. 362, top:** "But [Rashba's] position in all this [annulment nowadays] is extremely conservative and he is not prepared to make use of the conclusions of the talmudic debates and to apply them in other cases. Thus he summarises his opinion in this matter: 'Where they said it they said it; where they did not say it we cannot say it ourselves'."

Comment: I am surprised that Rabbi Goldberg does not refer us to Rabbi Berkovits's study of all the *responsa* of Rashba relevant to post-talmudic annulment (*TBU* 143-49), especially since Berkovits concludes there that Rashba agrees to contemporary annulment even in cases not matching those in the Talmud provided that the local Jewish authorities (*bet din* etc.) made explicit in their enactment that anyone who does not marry according to the local custom (e.g. with a quorum, a *ketubbah*, parents' consent etc. etc.) will have his marriage annulled, i.e. where they did not merely legislate punishment (fine, imprisonment, excommunication etc. etc.) for those transgressing the communal enactment but included annulment explicitly. Dr. A.H. Freiman, *Seder Qiddushin we-Nissu'in*, 66-70, comes to the same conclusion.

8.5 **P. 370, end - P. 371, top.** The case described here is that quoted in *Darkey Mosheh* (*Tur, 'Even Ha-'Ezer* 7:13). It deals with the report in *Terumat Ha-Deshen* (no. 241) of the permission given by contemporary leading rabbis, as a result of the "Decree of Austria", to women who had been taken captive to return to their husbands even if the latter were *kohanim*. Rema writes: "I think that it is possible that the great authorities of that time who rendered this liberal decision did not do so on the basis of the established *Halakhah* but as an emergency ruling necessitated by the needs of the moment because they were concerned about the future of those women for if they knew that they would not return to the "husband of their youth"[74] they might go astray and therefore the rabbis took a lenient line. Don't wonder how it is possible to be lenient with a possible Torah prohibition because (I think) they relied on the principle לעקור דבר מן התורה יש כח ביד חכמים, hence *Bet Din* held the power to annul their marriages so that each one became retroactively an unmarried woman."[75] D. Novak concludes from this: "When there is a threat to the Jewish family great spiritual leaders did not hesitate to make use of talmudic principles, principles sufficiently radical to correct a morally and socially unbearable situation, relying upon internal Jewish moral criteria."

Comment: It is not possible to draw broad conclusions regarding annulment of marriage, as Novak seems to do, from this example because:

1. The explanation that Rema suggests for the action taken by his predecessors is hard to understand (but see n.70).
2. The case involved **only a non-enhanced negative prohibition** ('*issur zonah le-khohen*) punishable at most by flogging, and, since the case was one without witnesses, if she

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73 *ET* XXV cols. 607-657. Cf. also Abel, "Rabbi Morgenstern's Agunah Solution" §§9.3-9.33.

74 Malakhi 3:14.

75 At the time of her being raped, and so was permitted to return to her partner. I do not know how this helps in the cases where the husband was a *kohen* nor why it should be necessary where the husband was not a *kohen*. In the first case she would be forbidden to remarry her husband even if she was unmarried when raped (by a gentile) and in the second case she would be permitted to return to her husband even had she been raped while still married. [See, however, a brilliant solution to the difficulty in this gloss of the Rema in Rabbi Meir Meiri, *'Ezrat Nashim*, London 5715, *'Ezrah Revi'it*, *Sha'ar Sheni*, s.v. *Bish'at ha'gezerah* to the end of the *sha'ar* (= p. 92, end – p. 94).]

We see from here that Rema was willing to countenance **post-talmudic** dissolution of marriage even **after an appropriate betrothal** even **in a case not mentioned in the Talmud** and even **without a (externally disqualified) *get*** and even **in the absence of an enactment embodying annulment** or, indeed, of **any enactment whatsoever**.

denies that she was contaminated and her husband believes her, there is **only a rabbinic prohibition** in her returning to him. In either case, we cannot apply its leniency to cases of possible adultery and *mamzerut*.

3. There is doubt nowadays about the priestly status of all *kohanim* – see *Ba'er Hetev*, *EH* 6:2, so in a case of a "priesthood prohibition" we are always dealing with a doubtful situation.[76]

Do we have examples of **post-betrothal annulment** when the betrothal had been properly executed? Rabbi Z. N. Goldberg in *Hafqa'at Qiddushin 'Enah Pitaron la'Aginut*, *Teḥumin* XXIII 158-60, writes: "Annulment subsequent to a properly executed betrothal was very rare even in talmudic times when all the Sages of Israel were together; even then it was only employed in cases where there was a *get* which was valid in itself but had been rendered unfit due to some external factor. **We do not find anywhere that this type of annulment can operate without a *get***." The following must, however, be considered. The *Rishonim* discuss how the Sages allowed[77] the waiving of so many rules of Pentateuchal gravity (**דאורייתא**) in order to accept otherwise disallowed testimony so as to permit the remarriage of a woman whose husband had disappeared. Rashi[78] explains that in all such cases the Sages retroactively annulled the marriage. Is this not an example of annulment of a properly contracted marriage without any *get*? Rabbi Z.N. Goldberg, however, argues that no conclusions can be drawn from there for general practice – even according to Rashi – because one can say that the testimony, though invalid in other cases, was accepted when it related to the husband's death since it was highly likely that, if it was not true, the matter would be discovered (eg. with the return of the husband) and the witness shown up as a liar. Therefore, there was good reason to accept the truth of the testimony. Only because this is apparently against what the Torah said: "…by the testimony of two witnesses" do we rely, in case the husband is in fact alive, on the power of annulment.

It should be pointed out that this very discussion took place almost 550 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 cases where there is a *get* (that is disqualified by Torah law but accepted by talmudic law as explained in the Talmud). See Freimann, *Seder Qiddushin we-Nissu'in*,[79] 8. Also recorded there (113) is the following statement from "a very old 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* '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 Kevod Morenu Ha-Rashag [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*]. See, however, §8.7 below for further discussion of this matter.

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76 Some say that this doubt lies behind the Ashkenazi custom of severely limiting the occasions of the priestly blessing.

77 Mishnah, *Yevamot* 152.

78 *Shabbat* 145b s.v. *Le'edut 'ishah*,

79 *Mosad ha-Rav Kook*, Jerusalem 1964.

8.6 **P. 374, n. 764.** "His approach is based on his understanding of the *Tosafot* in *Bava' Metsi'a'* 48b s.v.*Tinaḥ de-qaddesh be-khaspa'*…"

Comment: In place of *Bava' Metsi'a'* read *Bava' Batra'*.

8.7 **Pp. 376-78. Berkovits's annulment proposal. [P. 376]** "After a fundamental examination of the commentary of the *Rishonim*, Rabbi Berkovits reaches the following conclusion:

8.8 **[p. 377]** 'We find, hence, that according to the Re'ah, the Ritva, the Me'iri, the Rashba, the Rosh, the Rivash, the *Tashbets*, the Ri Ḥen….and the *Shiltey Ha-Gibborim* (and it would seem also according to the Mahariq) that this principle that whoever betroths does so in accordance with the will of the Sages and therefore the Sages can annul his betrothal, is still in effect nowadays.'

However, Rabbi Berkovits emphasises that the reference is to circumstances where there was a communal enactment and 'they made it explicit at the time of [the composition of] the enactment that if anyone does not obey the enactment of the *bet din* or of the community, his betrothal will be annulled. If they did not stipulate this condition from the beginning [= prior to the betrothal], he who transgresses the enactment is called a sinner but his betrothal is valid'.

Rabbi Berkovits also mentions that 'Although according to the law we could annul betrothal relying on the rule that whoever betroths does so in accordance with the will of the Sages, the great *posqim* were reticent about applying this in practice.' As we have seen in our earlier discussions, a large proportion of the *Rishonim* who maintain that contemporary *posqim* also have the power to annul betrothal are equivocal about permitting this in practice because of the stringency that attaches itself to the laws of marriage.

On the other hand, Rabbi Berkovits adds:

'Nevertheless, in spite of the equivocation of these great authorities, other great rabbis in almost every generation, under the pressure of the problems afflicting marriage, were forced to make enactments and they agreed to actually annul betrothals on the basis of their enactment relying on the principle that whosoever betroths etc.'

8.9 **[P. 378]** According to Rabbi Berkovits, when the rabbis instituted enactments of marriage annulment 'they had something to rely on'. He attempts to prove that the *Rishonim* who permitted marriage annulment 'in theory but not in practice' agreed with the conclusion of Maharam Al Ashqar that we quoted earlier:

'Therefore, if all that country and its rabbis, with the agreement of all the communities or most of them, took a vote and decided to rely upon these great trees [= authorities] to raise a barrier against, and to impose a fine upon, anyone who betroths in violation of their agreement and their enactment, and to annul the betrothal and requisition it [= the betrothal ring] for ever or until any time they choose, I too will support them'.

Rabbi Berkovits also accepts this conclusion and he is convinced that nowadays, because of the gravity of the problem of *'agunot* and *mamzerim*, we are obliged to legislate for practice and promulgate an enactment which makes possible the application of annulment of marriage. He thinks that especially nowadays, due to the developed instruments of communication, it is possible to bring together the Jewish communities throughout the world and to formulate an enactment acceptable to all of them. So he writes:

'It works out that even those who take a stringent view regarding actual practice were not speaking of enactments of all the communities or most of them in one country ….It would seem

that the present sad situation, which is the cause of our search for a cure by means of an enactment of annulment of marriage, includes within itself also the possibilities of carrying out improvements according to the agreement of the communities and their rabbis in accordance with Maharam Al Ashqar. In almost every land we have today, TG, national rabbinic organisations and organisations of communities of the Orthodox of the entire country. There are today communications even between the organisations of communities in one land and those in another and similarly between the national organisations of rabbis. Our world has contracted and thanks to the modern media we are able to consult with each other and to plan together both at the national and international level. The new technology, overcoming distance, places into our hands the possibility of formulating a plan together – the entire people of Israel – and to institute the enactments required for all the people. This is a hope which we could not have entertained from the day the People of Israel left their land and it is a possibility that we never possessed throughout all the generations of our horrific exile. The time has arrived to act for G-d - for the sake of the holiness of His people Israel'."

Comment: Berkovits deals with annulment in the fourth chapter of *TBU* (pp. 119 – 164). He argues vigorously for post-talmudic authority to annul marriage even in cases not identical to those in the Talmud and even when the annulment takes effect **long after the time of properly conducted *qiddushin* and *nissu'in*.** This last point, which is so important for contemporary problems of *get*-refusal, is not made clear by Rabbi Goldberg.

Almost all the explicit evidence for post-talmudic annulment, in situations other than those which exactly replicate the cases of the Talmud, refers to scenarios in which the marriage was contracted in violation of a prior communal enactment. We have only extremely rare references to the possibility of post-talmudic communal enactments of annulment to dissolve marriages **after** they had been properly contracted (apart, that is, from situations matching exactly the three cases in the Talmud where there is a correctly written yet externally flawed *get*) and there is no historical evidence of such ideas ever having been translated into practice. Indeed, Goldberg mentions in this chapter in the name of Professors Lifshitz[80] and Shochetman[81] that there is no precedent for a communal enactment to annul a marriage for any reason once it has been properly contracted.[82] Yet although Goldberg does refer to Lifshitz's attempt to surmount this problem she does not refer to Berkovits's arguments in this direction. In *TBU* [83] Berkovits writes:

"We have also proven that there is no difference between annulling marriage immediately after the *qiddushin* and [doing so] later on – for example at the time of divorce. This distinction was inferred [by various authorities] from a *responsum* of the Rashba. However, we have shown that what the Rashba [really] maintains is that the fear of '*iggun* by itself is not sufficient for an annulment of the marriage; some other supportive issue is required. Sometimes the support is one witness [testifying to the husband's death] or a gentile 'innocently reporting' [the husband's demise] [either of these] coupled with [the assumption that] a wife investigates thoroughly and [only then] remarries. Sometimes it is an [externally flawed] *get*. Only when he acted improperly did they annul the marriage without any other support. Both in the former [later annulment] and latter [immediate annulment] cases, their authority to annul flows from the ruling that 'anyone who betroths does so in accordance with the will of the Rabbis'…..

In view of all this, we have plentiful support to institute enactments today to annul [even properly contracted] marriage even after the *nissu'in*, so long as the enactment precedes the marriage, if there is some additional supportive reason or even without a supportive issue but merely due to

80 *ZD* P. 380, at note 792.

81 *ZD* P. 384, at note 806.

82 See also above, p. 28.

83 P. 162, beginning half way down the page.

the fact that he acted improperly i.e. specifically in matters touching marital life. All this is because of the gravity of the situation which forces us to put the *Halakhah* to practical use."[84]

8.10 **Pp. 381-82.** Rabbi Goldberg lists 3 reasons why Lifshitz's proposal for the *Kenesset* to legislate the requisition of the wedding ring, as and when required, might not be acceptable.

Comment: For an insight into the attitude of the *Ḥaredi* rabbinate towards *Kenesset* legislation see, *inter alia*, Rabbi Ovadyah Yosef, *Yehawweh Da'at*, V no. 63 (titled in error no.64) and Rabbi El'azar Needam, *Darkey Mishpat*, Beney Beraq 5764, chapter 13 para. 2 and the footnotes there.

8.11 **P. 382, ד** Marriage annulment is accepted as a solution by the joint rabbinical court of the Conservative movement in North America. This was made possible, we are told, by a philosophy which sees constant historical development in the halakhic process. "The Halakhah develops and accommodates itself to changing facts and times. So writes Rabbi Rabbinovits: 'Many times, when our Sages, of blessed memory, interpreted a law in a new manner or when they introduced an enactment or a decree, they did this without any precedent. The reason is quite obvious. If the Halakhah will not deal with new problems without having a legal precedent then the Halakhah will have no connection with people's lives'."

Comment: The Orthodox response to this can only be a restatement of Rabenu Tam's rejoinder to the *moredet* enactment of the Ge'onim (never mind the Conservatives!): "After the days of Rav Ashi we lost legislative authority and we will not regain it until the days of the Messiah".[85] Nevertheless, the accepted position amongst the Orthodox is that **emergency** halakhic changes are not entirely ruled out even today (see §8.13 below).

8.12 **The decrees and enactments of the Sages (*Gezerot* and *Taqqanot*)**[86]

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.[87]

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.[88]

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,[89] Rabbah says they cannot[90] (and that means even the Great Sanhedrin[91]). The *Rishonim* accord with Rabbah[92] but a number of *Aḥaronim* argue that it may be

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84 See, however, the cogent counter-arguments of Shochetman, "*Hafqa'at Qiddushin – Derekh 'Efsharit leFitron Ba'yat Me'uqvot haGet*?", *Shenaton HaMishpat Ha'Ivri*, 20 (5755 – 5757), 388-92.

85 It is true that Ramban and others disagreed with Rabbenu Tam's view of the legislative authority of the *Ge'onim* but they would not hesitate to endorse his opinion vis-à-vis post-Geonic authorities.

86 What follows appears also in Abel, "Rabbi Morgenstern's Agunah Solution" §§9.3-9.3.3.

87 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.

88 290, 291.

89 115.

90 138.

91 137

proven that some *Rishonim* rule like Rav Ḥisda.[93]

8.13 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.[94] However, in emergency situations such as the urgent need to stem the tide of assimilation, 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.[95]

Whether such decrees of abrogation could, once made, be extended permanently is disputed amongst the *Rishonim*. Rashba and others say yes[96] Rambam (see above) and others say no.[97]

Which sages/*bet din* have the authority to enact such emergency regulations 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.[98] Others argue that this authority was limited to the Sages of the Talmud.[99] The majority view is that even a contemporary *bet din* is endowed with this authority.[100] Rabbi Mosheh Feinstein rules accordingly.[101] 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 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*.

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92 155.

93 156.

94 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*.

95 231, 232. For other examples see *ET* ibid. at n. 205.

96 233.

97 244. 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.

98 19.

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

100 22.

101 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 Hoshen Mishpat* 2:1. See *ET* ibid. n. 148). It is interesting to note that Rabbi Shelomoh Luria (*Ḥokhmat Shelomoh HM* 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.