

## Comment on Dayan Broyde's Tripartite Agreement

### The Hebrew text

#### P. 2

**Line 5.** 'הרי את מקודשת לי כדת משה וישראל, בכפוף לתנאים הבאים'

Comment: Is it halakhically acceptable for the groom to say what amounts to a full unconditional formula of marriage and then to add “subject to the following conditions”? In the case of Mahari Bruna's condition the *Posqim* set out an exact formula which – in all the versions I have seen (*Noda' BiHudah*,<sup>1</sup> *Ḥatam Sofer*,<sup>2</sup> *'Arokh Hashulḥan*<sup>3</sup>) – has the groom precede both his initial positive betrothal and then its negation with the condition so that it should accord with the condition of the Gadites and the Reubenites where the condition precedes the transaction and is doubled - first expressed in a way that will result in a positive outcome and then so that it results in a negative outcome. Even if the appending to the wedding formula of 'בכפוף לתנאים הבאים' can be considered as the equivalent of *'al menat* and so allow us to dispense with the comparison to *beney Gad and beney Re'uven* according to the Rambam and his school, because Rambam's view in this matter is subject to dispute (*EH* 38:3) and seems to be in conflict with the Yerushalmi we must follow the stricter view at least in matters of *gittin* and *qiddushin* as stated explicitly in the *'Arokh HaShulḥan*.<sup>4</sup>

**Line 13.** 'אני מצהיר כי התנאי דלעיל נעשה בקניין בפני בית דין חשוב'

Comment: How do *qinyan* and *bet din ḥashuv* relate to *tenai*? No *qinyan* or *bet din ḥashuv* features in the aforementioned versions of Mahari Bruna's condition.

**Line 14.** כאסמכתא'לא ולא כטופסי 'שטרות

Comment: *לא כטופסי שטרות* refers to a financial undertaking; *שטרות* refers to the nature of a document but here they both seem to be referring to the condition.

#### P. 3

**Lines 12-13.** 'זה ייחשב כלא כשר מבחינה הלכתית בכל זמן שהוא, אזי לא היינו כבמקרה שהס' יישאים כלל'

Comment: This seems to be a part of the condition upon which the marriage is based. Should it not then be stipulated before the declaration of *qiddushin*, and doubled with positive preceding negative as above s.v. P. 2 Line 5?

**Line 19.** כשרים' י עדים 'ע"י שנ

Comment: What is the function of the two fit witnesses? Are they testifying to the fact of the couple's living together at least once every 15 months and does this mean that the couple would have to arrange once in 15 months for a pair of valid witnesses to see them entering the home together? I note that these witnesses do not appear in the English version of this text on PAGE 13. Is there any significance in the fact that the

<sup>1</sup> מהדורא קמא, אה"ע ח"א, סימן נ"ו, ד"ה ובשעת

<sup>2</sup> אה"ע ח"א, סימן קי"א, ד"ה ובשעת

<sup>3</sup> אה"ע ט"ז קנ"ז

<sup>4</sup> *EH* 38:49.

husband refers only to **his** abandoning the family home (p. 2, lines 6-10) whereas the wife refers to **either of them** abandoning it (p. 3, lines 18-21)?

#### P. 4

**Lines 6-7.** 2: עד ייחוד 1: עד ייחוד

Comment: What is the point of the witnesses of *yiḥud*? Are they signing merely that the *yiḥ ud* took place (in which case they would have no function at a Sepharadi wedding) or that the conditions of the marriage were repeated at the time of *yiḥud*?

**Lines 10-12** = A list of Ashkenazi rabbis who accepted the Rema's ruling (including *Terumat HaDeshen* 1390-1460!)

Comment: The condition for cases of the apostate brother was ultimately accepted also by the *'Aḥaronim* of the Sefaradim.<sup>5</sup> The *Hiqrey Lev*<sup>6</sup> in particular expresses astonishment at the rejectionist approach of the *Bet Yosef*.

**Lines 16-17.** “However, conditional *qiddushin* is not sufficient according to the *Halakhah* to allow a woman to leave her husband during his lifetime as many *'Aḥaronim* have written ‘*en tenai benissu'in*’.”

Comment: There can be no doubt that there can be a halakhically effective condition in *nissu'in* so long as the couple make clear that their condition is so intended. ‘*En tenai benissu'in* means that it was unusual for people to make a condition in *nissu'in* and not that such a condition is not possible.<sup>7</sup> If correctly stipulated such a condition would be fully effective. Indeed, the Wilna Gaon (*EH* 157 sub. para. 13) derives the validity of the conditional marriage of a man who has an apostate brother from the statement in *Bava' Qamma'* 110 concerning the ‘*umdena*’ where a woman was left bound to a leprous levir. From there, says the Gaon, it is clear that had she made an explicit condition it would have successfully annulled her marriage (*qiddushin* and *nissu'in*) if the condition was breached (= if she found herself bound to a leprous levir). Similarly, 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).<sup>8</sup>

The problem of *nissu'in* cancelling a marriage condition is only found in the Talmud in connection with conditions that could be clarified during the twelve months between the *'erusin* and *nissu'in* such as those of *nedarim* and *mumim*.<sup>9</sup> Such conditions if not repeated at *huppah*, *yiḥud* and especially *bi'ah* may well be deemed to have been foregone. However, conditions which cannot be clarified before the *nissu'in* such as those made in order to avoid *'iggun* or *yibbum/ḥalitsah* were clearly

<sup>5</sup> See *Yabia' Omer* I YD 20:3, footnote. The entire episode is recounted in Freimann, *Seder Qiddushin weNissu'in* 386-88.

<sup>6</sup> *EH siman* 58 (on *SAEH* 157).

<sup>7</sup> See *Tosafot Yevamot* 107a s.v. *Bet Shammai*.

<sup>8</sup> See “The Plight of the ‘*Agunah* and Conditional Marriage”, IX.97.

<sup>9</sup> As pointed out in *Responsa Hatam Sofer EH* II 68. Cf. also *Bet Shemuel EH* 157 sub-para. 6 (at the end). See my “The Plight of the ‘*Agunah* and Conditional Marriage”, IX 38.

made with the intention that they should span the post-*nissu'in* period of the marriage also – for if not, as the *Hatam Sofer* writes<sup>10</sup> – what would be the purpose of stipulating them in the first place? Such a condition, therefore, does not really need repeating after the *qiddushin* and the custom of reiterating it (in the case of the apostate brother) at canopy, seclusion and intercourse in accordance with the formula of *Noda' BiHudah*, R. Aqiva Eiger (*Pesaqim* 93), *Hatam Sofer* and '*Arokh HaShulhan*, is a stringency over and above basic halakhic requirements as *Hatam Sofer* notes.<sup>11</sup> There are indeed many arguments for abandoning the requirement of repetition of '*iggun*-avoidance conditions in marriage at the later stages of canopy, seclusion and intercourse.<sup>12</sup> This would obviate one of the main problems raised (in *ETB*<sup>13</sup> and elsewhere) against introducing conditional marriage in contemporary society, namely that such a society could not adopt the practice of an ante-intercourse declaration of condition stipulation recited in the hearing, if not the sight, of two witnesses.

Other halakhic objections are (i) that there is a unique opinion<sup>14</sup> - that of *Shiltey*

<sup>10</sup> *EH* II:68

<sup>11</sup> *Ibid.* s.v. *Wa'ani hisbarti*.

<sup>12</sup> See "The Plight of the '*Agunah* and Conditional Marriage", IX.40: "Furthermore, Berkovits points out that there are additional reasons for saying that even without repeating the condition after *qiddushin* we may assume that they do not intend to forego it. Although the following reasons were given by the earlier *Posqim* only *vis-à-vis* the condition of Mahari Bruna, Berkovits argues that they clearly apply with equal force to his own proposed condition.

(i) Nowadays when *qiddushin* and *nissu'in* are performed together there is no reason to think that they mean the condition at *qiddushin* to be cancelled at *nissu'in* as already pointed out in *Responsa Terumat ha-Deshen* (end of no. 223) and in *Hatam 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** - *Tenai BeNissu'in UvGet* 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 initially stipulated in his interest only and she certainly would not object to its cancellation - *Tenai BeNissu'in UvGet* 37.

(iii) There would be no illicit intercourse even if the marriage were 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** - *Tenai BeNissu'in UvGet* 32-4."

<sup>13</sup> See "The Plight of the '*Agunah* and Conditional Marriage", IX.24: "Is it really possible in today's world (1908), especially when the parties are not so religiously committed, to arrange witnesses for the act of intercourse – to hear the condition, albeit from outside the room, being recited by the groom to the bride while they are in bed together? [Cited from *ETB*, Rabbis: Lubetsky on p. 4 and p. 9 of *ETB*; Hoffmann 17, Hirsch 20, M. S. Dvinsk 30, Tenenbaum 32, Danishevsky 36; Hungarian protest 49.]"

<sup>14</sup> And the practice today is to accept every stringency in matters of marriage and divorce even if the *humra'* is maintained by only one *poseq*. This extremely strict approach 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 (p. 274a (in the large (5746) edition) beginning on the 17th line above the end of the column) & 6:2. Rabbi Yosef notes as a (earliest?) source for this extremity of stringency the *responsa* of Rabbi Yom-Tov Algazi – eg. *Responsa Qedushat Yom-Tov* no. 9, 15d & *Simhat Yom-Tov* no. 11, 44c. See my "Halakhah – Majority, Seniority, Finality and Consensus" IV 24-35 where I have attempted to demonstrate that R. Moshe Feinstein would not have taken into consideration even in the area of *gittin* and *qiddushin*, a unique strict opinion or even the strict opinion of an insubstantial minority of *posqim*. Also to be noted is the ruling in *Yabia' 'Omer* VI *EH* 14:6 that

*HaGibborim* in the name of Riaz – that even a condition made immediately before *bi'ah* would be cancelled during *bi'ah* and (ii) there is also the question of the **prohibition** of *bi'at zenut* which means that even if the condition **would** survive *bi'ah* it may not be **permitted** to make a condition that would, on its being triggered, convert retroactively every intercourse of this marriage into promiscuity. (iii) Is not such a condition against the Torah in that it contradicts the biblical right of the husband to deny his wife a *get*? These and other halakhic objections are dealt with in great detail by Berkovits in his *Tenai BeNissu'in UvGet* and a summary of Berkovits's responses with detailed annotation can be found in my "The Plight of the 'Agunah and Conditional Marriage", IX. 20-92. I have in my possession a copy (kindly supplied by Prof. Marc Shapiro) of a letter (dated September 15, 1965) sent to R. Berkovits by R. Leo Jung in which the latter reports that he had been told by R. Dr. M. D. Tendler that his father-in-law, R. Mosheh Feinstein, had said that as regards the theoretical *Halakhah* **R. Berkovits is right** but R. Feinstein is apprehensive to agree in practice.

## P. 5

**Lines 5-9** "According to the Halakhah, we certainly do not permit a married woman to exit a conditional marriage after marital relations (before the death of her husband) even if the condition was not fulfilled without the addition of a *get* as the *ET* states: "The *Halakhah* is that if one weds on a condition and performed *nissu'in* or *bi'ah* without repetition [of the condition] the wife needs a *get* due to doubt".

Comment: The *Encyclopaedia Talmudit* is here citing the Talmud's case of one who makes *qiddushin* on condition but then proceeds to *nissu'in* without repetition of the condition which refers only to conditions such as *nedarim* and *mumim* that can be resolved one way or another before the time of *nissu'in*, twelve months later (as above at footnote 9). There are many important differences between this situation and the proposal for conditional marriage to avoid *'iggun* as I have mentioned above.

**Lines 12-13** "...but in our case, if the husband wishes to diminish [the possibility of] promiscuous intercourse it would be preferable for him to leave the marriage by means of a [breached] condition than to leave it by means of [retroactive] annulment."

Comment: I cannot understand why conclusion of the marriage through breach of condition is preferable for the husband to conclusion by means of *bet din*'s annulment. Both of these courses produce retroactive dissolution and result, in the view of some authorities, in retrospective promiscuity.

**Line 15 and footnote 13.** "Part 2 of the agreement adds the proposal of 'Kitvu Utnu' of R. Yosef Eliyahu Henkin *Zatsal...*"

Comment: Is it possible to count R. Henkin as a supporter since he withdrew (in later editions of *Perushey 'Ibra'*) the entire proposal when he had been shown in *'En Tenai BeNissu'in* the ban on any type of conditional marriage? Of course, one could argue that the *harsha'ah* part of the proposal could still operate (though I doubt that R. Henkin would have proposed the *harsha'ah* without the condition) and one can point to Berkovits's arguments that *ETB* does not actually ban any and every type of

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where there is an **established lenient practice** in *gittin/qiddushin/yibbum/halitsah* we do not overrule it on the basis of the custom of abiding by every single strict opinion.

condition but we cannot assume that R. Henkin would have gone along with these arguments.<sup>15</sup>

**Line 21** From the words בכל עת עונתה it seems that the husband would have to repeat his renunciation of his right to cancel the *harsha'ah* before every intimacy with his wife.

Comment: I cannot find any indication of this in R. Herzog's *responsum* or anywhere else. Furthermore, I understand from the wording of the Rambam and the Rav *HaMaggid* in *Yad Gerushin* 9:25 that *yihud* is sufficient to indicate cancellation of the *harsha'ah*; there is no reference to *bi'ah*.

**End of p.5 – beginning of p.6.** “The statement of the Rambam is not accepted explicitly in the *Shulhan 'Arukh*.”

Comment: I don't understand the significance of the Rambam not being **explicitly** accepted in *SA*. The *SA* (*EH* 149:7) does take account of the Rambam's (unique?) opinion and accordingly rules the case a *safeq*. (However, both R. Eliyahu Mizrahi<sup>16</sup> and R. Yomtov Tsahaloni<sup>17</sup> cited in *Tsits Eli'ezer* XI:90, did rely on those who dispute the Rambam. In fact, the Mizrahi goes so far as to castigate those who would take a strict line because of the opinion of the Rambam warning them that they are laying themselves open to divine punishment for bringing about *'iggun*! Rabbi Waldenberg rules that in an emergency one can write and give the *get*. The formula for the document of appointment and empowerment can be found in *Tsits Eli'ezer* XV:57.)

## P. 6

### Line 5

" כל מקום שהבעל מפקיע הרשאתו אחר שאמר כתבו ותנו מוסיף כח להפקעת הקידושין (יחד עם מסירת ה) "דהוא בדיוק המקרה שבגמ' מתירין בפירוש הפקעה—הגט בלא"ה"

Comment: Whereas it is true that Rabban Gamliel validates the *get* by means of annulment of the marriage that is only if the husband did not inform the wife or the agent. In addition, the *Halakhah* is in accordance with Rabbi Yehudah *HaNassi'* who declares the *harsha'ah/get* cancelled even if neither the wife nor the agent was informed so long as the husband revoked his wishes before a *bet din* of three and some say even in the presence of two (the latter opinion is accepted in the *Shulhan 'Arukh*)<sup>18</sup> and **some say even in the presence of one** – see *Pithey Teshuvah* there<sup>19</sup>). Accordingly, it would be very easy for the husband to cancel the *harsha'ah* in a way that would not trigger *hafqa'ah* according to the law of the Talmud.

### Lines 10-11

"לו היה הבעל פוסל הגט, הנישואין בטלין בדרך שגורם בעילת זנות"

Comment: Actually, the annulment countenanced by R. Yehudah *HaNasi'* (for example, according to the *Shulhan 'Arukh*, if the husband made cancellation of the *get* or the *shelihut* in the presence of only one person who was neither his wife nor his agent) does not, according to *Tosafot* there,<sup>20</sup> function retroactively but from the

<sup>15</sup> See addendum.

<sup>16</sup> *Responsa Mayim 'Amuqim* 5.

<sup>17</sup> *Responsa Maharit Tsahaloni* 175.

<sup>18</sup> *EH* 141:60.

<sup>19</sup> Number 60.

<sup>20</sup> *Gittin* 32a s.v. *Mahu*. Cf. glosses of R. Aqiva Eiger, *Mishnah Gittin* 4:2, number 39.

moment of declaration by *bet din* so that it would not create retrospective promiscuity. This was one of the arguments of Rabbi S. Z. Auerbach<sup>21</sup> against the proposal to save a child from bastardy in the case of ‘The *Get* of the Maharsham’<sup>22</sup> and in a similar case dealt with by Rabbi Y. I. Herzog.<sup>23</sup>

**Footnote 20** This note relates to the statement that “If the husband were to render the *get* unfit, the marriage would be dissolved in a manner that would bring about promiscuous intercourse”. The footnote reads: ‘But see *Igrot Mosheh Even Ha’Ezer* I number 147’.

Comment: This implies that *IM* is somehow in conflict with the text-statement yet it reads to me like an endorsement thereof. It may however be that the reference is to R. Feinstein’s citation of the view (which he does not necessarily endorse) of the *Me’il Tsedaqah* (which he refers to as the opinion of the *Hatam Sofer* although the *Hatam Sofer* is in fact quoting the *Me’il Tsedaqah*) that a conditional marriage which results in retroactive annulment does not cause retrospective promiscuity since the couple were at all times living as man and wife.

## P. 7

**Lines 19-23** Here a ruling of Rabbi Yosef is cited which states that where a marriage took place in contravention of a communal enactment which would render the *qiddushin* invalid there are many *Rishonim* who would declare the marriage annulled. However, one could not rely on that alone and would require a *get* also - even if it be externally flawed. In our case we would have a *get* on the basis of his *harsha’ah* (which may be regarded at worst as an externally flawed *get*) plus annulment by the *bet din*. This then should be effective according to Rabbi Yosef.

Comment: Rabbi Yosef is there referring to annulment of a marriage that was effected **against a communal enactment** so that there was from the start doubt about the validity of the *qiddushin*. This, coupled with the annulment permit the woman’s release with a flawed *get* (given under duress in R. Yosef’s case or as a result of a *harsha’ah* prepared at the time of the *qiddushin* in R. Broyde’s case). The problem is that in R. Broyde’s case the original *qiddushin* were not conducted in defiance of any enactment. As they were in perfect order, Rabbi Yosef’s ruling is not relevant.

Nevertheless, one could respond to this in two ways. (i) Since in R. Broyde’s proposal the *qiddushin* are on condition and we speak of a situation where the condition has been breached, we do indeed have a situation of doubtful *qiddushin*. (ii) R. Yosef has pointed out that there are *Rishonim* who support post-talmudic annulment even of a properly conducted wedding (where the *qiddushin* are fully valid) so its annulment by a competent *bet din* would contribute towards a multiple doubt dissolution in a case of *iggun*.

**Lines 24-25** R. Broyde mentions here that the annulment in his proposal is similar to the annulment that R. Uzziel sought to introduce in the form of conditional marriage. He refers to *responsum EH 44* in *Mishpetey Uzziel*.

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<sup>21</sup> ‘Be’inyan ‘Afqei’inhu Rabbanan leQiddushin Mineh’, *Moriah* 21-22 (5730), 6-24.

<sup>22</sup> *Responsa Maharsham* I:9.

<sup>23</sup> In *Sefer HaYovel*, ‘Or HaMe’ir likhvod HaRav Uzziel, 5710. See also my “Rabbi Morgenstern’s Agunah Solution”, 4.2.1.

Comment: I have just read through that *responsum* – which is actually a reply by R. Herzog to R. Uzziel’s request for an opinion and refers only to questions of marriage or remarriage after the genocide of WWII. There is no mention of annulment or any other type of proposal to avoid the occurrence of *’iggun*. In *responsa* 45 and 46 the proposal is a form of conditional marriage only and does not, as far as I can make out, involve annulment by *Bet Din*.

**Line 26** It is claimed here by R. Broyde that R. Zevin agreed to R. Uzziel’s argument to differentiate between the vast majority of cases of conditions and a case where the couple have agreed to a condition dependent on another mind such as that of the groom’s father or that of the *bet din*.

Comment: It seems clear to me that R. Zevin insisted throughout his critique that a condition dependent on the mind of the father or the *bet din* or anyone else for that matter did not differ at all from any other type of condition and he therefore opposed R. Uzziel’s proposal to the end.

## P. 8

**Line 3** The Uzziel proposal of making the marriage dependent on an outside mind is exemplified here as “for example, he hands over the *qiddushin* to the *bet din* through their power of *hefqer bet din hefqer*”.

Comment: from *responsa* 45 and 46 it is clear that the proposal was a condition in *qiddushin* (and *nissu’in*) making the marriage dependent on the *bet din*’s never expressing dissatisfaction with it. As far as I can see, there is no application of *hefqer bet din*.

**Lines 4-6** R. Broyde says here that by means of such a condition the groom is in effect agreeing to the possibility of his intercourse being rendered promiscuous retrospectively. Therefore the condition will not be abrogated at *nissu’in* to avoid *bi’at zenut* because the groom understands that he has foregone his right to define his *bi’ah* as not being *bi’at zenut* and he does not have the power to cancel this condition because this type of condition is handed over to *bet din* and is out of his control.

Comment: I am astonished at all this because R. Uzziel states explicitly that his proposed condition eliminates all possibility of *bi’at zenut*. It is for this reason that the groom will not cancel it – because he will not need to, and therefore will not want to, since **there will not result any *zenut* with retroactive dissolution of the marriage should this type of condition be breached**. R. Uzziel agrees that a condition of this type, being dependent on the mind of others, cannot be cancelled by the groom (without the consent of the ‘others’) but he says that although that is sufficient to make the condition foolproof we would still be forbidden to employ the condition according to those who say that retroactive annulment produces promiscuity and such promiscuity is prohibited. Therefore he adds that in cases of this type of condition no promiscuity whatsoever emerges as a result of the retroactive annulment triggered by the breach of the condition.

## P. 9

**Footnote 33** refers to *Pitḥey Teshuvah EH* 157:9 at the end.

Comment: I cannot see the relevance.

**Lines 20-23** The final section of the woman’s declaration states that she would not have accepted a marriage proposal from a man if he were ever to revoke his

authorisation to give a *get*, or if, as a matter of *halakhah* as determined by an authorized *bet din*, the communal *taqqanah* [in the Broyde proposal] were to be considered invalid. Should either of these occurrences transpire, R. Broyde writes here, the marriage would be considered *qiddushey ta'ut*.

Comment: I am not sure that something that she foresaw at the time of the *qiddushin* as a possibility could be considered an error. Does it not rather fall into the category of condition?

## P. 10

**Lines 7-8** “*Be’ilat zenut* is, apparently, not a problem if it occurs retroactively after the husband’s death and that is why the Rema is lenient regarding *yibbum* and *halitsah*.”

Comment: See Berkovits’s convincing arguments against this understanding of the Rema in *Tenai BeNissu’in UvGet* pp.53-4 & 60. The following summary of Berkovits’s position is taken from my “The Plight of the ‘*Agunah* and Conditional Marriage” IX:33-35.

**IX.33.** Rabbi Berkovits expresses astonishment that *Naḥalat Shiv’ah* could say that only if the marriage were to be retroactively annulled after his death would the husband not mind the illicit intercourse that would be concomitant with the retroactive annulment. How can it be that a believing Jew would not care about illicit intercourse just because it was so declared only after his death? Furthermore, there is not a word of this in *NS* as we shall see on examining his words. In *NS* 22:8 the author asks how Mahari Bruna could have enacted a conditional marriage in the case of the apostate brother since the Talmud states unequivocally (*Yevamot* 94b, 95b, 107a) that there cannot be a condition in *nissu’in*. He answers that we do not find a condition in *nissu’in* if she leaves him during his life so that his intercourse becomes retroactively promiscuous<sup>24</sup> but if the condition takes effect only after his death and all his life his intimacy with her was on the basis of his betrothal — such a condition we do find in *nissu’in*.<sup>25</sup> In those cases described in *Yevamot* the references are to her leaving him (on the basis of the condition) during his lifetime. It would seem from this that *NS* would not agree to any condition that would retroactively dissolve a marriage during the lifetime of the husband.

**IX.34.** However, Berkovits continues, such a stance requires understanding. In *Noda’ Bi-Yehudah* I *EH* 56 the questioner (a pupil of Rabbi Landau) mentions that he has seen “in a certain *responsum*” that there is a difference between a condition that will undo the marriage after the husband’s

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<sup>24</sup> And therefore we fear that he will cancel the condition at *nissu’in*.

<sup>25</sup> Lubetsky and others understood this to mean that in this case the condition will not be cancelled by the groom at *nissu’in*, because he does not care about promiscuity that can only become retrospectively apparent after his death.



death (which can be made because the acts of intercourse will not be retroactively considered promiscuous, so the couple will feel no need to cancel it) and one which will undo it at some time during his life (which cannot be made because the acts of intercourse will be retroactively considered promiscuous so they may cancel it at *nissu'in*). It seems that the questioner had seen this distinction in *NS* and he asks what difference it makes, since when the marriage is annulled it will surely always result in retroactive illicit intercourse? Surely it is no more acceptable to him to practise illicit intercourse that will become apparent after his death any more than if it will become apparent during his life!

**IX.35.** The answer, says Berkovits, seems obvious. *NS* writes explicitly that when the condition takes effect after death, so that during his life he had intercourse **on the basis of his betrothal (as part of married life)**, this is not promiscuous intercourse. The point is clearly that since during the marriage the acts of intimacy were all in a marriage context there can be no problem of promiscuity. When he excludes from this the case where the marriage is undone retroactively **during his life** he is referring to the other case under discussion – the case of vows and blemishes mentioned in the Talmud (*Ketubbot* 72b-74a) — for it is only these two cases that he examines.<sup>26</sup> *NS* never discussed our type of condition and there can be no doubt that it belongs with the condition of Mahari Bruna since in our condition too the couple **want to live together as man and wife and so they actually do**. That cannot possibly be regarded as promiscuity.<sup>27</sup>

## Observations on the English text

### Page 2

**Lines 20-21** “a time of urgency is to be treated as if it is after the fact”.

Comment: This equates *she'at doḥaq* and *di'avad*. It is noteworthy that Rabbi Ya'aqov Reischer, author of *Responsa Shevut Ya'aqov*,<sup>28</sup> rules – in a case of *mayim*

<sup>26</sup> In this latter case, if he would insist on his condition throughout *nissu'in* and the marriage would be retroactively cancelled if she were found to have been subject to a vow or blemished, every intercourse would be regarded as having been promiscuous because, had she been honest with him, **he would never have wanted the marriage** and would regret that he had ever been intimate with her as the entire relationship was under false pretences. We therefore fear that the condition will be foregone at *nissu'in*.

<sup>27</sup> Since they live together in the full knowledge that the condition may one day be breached and the marriage retroactively undone, there are no false pretences. The liaison may therefore be regarded as legitimate and cannot be regarded as promiscuous even when viewed retrospectively from the time following the breach of the condition.

<sup>28</sup> Vol. III number 110.

*she'en lahem sof* - that *she'at doḥaq* is **even better** than *di'avad*.<sup>29</sup> See also *Responsa Yabia' 'Omer IX EH 36:10*.

## Page 7

**Lines 29-31** “Finally, the husband’s revocation of agency for the pre-authorized *get* provides a basis for a claim of *kiddushei ta'ut* by the wife, if that was his plan at the time of the marriage.”

Comment: How can we ever know that he harboured such intention in his mind at that time? Would the possibility that he did do so suffice even as a *safeq*?

## Page 10

**Line 7** “Of course, this result will not ever be reached as the rest of the agreement validly creates a marriage, allowing for a typical wedding ceremony to ensue.”

Comment: If this result will not ever ensue why insert a declaration about the possibility of its happening? On the other hand, how can we be sure that it will not ensue, at least according to some authorities? If some *poseq* would not accept the condition or the *get* or the annulment we would surely then have a situation of possible *'iggun* and we would need this declaration of ‘intent to marry only with this agreement binding’. But how would that help to undo the marriage (according to the rejectionist *poseq*)? Surely it would be no better than an explicit condition?

**Footnote 35** – list of *posqim*.

Comment: To the list in this footnote could be added: *'Igrot Mosheh EH I 79:3 s.v. 'Aval be'emet; Mishpetey 'Uzziel 46:8*, first four paragraphs.

## Page 15

**Lines 17-18** “As a matter of Jewish law, I accept (through the Jewish law mechanism of *kim li*) whatever minority opinions.....”

Comment: The rationale of *qim li* is that a person holding property claimed by others who have the support of most *Posqim* is allowed to keep the property by adding the minority (even two *posqim* and some say even one if that one is of the *'amudey hatawekh* such as the Rambam/Rabbenu Tam etc) to his *hezqat mammon (semokh mi'uta' lahazaqah)*. Obviously, *qim li* does not operate outside the field of *diney memonot* so how could it be of use in matters of *gittin* and *qiddushin*? Also, the husband is here agreeing to a minority being used **against himself** in his wife’s interest so even if it were a matter of *diney memonot* how could *qim li* (which only works to enable a person to **resist** a claim on his property) be of use and, indeed, why should it be needed anyhow when he has explicitly declared his wife in the right

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<sup>29</sup> This *responsum* of *Shevut Ya'aqov* is remarkable in that it allows suspension of the eternal *ab initio* prohibition of remarriage for a woman whose husband was lost at sea in cases where there is an emergency additional to that of the basic *'iggun*, for example if she is a young woman for whom the need of remarriage is all the more desperate. On this amazing leniency it was remarked by Dayyan Y. Abramsky of the London *Bet Din* that “his words could not be believed were they merely heard but only if they be read in the written text” – see R. Meir Feuerwerker (Meiri), *'Ezrat Nashim I:240 col. 2*. (It is worth noting that Rabbi Reischer’s willingness to criticize *Rishonim* and earlier *'Aharonim* earned him the censure of others, particularly the Sefaradi rabbis of Jerusalem. As a rule, however, he made a point of defending both the *Rishonim* and the *Shulḥan 'Arukh* against their critics. He came to be regarded as a final authority even during his lifetime.)

## Addendum

In their “*’En Tenai BeNissu’in*” by R. Zevi Gertner and R. Bezalel Karlinski,<sup>30</sup> the authors accept<sup>31</sup> that **Rabbi Weinberg** and **Rabbi Berkovits** were right in saying that their proposal was not the same as that of the French rabbinate but they nevertheless maintain that 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 Hayyim ‘Ozer Grodzynski to Rabbi Shemuel Yitshaq 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 forfend that they do such a thing and that the children born would be possible *mamzerim* with whom it would be impossible to marry.....”

Now, they argue, 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.** How do Rabbis Gertner and Karlinsky deduce from the words of Rabbi Grodzynski that the Berkovits proposal cannot be accepted **even in theory**? Surely in the theoretical *Halakhah* Berkovits was right (as even Rabbi Feinstein agreed!). It is the practical application of the proposal that presents problems. Indeed, the public declaration of the Russian and Polish rabbinates on pages 43-44 of the original *’En Tenai BeNissu’in* (composed by R. Yehudah Lubetsky in 1908 and published by R. Aharon Waranowsky, Warsaw 1930) apparently accepted that [even] the French condition would work halakhically according to most *Posqim*! (It is remarkable that R. Hayyim Ozer Grodzynski and Rabbi David Friedman of Karlin in their personal communications that appear on page 16 of (the Lubetsky) *ETB* state 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** yet in the public declaration of the Polish and Lithuanian rabbinate to which they appended their signatures it is stated only that according to the *halakhah* **derived from a profound examination of the Law as it is** a woman who remarries on the

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<sup>30</sup> *Yeshurun*: 8 (5761) 678-717 (part 1), 9 (5761) 669-710 (part 2), 10 (5762) 711-750 (part 3).

<sup>31</sup> Part 3, pages 749-50, s.v. *’Akhen*.

basis of the French condition is an adulteress **according to some (*kammah*)<sup>32</sup> *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. at least rabbinically, as possible *mamzerim*). This implies that when viewed from a strictly halakhic perspective (‘the *halakhah* derived from a profound examination of the Law as it is’) – leaving aside matters of policy, ethics and practicality – the French condition would have worked according to most of the *Posqim*! In their *ETB* (part 3, p. 694, note 68) Rabbis Gertner and Karlinsky have also noted this anomaly.

2. In his letter to Rabbi Hillman, 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. This implies that although it **is** permitted according to the *Halakhah* to formulate a condition that would be halakhically sound, one should not do so 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 to walk (*'asur lelekh*) 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 an imprecise use of the word *'asur* in a gloss of the Rema but I cannot pinpoint it at present

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"ח even worse than the possible adverse consequences of conditional marriage.

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

Until about 1800, *Yeshivah* study for boys was limited to only the most promising young men. In 18<sup>th</sup> century Wilna perhaps **1 boy in 2000** attended a *yeshivah*. Initially, the Gaon would not acquiesce to R. Ḥayyim Volozhyn’s proposal to extend the *Yeshivah* system; later, however, he agreed. Over the last two hundred 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

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<sup>32</sup> I am unaware of any definition of *kammah*. Perhaps it can mean 10% or 30% or even more. I would imagine, however, that it cannot be a majority because that would certainly have been rendered *rov posqim*.

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 *kolel*,<sup>33</sup> today viewed favourably in all communities.

Another change that has taken place in the last two hundred years is the adoption of the wig by married women instead of the scarf – or some similar head-covering. The change was condemned by the leading rabbinic authorities at the time and even today Rabbi Ovadyah Yosef (*Yabia' Omer* V EH 5) 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** (at least in Sepharadi society) to a marriage in which the wife goes out in a wig.

One could add to all this the talmudic and post talmudic enactments that have changed – sometimes beyond recognition - Jewish religious practice: *Prozbul*, *Heter 'Isqa'* and *Mekhirat Hamets*.

One should also not lose sight of the approach to halakhic decision making premised on such concepts as (i) “The Lord is good to all and His mercies are upon all His works”, (ii) “Her ways are ways of pleasantness and all her paths are peace”, (iii) “The Torah had pity on the property of Israel”, (iv) “The Torah was not given to the ministering angels” (*et al*) - all concepts used in the Talmud and the *Posqim* as part of the halakhic process to justify lenient interpretation and application of the *Halakhah*.

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 *rabbanim* and a number of *Gedolim* have attempted in the area of global solutions to the 'Agunah' tragedy. Orthodox authorities who have been willing to accept **in practice** some type of conditional marriage to avoid 'iggun include **Rabbi Eliyahu Hazzan**, Chief Rabbi of Alexandria 1888-1908, who suggested in a *responsum* its practical introduction. This *responsum* was addressed to the French rabbinate and the attempt of the latter to introduce conditional marriage was based upon it (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 (*Seder Qiddushin weNissu'in*, 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 = *yiḥud* and *bi'ah*]. I know that this permissive ruling is not generally agreed upon; nevertheless, it is of some help, because those who allow it are fit to be relied on — in the time of pressing need in which we find ourselves – for the rescue of the daughters of Israel and in order not to increase *mamzerim* in Israel” (*Responsa Ta'alumot Lev III 49*).

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

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<sup>33</sup> This was, I understand, the attitude in the whole of Poland where it was impossible to collect money for a *kolel*. It is also known that R. Yoel Teitelbaum of Satmar abandoned his total opposition to the *kolel* only towards the end of his life.

conditional marriage.<sup>34</sup> R. Pipano wrote the formula for a *ketubbah* for conditional marriage in accordance with the Constantinople proposal.<sup>35</sup>

**Rabbi Mosheh Schochet** proposed<sup>36</sup> 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 goes so far as to declare: **“For it is certain that there is a definite assumption ( אומדנה דמוכח ) that she did not marry on such an understanding” and therefore even if no explicit condition was made at the time of the marriage [the marriage would be retroactively annulled].**

In 1936, **Rabbi David HaKohen Sakali** (*Rosh Bet Din* in Oran, Algeria) advocated in a *responsum*<sup>37</sup> 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 they 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 proposals have so far failed to convince the majority of the *Gedolim* and as a result all of them have been shelved but surely the need for a global solution in this area is greater 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 the wives and, in the cases of *get-refusal*, by the husbands, are as severe as, and usually more severe than, those avoided by *Prozbul*, *Heter 'Isqa* and *Mekhirat Hamets*.

<sup>34</sup> See Freimann, *ibid.*, 391, second paragraph.

<sup>35</sup> *Responsa Nose' Ha'Efod* no. 34, published at the end of the book *'Avney Ha'Efod* vol. 2, Sofia 5688.

<sup>36</sup> *Responsa 'Ohel Mosheh* no. 2.

<sup>37</sup> *Responsa Qiryat Hanah David* II 155-58.

Additionally, in the specific area of women's rights the following should be noted:

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. According to some, this includes coercion in a case of the *moredet me'is 'alai*. According to those who understand the coercion in the latter case to be an enactment of the Sabora'im/Ge'onim, 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.
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) - the *herem* of Rabbenu Gershom which was a prime example of striking a balance between competing demands of the Torah – the demands for the sanctity of marriage and the demands for righteousness in interpersonal behaviour.<sup>38</sup>
3. The enactments 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.

Cf. also the countless examples of abrogation of Biblical Law by rabbinic enactments, in the spiritual and material interests of Israel (*ET XXV Yesh koah beyad hakhamim la'aqor davar min haTorah*, cols. 607-48).

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

One should perhaps point out that the *heter 'isqa* permits even biblical *ribbit* which would, without the *heter*, exclude the perpetrator from the Resurrection – 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

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<sup>38</sup> Cf. the rationale by a 14<sup>th</sup> 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."

On the other hand, we have the rationale of the Rosh (*Responsa* 42:1) for the *herem* of Rabbenu Gershom which enacted exactly what R. Avraham forbade:

"...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*.

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,<sup>39</sup> remains the question: Is the situation of *'iggun* grave enough to justify (halakhically acceptable) tampering with marriage also?

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<sup>39</sup> Last but one paragraph of his introduction to Berkovits's *Tenai BeNissu'in UvGet*.