

Comments on “*’En Tenai BeNissu’in*” by R. Zevi Gertner and R. Bezalel Karlinski
(*Yeshurun* 8 (5761) 678-717 (part 1), 9 (5761) 669-710 (part 2), 10 (5762) 711-750 (part 3).

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

Abbreviations appearing in these glosses:

ETB = R. Yehudah Lubetsky, *’En Tenai BeNissu’in*, Warsaw 1930.

SQN = Dr. A. H. Freiman, *Seder Qiddushin we-Nissu’in*, Jerusalem 1964.

TBU = R. Eliezer Berkovits, *Tenai BeNissuin UvGet*, Jerusalem 1966.

Part 1

P. 687 n. 41 and n. 42. This falls within the quotation of an article by Rabbi Yitshaq Kosovsky-Shaḥor, Rabbi of Johannesburg.

1 In n. 41 we read an extensive rationale by a 14th century sage, Rabbi Avraham *Min HaHar* (*Nedarim* 20b), justifying the husband’s right to divorce his wife against her will, which concludes:

“Therefore, one must not introduce any enactment to associate another mind with the mind of the husband in the matter of divorce for example, enacting that a man shall not divorce his wife save with her consent or the consent of her relations, for such an enactment would be destructive for it would contradict the intention of the Torah, as we have explained.”

2 In n. 42 we meet the rationale of the Rosh (*Responsa* Rosh, 42:1) for the *ḥerem* of Rabbenu Gershom which enacted exactly what R. Avraham forbade:¹

“...but Rabbenu Gershom made a fence in this matter...because he saw that the generation was wanton, contemptuously throwing *gittin* at the daughters of Israel, so he enacted the equality of the authority of women and men – just as the man divorces only of his own free will so the woman can be divorced only of her own free will.”

This is a remarkable example of the compelling effects of grievous social problems upon the *Halakhah*.

P. 688 Still in the quotation from Rabbi Kosovsky-Shaḥor’s article.

3 The final paragraph of this article (s.v. *Bekhol ’ofen*) summarises the preceding paragraphs as follows:

“Anyway, it is clear that the responsibility for the bitter fate of this group of wretched women is not to be put at the door of the Hebrew Law but rather at the door of the modern statutes in the lands of our exile which deprived the *Bet Din* of the authority to judge and to adjudicate and ‘to bring forth justice like light’.”

1 Was Rabbi Avraham perhaps alluding to the *ḥerem* of Rabbenu Gershom?

4 In the State of Israel there are far too many women² awaiting their *get* in cases where the marriage has broken down and is well beyond the point of no return in spite of the fact that the rabbinic courts have extensive powers to persuade the husband to divorce. These powers (excluding imprisonment) do not add up to halakhic coercion but are equivalent to the *harḥaqot* of Rabbenu Tam rather than to *kefiyyah* and the *harḥaqot* may, even according to Rabbenu Tam himself, be employed in cases of *me'is 'alai* (so long as there is no fear of her having set her eyes on another or of other women learning from her to use this claim as a ruse).³ However, they are often not employed because of the fear of transgressing some opinion that says that they should not be.⁴ This follows the accepted practice today of adopting every strict opinion in matters of marriage and divorce which I have been able to trace back only to the 18th century.⁵

5 Thus, besides the fact that the basic inequality in the Law was not, and could not have been, adjusted by Rabbenu Gershom's ordinance⁶, the additional (comparatively recent) practice of attempting to abide by the stringencies of every single opinion in matrimonial matters⁷ makes life unbearable for so many Jewish

2 The figure depends a great deal on one's definition of *'agunah*. The Israeli *batey din* maintain that the figure is a few hundred; the women's groups claim that it is tens of thousands.

3 See R. Shemuel Z. H. Gertner, *Kefiyyah beGet* (Jerusalem 5758), 488 no.3.

4 See *ibid.* 489 no. 5 & 6 and see also my "A Critique of *Za'aqat Dalot*" 6.10 (s.v. 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 *harḥaqot* 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, *Kefiyyah beGet*, 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 *harḥaqot* 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 *harḥaqot* than *niddui* (which is certainly forbidden).

Rabbi Ovadyah Yosef (*Yabia' Omer* VIII *EH* 25:3-4) strongly objects to this *ḥumra* and argues powerfully for a full application of the *harḥaqot* nowadays as in the past. The latter's point, he observes, is not that *harḥaqot* 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 *harḥaqot* against the recalcitrant husband."

It should be noted, however, that, paradoxically, Rabbenu Tam considered cases of *me'is 'alai* to be circumstances of neither *kefiyyah* nor *ḥiyyuv* nor even *mitswah*, yet he still permitted the application of *harḥaqot* to achieve a divorce. This was because although there was no obligation on the husband and thus no pressure could be exerted on him, society was still entitled to step in in support of the wife by **withdrawing from** the husband while at the same time not doing anything **to him**. See Gertner *ibid.*, section 8 on pp. 476-479 [in particular p. 479 col.1 lines 14-16] & 487 no.1.)

5 See my "Halakhah – Majority, Seniority, Finality and Consensus" IV.8: "However, in the area of *gittin* and *qiddushin* it is the accepted practice (though not agreed to by all authorities) to take into account **all** opinions (where these advocate stringency) even if they are opposed to the lenient rulings of the *Shulḥan Arukh*, the Rema and the vast majority of the *Posqim*. Even a single stringent opinion would have to be taken into account. An oft-quoted source for this stringency of approach is Rabbi Yom-Tov Algazi (18th century) who applies this "accepted practice" to *yibbum* and *ḥalitsah* also."

See, however, my argument (*ibid.* IV.24-32) that Rabbi Mosheh Feinstein does not seem to agree with this extreme position. Even in matters of marriage and divorce, he seems to maintain that the strict opinion of an individual *poseq* or even of insubstantial minority groups of *posqim* need not be adhered to.

6 To be truly equal, the enactment would have had to declare any sexual relationship entered into by the husband before divorcing his present wife adulterous. This would entail his being subject to a penalty of excision and death (similarly with his adulterous partner) and any children born to him from this second relationship being accorded the status of biblical *mamzerim*. Even a full-fledged ordinance of the greatest rabbinic authorities (even Mosheh *Rabbenu* and his '*Sanhedrin*') could not do that, how much more so Rabbenu Gershom.

7 See above, note 5.

women even where the Jewish people live in a country where the rabbis have total control in the area of marriage and divorce.

6 It would, thus, be more accurate to say that the difficulty lies in the following three areas **in descending order**: 1. The inequality between Jewish men and Jewish women in Biblical and (despite Rabbenu Gershom) Rabbinic Law. 2. The incredibly strict manner of the application of the *Halakhah* (at least since the 18th century) in areas of *gittin* and *qiddushin*. 3. The lack of meaningful sanctions at the disposal of the *Bet Din* in modern democracies outside the State of Israel and to a lesser extent even in Israel.

7 **P. 693** note 63 line 4. Mention is here made of a work authored by Rabbi Yeḥi'el Mikhal Epstein titled *'Or LaYesharim* (Zhitomir 5629) which was a commentary on the *Sefer HaYashar* of Rabbenu Tam. It is worth investigating whether Rabbi Epstein sheds any light on the apparent contradiction there between the two citations of the opinion of Rabbenu Tam concerning coercion in the case of the *moredet*.

8 **P. 694.** In note 68 (in a reference to *ETB*) it is remarked that there was a surprising difference between the opinion of the French condition as expressed in the private letters of Rabbi David Karliner, Rabbi Ḥayyim 'Ozer Grodzynski and others, and that expressed in their public protest (i.e. the public protest of the Russian and Polish rabbinate). Whereas in the former communications they stated that a woman who leaves her husband without a *get* on the basis of the French condition is a **definite** adulteress and her children from the second husband are **definite mamzerim**, in the latter they say only that according to the *halakhah derived from a profound examination of the Law as it is* “she is an adulteress **according to some (kammah⁸) posqim**” and her children from the second husband will be forever forbidden to marry into the congregation of Israel. This is repeated further on: “...and the woman who remarries without a *get* by means of this condition is a **possible** adulteress (*safeq 'eshet 'ish*) and the children will be excluded eternally from marrying into the Congregation according to all opinions (i.e. either biblically, as certain *mamzerim* or rabbinically, as possible *mamzerim*).⁹ This implies that when viewed from a strictly halakhic perspective (‘the *halakhah* derived from a profound examination of the Law as it is’) – leaving aside matters of policy, ethics and practicality – the French condition would have worked according to most of the *Posqim*.

9 On **pp. 697-700** all the main objections in *ETB* are collated without any of the responses of Rabbi Berkovits in *TBU*. Even when R. Berkovits's work is described (in part 3, pp. 736-750) there is no attempt to detail even one of his answers to the arguments against conditional marriage; there is only a general survey of his work.

10 **P. 705** end of last paragraph. The authors say here that “The Sages of Constantinople and other revered rabbis abandoned their programmes [for the introduction of conditional marriage] due to the publication of the work *'En Tenai BeNissu'in*.”

11 The Constantinople proposal took place in 1924. It had support from some *posqim* but most opposed it. It was never put into practice. *ETB* was published only in 1930 and it is stated in the introduction to *ETB* (p. vi) that this was due to the publications of Rabbi Yosef Shapotshnik of London in 1928 and 1929.¹⁰ Therefore, it seems that *ETB* was not aimed at the Constantinople *bet din* nor was the withdrawal of that proposal in any way due to *ETB*.

8 This word usually means ‘a few’. It is certainly not more than half because such a number would be referred to as a majority - *rov Posqim*.

9 However, the public protest of the Hungarian Rabbinate (well known for its extreme stance in halakhic matters) states that a woman who remarries without a *get* relying solely upon the French rabbinate's condition and annulment is committing **certain** adultery and her children from her second marriage are **definite mamzerim**.

10 See Abel, “The Plight of the *'Agunah* and Conditional Marriage” VIII.5.

Part 2

12 P. 670 in note 2. Reference is here made to Rabbi Louis Epstein's argument that if the Sages of different generations found halakhic solutions to the problems thrown up by (i) Release of Debts (*Shemittat Kesafim*) – *Prozbul*, by (ii) *Shabbat* Transportation (*Hotsa'ah*) – 'Eruv, by (iii) Loan Interest (*Ribbit*) – *Shetar 'Isqa*', and by (iv) Possession of *Ḥamets* on *Pesaḥ* (*Bal Yimatse*) – *Mekhirat Ḥamets*, then how is it possible that for the 'Agunah no resolution can be found?

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

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

15 (i) The *Prozbul* was enacted, as the Talmud says,¹¹ because with the approach of *Shemittah* people were refusing loans to the poor (a new reality) for fear of not getting back their money, thus transgressing the commandment in Deuteronomy 15:9-11 (impugning the principles of righteousness). It is still used regularly today.¹²

16 (iii) *Heter 'Isqa*' has its beginnings in the amoraic period in Babylon¹³ where commercial reality necessitated the circumvention of the prohibition of interest which had been generally applicable in a mainly agricultural society but was increasingly unworkable in a fiscal economy based on trade and industry.

17 It developed over the centuries to the point where there came into being a standard document – *shetar 'isqah* – to cover any transaction where there might be a problem of biblical or rabbinic *ribbit*.¹⁴

18 Every bank in Israel today (as far as I know) has a *heter isqa*'.¹⁵ It is also used for any investments or deals between two Jews which would otherwise touch upon the prohibition of paying or taking interest.¹⁶ Rabbi David Feldman writes in his footnotes to the *Qitsur Shulḥan 'Arukh*:¹⁷ "Nowadays it (the banking system) is something without which one cannot exist as the entire basis of business depends on it...and there are Jews amongst the owners. Therefore, **there is an obligation upon us to produce some kind of permissive arrangement....**".¹⁸

11 *Gittin* 36a.

12 The possible transgressions, recorded in the context of Deut.15:7-11, involved in failing to lend to the poor man with a genuine need, total nine – five negatives and four positives! See further in the introduction to Rabbi Y. M. Poupko (the *Hafets Hayyim*), *'Ahavat Ḥesed* (Warsaw 1888), pp. 9-12.

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

14 Cf. *Naḥalat Shiv'ah* 40, *Terumat HaDeshen* 302. See Hillel Gamoran, "From R. Judah bar Ilai to the *Heter Iska*". Cf. R. Ya'aqov Yeshayah Blau, *Berit Yehudah* (Jerusalem 5736), chapter 40 (pp.624-638).

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

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

17 Manchester-New York 5711, 65:28.

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

19 (iv) *Mekhirat Hamets*¹⁹ also has its sources in the Talmud where it begins as one possible way of disposing of *hamets* before the advent of the festival.²⁰ It later developed into a sale with the understanding that the gentile would sell back the *hamets* after the festival.²¹ In both these sales, the money corresponding to the full worth of the *hamets* was paid by the gentile to the Jew and the *hamets* was transferred from the Jew to the gentile.

20 The sale was later extended²² to cover cases such as the Jewish shopkeeper who found himself left with stocks of whiskey and other *hamets* goods that he could not possibly sell or consume before the advent of *Pesah*, which he could also not afford to destroy **and which it would be exceedingly burdensome to physically remove from its place**. This ‘weaker’ type of official, rather than actual, sale was ‘strengthened’ by the introduction of a document detailing the legal minutiae of the sale.

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

22 Whereas there was some opposition to the ‘sale on the understanding of return’ and the ‘sale without removal from the premises’, the opposition to the communal sale was powerful and widespread. Nevertheless, it is now universally accepted, and even encouraged, as a way of avoiding loss and of avoiding any possible transgression.²³

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

(i) “The Lord is good to all and his mercies are upon all his works”,²⁴

(ii) “Her ways are ways of pleasantness and all her paths are peace”,²⁵

(iii) “The Torah had pity on the property of Israel”,²⁶

(iv) “The Torah was not given to the ministering angels”²⁷ (*et al*) are all concepts used in the Talmud and the *Posqim* as part of the halakhic process to justify lenient interpretation and application of the *Halakhah*.²⁸

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

20 Cf. *Pesahim* 2:1

21 Cf. Tosefta *Pesahim* 2:6,7.

22 Cf. *Bah, Tur 'Orah Hayyim* 448.

23 The possible transgressions involved in retaining *hamets* on *Pesah* are recorded in Exodus 12:15 & 19, 13:7; Deut. 16:4.

24 Psalms 145:9.

25 Proverbs 3:17.

26 *Rosh HaShanah* 27a.

27 *Berakhot* 25b.

28 See, for example, Rambam's ruling (*Melakhim* 10:12), in accordance with Tosefta *Gittin* 3:18 (cf. *Gittin* 61a), that charity must be given even to the poor of idolatrous nations (although this will sometimes mean that there is less available for Jewish charities – *Perishah, Hoshen Mishpat* 249:2). Rambam bases this upon (i) and (ii). The Talmud in *Sukkah* 32b dismisses the possibility that the *hadass* may be the oleander rather than the myrtle on the basis of (ii) and on the same basis the Talmud in *Pesahim* 39a dismisses the suggestion that the bitter herbs eaten with the *matsah* may be the oleander.

Number (iii) is cited in Yerushalmi *Terumot* 8:4, *Pesahim* 1:8 and Rashbats, *Zohar HaRaqiya', shoresh alef*, as the source for relying on the more lenient opinion where a loss would otherwise be sustained. The Rema often takes this line in his glosses to *Yoreh De'ah*.

Number (iv) is cited in *Berakhot* 25b to permit ‘his heel to see his nakedness’, in *Yoma* 30a to permit ‘excrement invisible even when sitting’, in *Qiddushin* 54a to explain the permission for the priests to remain clothed in their

24 Of course, the action taken upon any of these principles must be justifiable within the parameters of the halakhic process and it is precisely this that various *posqim* have attempted in the area of global solutions to the 'Agunah tragedy'.²⁹ The attempts have so far failed to convince the majority of the *Gedolim* and as a result all such attempts have been shelved – even by the Conservatives - but it seems to me that the need for a global solution in this area is greater even than the need in the cases of *Prozbul*, 'Isqa' and *Mekhirat Hamets* where the problem was one of livelihood whereas in cases of 'Agunah it is a problem of life itself – women incarcerated eternally in an invisible prison - their lives ruined - and countless (kosher) children unborn or, where the women cannot or will not accept the situation, numerous cases of adultery and numerous *mamzerim* born. Also, the grave prohibitions being committed by some of

kohanic garments for a while after they finish the service – which they have to because they cannot remove them instantaneously - and in *Me'ilah* 14b to explain why Temple structures were always completed before their dedication - because the workers were bound to occasionally benefit in one way or another from the materials with which they were working.

See also *Responsa Radbaz* III 1052 (627) who writes that according to the verse “Her ways are ways of pleasantness...” it must be that “the laws of our Torah agree with reason and logic....and it is therefore unthinkable that a person is legally obligated to agree to lose a hand or a foot in order to save the life of another”. See other examples in *ET* VII cols. 712-724.

29 Noted *posqim* who have been willing to accept in practice some type of conditional *nissu'in* to avoid 'iggun include **Rabbi Eliyahu Hazzan**, Chief Rabbi of Alexandria 1888-1908, who suggested, somewhat guardedly, the introduction of conditional marriage. His *responsum* was addressed to the French rabbinate and the attempt of the latter to introduce conditional marriage was based on this *responsum* (although this fact is not mentioned in Lubetsky's 'En Tenai BeNissu'in).

The essence of his response, which I have quoted in “The Plight of the 'Agunah and Conditional Marriage' IV.3 and as recorded by Freiman (*SQN* 389), reads as follows.

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

Similarly, **Rabbi Eliyahu Ibn Gigi** of Algeria and **Rabbi David Pipano** of Sofia, Bulgaria, lent their support to the proposal of the Constantinople rabbinate for conditional marriage (see Freiman, *Seder Qiddushin weNissu'in* 391, second paragraph). The latter wrote the formula for a *ketubbah* for conditional marriage in accordance with the Constantinople proposal (*Responsa Nose' Ha'Efod* no. 34 published at the end of the book 'Avney Ha'Efod vol. 2, Sofia 5688).

Rabbi Mosheh Schochet proposed (*Responsa 'Ohel Mosheh* no. 2.) in 1933 that a debate take place at a gathering of leading halakhic authorities about the introduction of conditional *qiddushin* and *nissu'in* so that should a situation of 'iggun arise there would be no need for a *get*. Rabbi Schochet explains: “**For it is certain that there is a definite assumption (אומדנה דימיה) that she did not marry on such an understanding**” and therefore even if no explicit condition was made at the time of the marriage [the marriage would be retroactively annulled].

In 1936, **Rabbi David HaKohen Sakali** (*Rosh Bet Din* in Oran, Algeria) advocated in a *responsa* (*Responsa Qiryat Hanah David* II 155-58) the introduction of conditional marriage basing himself on the condition of Mahari Bruna. Most interesting is R. Sakali's following point.

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

the wives and, in the cases of *get*-refusal, by the husbands, are as severe as, or even more severe than, those avoided by *Prozbul*, *Heter 'Isqa'* and *Mekhirat Hamets*.³⁰ The fact that this particular effort emanated from the Conservative movement, with whose religious philosophy Rabbi Gertner and Rabbi Karlinsky – and Rabbi Abel – disagree is irrelevant to the validity of the effort itself.

25 My criticism of these arguments of Epstein is two-fold – one because of what he left out and the second because of what he left in. First, what he left in: The '*eruv*' argument is, in my opinion, a non-starter because, unlike the other three rabbinic enactments which release a biblical prohibition, it was not introduced by the Sages as a way of avoiding the difficulties imposed by the biblical prohibition of transportation on *Shabbat*. Wherever carrying on *Shabbat* is proscribed by Biblical Law an '*eruv*' is ineffective. The '*eruv*' must rather be understood as part of the additional rabbinic *Shabbat* regulations (*shevutim*) of *hotsa'ah* which were enacted initially **only in the absence of an '*eruv*'**. Thus not only does '*eruv*' not come to ease the burden of biblical regulation it does not even come to ease the burden of prior rabbinic regulation. It was an enactment contemporary with the *shevutim* of *hotsa'ah* so that the rabbis were in effect saying, "In addition to the biblical areas where transportation is forbidden on *Shabbat* we are adding the following areas where it shall be forbidden **unless there is an '*eruv*'**".³¹

Regarding what R. Epstein left out, the following examples are worthy of consideration.

26 1. All the cases in the Talmud where the Sages apply coercion or annulment, thereby evading Biblical Law, in the interest of the biblical demand for justice.³² According to some, this includes coercion in a case of the *moredet me'is 'alai*.³³ According to those who understand the coercion in the latter case to be an enactment of the Sabora'im/Ge'onim,³⁴ it is an evasion of both Biblical and Talmudic divorce law by the post-talmudic authorities in the interests of biblical and talmudic demands for justice.

27 2. Another, post-Talmudic, example of a global, halakhic solution to the problem of women's suffering in matters of marriage and divorce (as far as it goes) is the *herem* of Rabbenu Gershom which was a prime example of subjecting the requirements of the Torah to the requirements of reality and righteousness³⁵ or, more accurately, striking a balance between competing demands of the Torah – the demands for the sanctity of marriage and the demands for righteousness in interpersonal behaviour.³⁶

30 Adultery – Exodus 20:13; Leviticus 20:10. *Mamzerut* – Deut. 23:3, *Hagigah* 1:7, *Yevamot* 4:13 et al. For the sins of the recalcitrant husbands see note 36. There is, however, a stringency in *ribbit* not found even in adultery – see the final paragraph of this paper (section 49).

31 One could raise this objection also to the *Prozbul*, which, according to the *Halakhah* as recorded in *Yad (Shemittah 9:10)*, *Tur (Hoshen Mishpat 67)* and *Shulhan 'Arukh (Hoshen Mishpat 67:1)* following Abbai (*Gittin 36a*), did not operate when *Shemittah* was biblically applicable. Nevertheless, I have raised no such objection because according to Rashi's understanding of Rava (*Gittin 36b s.v. Rava*) '*amar*', see also *Tosafot* *ibid.* 36a s.v. *Mi 'ikka' midi* at the end) *Prozbul* did operate even when *Shemittah* was biblically in force.

32 See *ET* II s.v. '*Afqe'inho* pp. 137-140.

33 Rambam and his school - see the discussion in Rabbi Ovadyah Yosef, *Yabiya' 'Omer*, III, *EH*, 18, 19&20; Dayyan E. Y. Waldenberg, *Tzitz Eliezer* V:26; Rabbi Y. Herzog, *Heikhal Yitsḥaq* *EHI*:2.

34 Which persisted, according to the *Ittur*, for 600 years! - see R. Yosef *ibid.* 18:6.

35 See above, page 1, the citation from the Rosh and see also *ET* XVII col. 379 s.v. *Benose' 'ishah 'al 'ishto* and col. 382 s.v. *Begerushin be'al korḥah*.

36 The unjustified withholding of a *get* can involve many serious transgressions. Depending on the circumstances any or all of the following may apply: Leviticus: 19:13 (second negative), 19:14 (second negative), 19:17 (first negative), 19:18 (2 negatives and 1 positive), 22:32 et al.

37 *Ketubbot* 68a.

28 3. The enactments³⁷ that entitled unmarried daughters, in the presence of a son or sons, to inherit 1/10 of their father's estate and that awarded them, until marriage, rights of sustenance from their father's estate relegating the son(s), in the case of a meagre inheritance, to the status of paupers. This is especially noteworthy in that the laws of inheritance are described in the Torah as *huqat mishpat* and are thus considered as monetary matters involving prohibition (*mamon sheyesh bo 'issur*) so that, as Rambam rules, they cannot be subject to any type of condition or alteration as they would be if they were pure *mamon*.³⁸

29 4. Besides these, there are countless examples of abrogation of Biblical Law by rabbinic enactments, in the spiritual and material interests of Israel.³⁹

It is possible that R. Epstein does use these arguments in the course of his work (which I have not read) but no mention is made of this by R. Gertner and R. Karlinski.

30 P. 672 note 9. It is of interest that R. Epstein mentions here 3 of his own objections to conditional marriage⁴⁰ (later mentioned by other authorities cited in *ETB*⁴¹). None of these objections was mentioned by Rabbi Kook, whose refusal to accede to the idea of conditional marriage, though he maintained that it would work halakhically, was a result only of his fear that some of the presiding rabbis would err in the conduct of the proceedings.⁴² All of the objections were eventually answered by R. Berkovits⁴³ – except, perhaps, the practical problem raised by Rabbi Kook.⁴⁴

31 P. 696 at the foot of the page mention is made of Rabbi Shaul HaLevi Morgenstern as a signatory of the *herem* against the Epstein proposal. This Rabbi Morgenstern was the grandfather of Rabbi Mosheh Morgenstern whose *bet din* for 'agunot has been so strongly criticised by the orthodox rabbinate.

Part 3

32 Pp. 712-714. On p. 712 there is an astonishing and powerful condemnation from Rabbi Louis Epstein's former teacher, Rabbi Mosheh Mordekhai Epstein, who, the former tells us, did not want even 'to touch my composition'. Referring to WWI, Rabbi M. M. Epstein writes:

“The Germans went to war against the entire world. Did they not know from the beginning that they would be slain and there would be left orphans and widows?”

38 For the same reason they should be beyond the scope of *Dina' DeMalkhuta'* – see *Responsa of Rabbi Aqiva Eiger, mahadura' tinyana'*, no. 8.

39 See *ET XXV* col. 646 s.v. '*Af mishum hefseid mammon* – col. 648. See also below, sections 45-49, where I have outlined some more recent changes in orthodox practice.

40 Firstly, Jewish marriage would be an uncertain institution. Secondly, the children of a Jewish marriage would possibly be morally (though not legally) illegitimate offspring. Thirdly, it would be impossible to institute nowadays that the condition be repeated at the time of intercourse.

41 See Abel, “The Plight of the 'Agunah and Conditional Marriage”, IX 93, V.2 & IX.21, IX 20-24.

42 This fear was shared by R. Epstein.

43 See the responses of R. Berkovits in the above paper (note 41).

44 See “The Plight of the 'Agunah and Conditional Marriage” (IX.97-98) where I wrote as follows:

Rabbi Kook wrote: “Although it is clear that an explicit condition is effective even in *nissu'in* (as was customarily done in the case of an apostate brother) we have not agreed to introduce conditional marriage as a general enactment because of the damage that can arise from this through those who are not well-versed in the laws of conditions and generally in the laws of marriage and divorce yet are involved with such matters though they have no right to be.” (Letter dated 3 *Tevet* 5686 published at the beginning of *Torey Zahav* by Rabbi S. A. Abramson, New York 5687): *TBU* 68.

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

Comments on Gertner and Karlinsky

Nevertheless, this knowledge did not stop them from fighting with devotion to the point of self-sacrifice because they realised that the national honour demands sacrifices and they brought those sacrifices without complaint. The honour of the People of Israel is our Torah and for its sake we shall offer sacrifices as necessary, sacrifices of the slain, of orphans, widows and ‘*agunot*.’

33 Rabbis Gertner and Karlinsky cite after this another communication to Rabbi Louis Epstein which they introduce with the following words:

“In a spirit similar to the above words [of Rabbi Mosheh Mordechai Epstein], Rabbi Yisrael Binyamin-Bendet Feivelsohn writes to [Rabbi Louis Epstein] in his reply to him.”

34 However, the letter does not seem to be at all in the spirit of Rabbi Epstein’s retort. On the contrary, it sounds remarkably positive, even hopeful.

Beginning at the top of p. 713, it starts by apologising for a delay in replying due to the fact that before Passover, when Rabbi Epstein’s letter arrived, Rabbi Feivelsohn did not have the time ‘to contemplate his [R. Epstein’s] words well, for they require much perusal, research in the sources and logical consideration.’

35 The letter continues:

“Now after the Passover I have set my eyes and my heart upon his words and now I come to his glorious Excellency.

In truth his words are correct and seemly, both their general and detailed components. He applied casuistry with wisdom with much understanding and knowledge – and, generally speaking, his proposal is better and more straightforward than [that of] those who preceded him in this area, especially conditional marriage, for the pleasantness of the Torah and the holiness of Israel do not go together with retroactive annulment of marriage – so that their life together for tens of years becomes a life of anarchy and their children become as children of anarchy. Still, with his proposal, counsel and wisdom are required to take into consideration that with which our Rabbis of blessed memory concerned themselves – “that it should not be a light matter in his eyes to divorce her”.

Nevertheless, his words are seemly and correct but no-one will listen to him⁴⁵ as long as [this] best and most fitting proposal is not endorsed by a committee of the majority of the Sages of Israel,⁴⁶ the Lo-rd be upon them that they might live.⁴⁷ Such a thing is possible nowadays more than in the past since in virtually every land and city there is a rabbinical assembly or a rabbinical committee or the like. He should send his proposal to every [rabbinical] assembly in the United States and they will debate the matter either in a general assembly or by means of appointing a special committee specifically for this and the matter will be decided by a majority.

I would imagine that his glorious Excellency thinks like me that there is not a single rabbi in Israel who does not feel the pain of the chained daughters of Israel and who does not care about a solution for them. However, each one knows and acknowledges that an individual and even a supreme [rabbinic] court of one

45 This is based on II Samuel 15:3.

46 = the *Gedoley HaDor*.

47 Based on Isaiah 38:16.

country does not have the authority to introduce a radical enactment like this and certainly [is this so] in our generation which.....⁴⁸ they will come up against us from all sides to make breaches in our wall. Nevertheless, our heart and our innards⁴⁹ are upon the slain ones of them⁵⁰ so when all the faithful and pleasant amongst us will give each one his head, his heart and his hand to this affair, may the Lo-rd enlighten our eyes and set right our counsel in accordance with the words of our eternal Torah whose ways are ways of pleasantness.”

36 Again, Rabbis Gertner and Karlinsky follow this letter with a highly critical citation from the protest of the Lithuanian rabbinate which, unlike Rabbi Feivelsohn’s letter, is totally negative towards the Epstein proposal yet they introduce this protest with the words: “And similarly did the rabbis of Lithuania write...”!

37 P. 722, footnote 32 lines 6-8. Reference is here made to a statement of Rabbi Henkin that the pamphlet *ETB* denies the **halakhic possibility** of a conditional *nissu'in* and to the fact that Rabbi Henkin explains at length why such a condition is halakhically excluded.⁵¹

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

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

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

40 P. 747, note 117. This footnote informs us that Rabbi Eliyahu Jung passed a copy of *TBU* to one of the *Gedoley HaPosqim* in the USA requesting an opinion. The *Gadol* replied that from a purely halakhic perspective he is not opposed to the idea but it is difficult for him to agree to it in practice. I am led to wonder whether this *Gadol* was **Rabbi Mosheh Feinstein** because Professor Marc Shapiro, in *Between the Yeshiva World and Modern Orthodoxy: The Life and Works of Rabbi Jehiel Jacob Weinberg 1884-1966* (London, 1999), mentions in note 83 on p. 191, that in a letter from Rabbi Leo Jung to Rabbi Eli'ezer Berkovits, Rabbi Dr. M. D. Tendler is quoted as reporting that the latter’s father-in-law, **Rabbi Mosheh Feinstein**, expressed theoretical approval of Berkovits’s position. Professor Shapiro subsequently confirmed to me that the *Gadol* was indeed Rabbi Feinstein.

41 On P. 748 s.v *Le'or kol ha'amur*, Rabbis Gertner and Karlinski come to the conclusion that it seems extremely difficult to accept the statements that Rabbi M. M. Kasher in his article attributes to Rabbi Y. Y. Weinberg. It rather seems that Rabbi Weinberg supported Rabbi Berkovits to the end and never changed his mind at any point. This, of course, accords with Berkovits’s position.

48 There is a lacuna here in the original.

49 There seems to be a *nun* missing from the Hebrew here which should read: נַעֲמֵינֵינוּ - cf. Rashi to Psalms 87:7.

50 From the insertion for the 9th Av (to the fourteenth blessing of the *'amidah*): *Naḥem*.

51 See, however, above, sections 8, 30 (note 44) and 40, from where it is clear that many authorities accept that conditions in *nissu'in* are halakhically feasible and this is admitted by some even in *ETB*.

42 P. 749. At the end of note 122, the authors agree to Berkovits's argument⁵² that *LeDor 'Aḥaron* did not understand *ETB* as forbidding **any kind** of conditional marriage. Only one contributor – Rabbi Yosef Kanowitz – understood that *ETB* had in fact forbidden any form of condition in marriage and, say the authors, “Rabbi Berkovits disproves his words at length”.

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

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

44 Now this (“one should not make **in any manner** an enactment of a global condition in marriage”) shows that Rabbi Grodzynski understood that the declarations in *ETB* did indeed outlaw **any** conditional *nissu'in* and that they were not aimed only at the French proposals. Hence, this would seem to close the door on us. However, I feel a few observations would still be in order.

1. I have already pointed out that the public declaration of the Lithuanian rabbinate apparently accepted that [even] the French condition would work halakhically according to most *Posqim*.⁵³
2. In this letter also, Rabbi Grodzynski chose his words very carefully. He did not say that it is **forbidden** to institute any global condition in marriage but that “one **should not**” do so.⁵⁴
3. The reference in this letter to possible *mamzerut* refers only to the French condition, not to “any condition”.

It seems to me that no global enactment will take place unless and until a situation develops in which the *Gedoley HaDor* consider its institution essential **as the only way of avoiding a spiritual catastrophe** ו"ה even worse than the possible adverse consequences of conditional marriage.

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

52 *TBU* 168-70.

53 See above, section 8.

54 This implies that it **is** possible to formulate a condition that would be halakhically satisfactory, though still practically proscribed as a matter of policy. Cf. the observation of Rabbi Ovadyah Yosef in *Yabia' 'Omer* IX *OḤ* 1:2 that from the wording of the *SAOḤ* 2:6 (It is forbidden (*'asur lelekh*) to walk with an erect gait and one should not walk (*welo yelekh*) bareheaded) one can derive that it is **not** forbidden to walk about with an uncovered head. I have a vague recollection of a similar observation in the *Mishnah Berurah* on the wording of the Rema but I cannot pinpoint it at present.

46 Until about 1800, *Yeshivah* study for boys was limited to only the most promising young men. In 18th century Wilna perhaps **1 boy in 2000** attended a *yeshivah*. Over the last 200 years things have changed beyond recognition and today – due to the very different times in which we live – it is considered essential for every boy to attend *yeshivah* for a minimum of 3 years full-time study. A similar story could be told of another modern invention of orthodoxy – also initially strongly opposed in some quarters – the *kollel*, today viewed favourably in all communities.⁵⁵

47 Another change that has taken place in the last two hundred years is the adoption of the wig by married women instead of the scarf – or some similar head-covering. The change was condemned by the leading rabbinic authorities at the time and even today Rabbi Ovadyah Yosef⁵⁶ has written vehemently against it, citing classical *'aharonim* who recorded that **it was first introduced by “the *apiqorsim*”** and ruling that **divorce would be preferable** to a marriage in which the wife goes out in a wig. Nevertheless, the change seems to be here to stay.

48 Of course, the institution, or acceptance, of these and other changes did not touch upon the minefield of adultery and bastardy but they still demonstrate how strictly held ideological severity and long-entrenched custom have perforce been tampered with and tempered, even turned on their head, when circumstances have impelled Jewish society in directions it might have preferred not to travel.

49 One should perhaps point out that the *heter 'isqa* permits even biblical *ribbit* which would, without the *heter*, exclude the perpetrator from the Resurrection⁵⁷ – a punishment worse than the death penalty of an adulteress or the status of bastardy as is apparent from *Sanhedrin* 107a where the Talmud describes the attempts made to publicly humiliate King David because of his sin against Bat Sheva'. His enemies would ask him, “He who has relations with a married woman – which death-penalty does he suffer?” To this he would respond, “He who has relations with a married woman – his death is by strangulation and he has a portion in the World to Come but he who shames his fellow in public has no portion in the World to Come”. From the Talmud there (90a) it is clear that the World to Come refers to the Resurrection so that we can deduce from this that the Talmud regards being debarred from the Resurrection as a far worse punishment than the death penalty and, presumably, bastardy. If that is a correct deduction one can argue that if the evasion of the prohibition of *ribbit* was successfully attempted then *qol wahomer* there is no reason why such an attempt not be made to evade the need for a *get* in irresolvable situations of *'iggun*. The force of circumstances was considered sufficient to justify action in the case of *ribbit* and that, as Rabbi Weinberg wrote,⁵⁸ remains the question: Is the situation of *'iggun* grave enough to justify (halakhically acceptable) tampering with marriage also?

The Responsum of Rabbi Pipano (See section 24, note 29.)

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

51 He begins by describing the tragedies with which the Sages of Constantinople were grappling. There were cases where husbands had left home to find work and eventually decided that they were better off staying where they had found a job. They thus abandoned the wives of their youth and left them as

55 See also above, sections 12-29, some of the classical enactments that changed the face of Judaism.

56 *Yabia' 'Omer* V *EH* 5.

57 See above, note 16.

58 Last but one paragraph of introduction to *Tenai BeNissu'in UvGet*.

widows without any support, not even sending them one letter. The abandoned wives wept bitterly at the *bet din* for their children were starving and the whereabouts of their husbands were unknown.

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

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

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

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

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

1. the husband was absent for more than an agreed period,
2. the wife summoned her husband to *bet din* and the husband would not accept the ruling of the *bet din*,
3. the husband disappeared,
4. the wife found herself in need of *ḥalitsah* and unable to receive it because the brother's whereabouts are not known or because he refuses to do *ḥalitsah*,
5. the husband became ill with an infectious/contagious disease (or he had such a disease at the time of the marriage but did not disclose this to the wife) or
6. any other circumstances arose that made it impossible for her to live with him.

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

55 In the next 3 paragraphs⁵⁹ (= section 8)), Rabbi Pipano describes briefly the first arguments of the Constantinople sages built upon *Ketubbot* 73 and mostly agrees with them. He concludes that if one betroths a woman on condition and then weds her without repetition thereof her requirement of a *get* is only rabbinic according to almost all the *Posqim*.

56 In the following paragraph (= section 9)), he agrees with Constantinople that a condition repeated at *nissu'in* and *bi'ah* would be effective according to all but Riaz and, he adds, if the groom made clear at the repetition at *bi'ah* that he means his condition to obviate the need for a *get* should the condition be broken, then Riaz also would agree that no *get* is required.⁶⁰

57 In sections (7), (7) and (1) our author examines the support that the Constantinople rabbinate summoned from the condition of the '*ah mumar* and he ultimately agrees with this too.

59 S.v. *Ukhdey*, s.v. *Wa'ani* and s.v. *Welo' 'od*.

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

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

1. The condition is for the benefit of the woman.
2. The Rashba and the Ran maintain that foregoing a non-monetary condition is ineffective.
3. He is particular about maintaining the condition.
4. It is not certain that his intercourse will prove promiscuous.
5. This condition could not be subjected to propitiation.
6. After a number of declarations and announcements it is not logical at all that she would forego the condition.
7. Both bride and groom swear an oath that they shall never forego the condition.⁶¹

61 Cf. the following piece from “The Plight of the *‘Agunah* and Conditional Marriage”:

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

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

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

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

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

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

- (i) Nowadays when *qiddushin* and *nissu'in* are performed together there is no reason to think that they mean the condition at *qiddushin* to be cancelled at *nissu'in* as already pointed out in *Responsa Terumat ha-Deshen* (end of no. 223) and in *Ḥatam Sofer* (ibid. s.v. *We-'omnam*). The latter states clearly (ibid. s.v. *Wa-'ani*, at the end) that the repetition of the condition at the various stages of *nissu'in* is only a stringency and **is not essential**: TBU 48.
- (ii) The condition was made for her own future protection, so even if he wished to cancel it she would certainly not do so, as pointed out in *Responsa Me'il Tsedaqah* no. 1, and an unconditional betrothal cannot happen without her consent. In the Mishnah’s case where he made *qiddushin* on condition (that she is not subject to vows) and made *nissu'in* without repeating the condition we fear that he cancelled the condition because it was in his interest only and she certainly would not object to its cancellation: TBU 37.
- (iii) There would be no illicit intercourse even if the marriage was retroactively annulled in the case of Mahari Bruna’s condition or our condition so that **neither of them need feel any need to cancel it**: TBU 32-4.

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

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

61 “The aforementioned groom at the time that he betrothed the aforementioned bride in the presence of witnesses made conditions with the aforementioned bride, absolute conditions like the conditions of *Beney Gad* and *Beney Re’uven*, with the condition preceding the declaration stating that he is wedding the aforementioned bride in accordance with these conditions and because of this the aforementioned bride agreed that if the conditions would be fulfilled the betrothal should be effective and if they would not be fulfilled – even one of them – the betrothal should be totally nullified and would have no effect at all and the article used for the betrothal should be a gift.

62 Thus did the aforementioned groom say to the aforementioned bride in the presence of the witnesses signed below: ‘If it should ever happen that, in the course of time, I need to journey away from home, I shall ask permission of the bride for the agreed period and I shall be obliged to write to her from wherever I am, telling her where I am and if the time allowed should need to be extended I must ask permission yet again by letter. If, however, I tarry there without her permission more than the period fixed between us...or if it be thus – that there be a quarrel between us and she sues me to judgment before a righteous *bet din* and the *bet din* make me liable in any way and I shall be unwilling and shall disagree to accept the judgment upon myself or if I flee and my whereabouts be unknown then the betrothal shall not be effective but shall be nullified retroactively and she will not need a *get*.

63 Furthermore, if I am worthy to have surviving descendants at the time of my death, the betrothal shall be effective. If, however, it should happen that I die without surviving descendants, Heaven forbid, the betrothal shall not be effective and she will not require *yibbum* or *ḥalitsah*.

64 Also, this marriage is on the understanding that I will be healthy and strong. If, however, an impure situation arises⁶² as a result of which I become ill with a contagious or infectious disease or if I was ill in such a way at the start of the marriage but this was not known to her until later or any similar situation in such a way that it is impossible to dwell with her then the betrothal shall not be effective and the money I give to her as betrothal shall be nothing more than a mere gift and she will not require a *get*. When the woman comes before the righteous *bet din* seeking her rights, the *bet din* shall investigate the matter thoroughly and if they find that right is on the woman’s side they shall do all in their power to obtain a divorce from him or *ḥalitsah* from the levir but if they cannot achieve this they shall permit her to the world without a divorce or *ḥalitsah*.

62 Illness.

65 In all cases, she can claim and take her *ketubbah* payment and additions to the *ketubbah in toto* [????]⁶³ and she will not suffer any loss, because of the condition, as regards the *ketubbah* or the additions thereunto’.

66 In our presence - the witnesses signed below - the aforementioned groom and bride swore....that they shall not be allowed or permitted to annul any one of these conditions.... and not to forego any one of them or a part of it.”

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

67 At the time of the betrothal the groom shall say to the bride:

(Here Rabbi Pipano details the exact wording of the conditional marriage formula.)

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

69 He concludes with the following paragraph:

“Finally, let me bless you ‘Be strong and may your heart be firm’ because you have set your mind to save the daughters of Israel from captivity and from mishap. May A-mighty G-d grant you strength and good health to arrive at the conclusion of the matter. This is the gift of a poor man who has offered his sacrifice from that with which G-d has graced me. Whomever He chooses He will bring near to him according to His will.

Thus says the servant who prays to his Creator: ‘May He heal him from his sickness and restore him to his position; may his innards be filled to contemplate His Torah and to create *novellae*’.

Being the insignificant,

David son of Avraham Pipano
Pure Sefaradi.”

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

70 There now follows a lengthy paragraph by the *magiah* (proof-reader?) (who is not identified), as follows.

71 “In truth, the rabbis of Constantinople did a great thing by enacting conditional marriage but this is only an enactment for the future (and even this plan has not yet been put into action). What, however, have these sages achieved with their enactment for the **several thousands and tens of thousands** of chained women who are now in a sad and depressing situation being left with ‘nakedness and destitution’. The results are fearful and terrifying for amongst these ‘*agunot* are wanton women and decent women. As to the wanton, some of them **convert to Christianity** and some **proceed to debauchery**, offering themselves to anyone. The decent ones either **bear a life of pain** or **commit suicide**. Thus, this problem, **which has been tearing apart the world of Judaism for some years**, is not completely solved by means of conditional marriage.

63 I could not decipher the enclosed.

72 “The truth is that if we delve into the spirit and the profundity of our Holy Torah we shall see clearly that it is a law of life. ‘And he shall live through them – and not die through them’. We can see in the fundamental structure of the Talmud progressiveness and adaptation to the variable and changing conditions of life. There are in the Talmud a considerable number of progressive ideas and even an inclination to reform, especially in the area of *’iggun* where they were lenient even with one witness and ‘a witness [reporting] from a witness’ and even a manservant and maidservant and a gentile speaking in his innocence etc. In a number of cases they made annulment of marriage on the grounds that anyone who marries does so in accordance with the will of the Sages. In the interests of wanton women and of decent women: *Ketubbot* 3a. Because ‘he acted unjustly etc.’: *Yevamot* 110a. Similarly in a number of places in the Talmud – see *Bava’ Batra*’ 48b, *Yevamot* 90b, *Gittin* 33a and 73a. Some of these deal with a nullified *get* and some with no *get* at all. A number of these cases the *Posqim* accepted as *Halakhah*.....

73 “We also find in the Talmud that the Sages have the authority to abrogate a law of the Torah even permitting a prohibition involving an action, particularly⁶⁴ when there is good reason to do so – see *Yevamot* 89; *Tosafot Bava’ Metsi’a*’ 20, s.v. *Shover* ; *Bava’ Batra*’ 48b and *Tosafot* there; *Tosafot Yevamot* 110 s.v. *Lefikhakh*. All the aforementioned points apply in our case:

74 ‘**In the interests of wanton women and of decent women**’ we have explained above.

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

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

77 I know that a number of *Posqim*, *Rishonim* and *’Aḥaronim*, built up several distinctions, and distinctions upon distinctions, regarding all the aforementioned talmudic sources but I do not wish to write at length. I wish only to stress that if the Sages of the Talmud were living at this time they would certainly institute several enactments in order to release from the chains of *’iggun* these thousands and tens of thousands of miserable women. The fact that they made no such enactments in their time is because the situation was not so horrific as it is today when due to great wars the world has changed dramatically and indecency and cruelty have struck roots in the heart of mankind. There is no compassion! There are no ethics or humanity! Therefore, my Masters! Rabbis of Israel and the Diaspora! Long enough have you sat and watched in indifference and apathy. In these unfortunate times a great responsibility and obligation weighs heavily upon us. It behoves you to assemble, several rabbis from all lands, in one centre to arrange counsel and to pass enactments in order to remove this stumbling block from the midst of our people for that which the *posqim* have written - that only the

64 Surely this should read ‘but **only** when there is good reason’ – see “Rabbi Morgenstern’s Agunah Solution” 9.3.1.

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Sages of the Talmud like Rav Ami and Rav Assi - and none beside them - are qualified to institute enactments like these - is not logical for, on the contrary, Yiftah in his generation is like Shemuel in his generation'. Furthermore, we see that humanity is developing every day so that if we shall succeed in this important business then not only will we wipe away the bitter tears of these women who scream and weep but we shall also seal the mouths which speak terrible things against our Holy Torah, for many Jews and non-Jews speak – and justifiably so – ‘Is this the Torah of which they say that it is a Law of life and righteousness and equity etc?’ Therefore, it is our duty to try with every possible effort to put an end to these matters and to set up the Law upon her pedestal, to return the crown of the Torah to her former glory and to place it in the lofty heights fit for her. Then shall we have sanctified the Name of Heaven in public.