Agunah:

The Manchester Analysis
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### Abbreviations

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<tr>
<td>ARU</td>
<td>Agunah Research Unit Working Paper</td>
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<td>EH</td>
<td>'Even Ha’Ezer</td>
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<td>ET</td>
<td>Encyclopediah Talmudit</td>
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<td>ETB</td>
<td>'Eyn Tenai BeNissu ’in, Vilna 1930 (R. Yehudah Lubetsky, ed.)</td>
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<td>M.</td>
<td>Mishnah</td>
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<td>OH</td>
<td>'Oraḥ Ḥayyim</td>
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<td>PDR</td>
<td>Piskei Din Rabbani’im</td>
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<td>T.</td>
<td>Tosefta</td>
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<td>TBU</td>
<td>Tenai BeNissu ’in UveGet (Berkovits)</td>
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<td>Y.</td>
<td>Talmud Yerushalmi</td>
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<td>YD</td>
<td>Yoreh De’ah</td>
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NB: The contents of this book are purely theoretical. Practical questions must be submitted to those with the appropriate Orthodox halakhic authority

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“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 …”

Rabbi David Pipano, Sofia, Bulgaria

*Responsa Nose’ Ha’Efod, responsum 34*  
(5688/1927-28)
Key Points

A General Issues

1 We argue that a woman should be defined as an agunah whenever she has not received a get within 12 months of a bet din having at least recommended (by hamalatsah) that the husband grant it (assuming that the bet din spends no more than 12 months seeking shalom bayit). We would also include within the definition of agunot women who submit to extortionary conditions in order to receive a get (§1.5).

2 We seek a “global” solution, meaning one which ideally has the capacity to prevent the problem from arising at all, or at least will resolve it in all cases. Such an objective is not, however, best served in current conditions by a single (“one size fits all”) solution; rather, we may need a set of solutions which solves the problem for all, though not necessarily by the same means (§1.6).

3 This entails consideration of the position also of non-Orthodox Jews (whose children may become more traditional: the phenomenon we describe as “upwards religious mobility”). Already in Israel remarriages after a Civil or Reform marriage are often permitted even if a get (lehumrah) is not possible (§1.11).

4 The problem of recalcitrance is regarded by many as one of morality, in that it allows a sinner to be rewarded (pot’ e niskar: see M. Hall. 2:7), and thus jeopardises the reputation of the halakhic system as a whole. As such it can be remedied only by internal, halakhic measures. Indeed, the concept of killul haShem means not only that everything must be done within the Halakhah as at present fixed to avoid the desecration of disrepute brought upon the Torah itself in the eyes of a well-informed and morally critical world (as well as within Orthodoxy itself) but also that psak Halakhah should itself be affected by such considerations, as seen from an argument of the Hazon Ish (§1.16).
On insisting on his “rights”, in the face of a decision of the bet din, the husband is either violating a commandment (if there has been a ḥayyuv), or at least acting (if there has been a mitsvah or hamlatsah) shelo kehogen. Consideration should be given here to the applicability of kofin al midat sedom (abuse of rights), whose very origins appear to lie in the halakhah of ḥalitsah (§§1.24-25).

Those who support the “right” of the husband to impose financial and other conditions on his granting the get rely on an argument from Maharashdam, but the scope of this teshuvah is limited and in any event represents an insubstantial minority opinion, by which we are not bound (§1.27, and see section B1-2 below, on the ḥamraḥ shel ʿeshet ʿish).

Despite arguments that any solution to the problem of ḥaggun would undermine the stability of Jewish marriage, the issue has no necessary connection with that of the grounds for divorce (§1.5).

**Issues of Authority**

In deciding whether a situation of ḥaggun has arisen, we are in principle bound by the ḥamraḥ shel ʿeshet ʿish, but this, insofar as it may require that we take into account even a single stringent opinion, appears to be a modern innovation, of purely customary or, at most, rabbinic origin and status (§2.7). Moreover, analysis of a teshuvah by R. Moshe Feinstein (Iggrot Moshe, EH I, 79) leads to the conclusion that insubstantial minority halakhic opinions, even in matters of ʿerwah, need not be considered (§2.9 and Appendix A to Chapter Two). See also Rabbi Yitzhak Elkanan Spektor of Kovna: Ein Yitzḥak, Even Haʾezar 1, 62, Sections 7-8.

Once a situation of ḥaggun has materialised we need not take account of stringent minorities, as is confirmed in a decision by Rabbis Hadayah, Elyashiv and Zolti in Piskei Din Rabbaniyim (§2.14). Moreover, in the absence of a solution to an ḥaggun situation according to rov poskim, we may rely on lenient minority views and even on a lone opinion (§§2.11, 6.5).
Key Points

3 There is a controversy regarding the applicability of the rule of rov where no face-to-face meeting has taken place (Taz v. Shakh). On such a view, the matter is one of safeq (§§2.8, 11).

4 There is authority for the applicability of the doctrine of sfeq sfeqa even in giddushin and gittin (§§2.22-23).

5 Since the doctrine of sfeq sfeqa clearly includes factual as well as halakhic doubts, there is no reason why it may not be applied to historical facts (§2.27: particularly relevant to the issue of coercion, below).

6 In a situation of “urgency” (she’at hadelag) – a category lower than that of “emergency” (tsorekh hasha’ah) – it is generally accepted that leniencies may be adopted (§§2.38-41), including permitting lekhatzillah what otherwise would be permitted only bedi’avad, following a minority opinion and even a lone lenient opinion (according to the Taz), despite the fact that a biblical prohibition may be involved (§6.5).

C Conditions

1 The use of the condition of R. Yoseh (found in the Palestinian Talmud) relating to a marriage failing because of “hatred” is claimed by the teachers of the teachers of Me’iri as having provided justification for the geonic measures of coercion. The fact that Ra’avya indicates that he had seen such a clause in ketubbot (§3.10) leads at least to a safeq regarding the use of terminative conditions today.

2 The major codes accept conditional marriage (§§3.19, 89), despite the talmudic maxim ‘eyn inai benissu’in. The booklet edited by R. Lubetsky, bearing that title, was written in the context of the proposals of the French Rabbinate, which eliminated any role for the bet din in the operation of the condition, and should not be taken as entailing any general ban, as argued by R. Berkovits. Tosafot explain the maxim as meaning only ‘Eyn regilut lehatnot benissu’in (§3.18).
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3 The fear of be’ila zenuif qiddushin is retrospectively terminated is contested, as argued particularly by R. Uzial R. Eleazar in a baraita in Yebohot 61b excludes zenu when cohabitation was leshem ishat (§3.49).

4 Where the fear of be’ila zenu prompts an assumption that any marital intercourse revokes any antecedent condition, the latter may be safeguarded by oath, and perhaps by making the marriage conditional also on observance of the oath (§§3.65-66).

5 Ultimately, there is a need for a taqanah of gedoley hador making any such tna standard (tnai bet din) (§3.81).

6 A substantial number of proposals for forms of conditional marriage have been made by reputable posqim in the 20th century (§3.82). Of particular interest are those by Rabbis Pipano, Henkin and Uzial.

7 As regards conditions, we assume that the condition is one which accords a role to the bet din, as opposed to the French conditions against which ‘Eyn Tnai BeNissuin was directed. Conditional marriage (qiddushin and nissuin) would be effective according to the vast majority of posqim provided that the Halakhat is meticulously adhered to both in the substance and form of the condition. It would be possible to neutralise the opposition to conditional marriage on the bases indicated in chapter two (the status of minority opinions in areas of doubt, or reliance on she’at haledaq). However, a better strategy may be to combine conditions with other remedies, in a way which will invoke sfeq sfeqa (§§3.90, 6.7).

D Coercion

1 Rabben Tam accepted me’is ‘alay as a grounds for divorce (even justifying harlapot), though not for (the Geonic) kefiayah (§4.51), and some authorities (e.g. R. Hayyim Palaggi) accept a period of separation as sufficient evidence for termination of the marriage (§§1.29-30).

2 There are substantial doubts regarding Rabben Tam’s rejection of kefiyah for the mordet me’is ‘alay, as regards:
Key Points

(a) the interpretation of the sugya of moredet, and particularly its final conclusion (§§4.7-16);
(b) the variant text of Amemar in Ketubbot 63b (§4.7);
(c) Rabbenu Tam’s own position (§§4.34-36);
(d) the degree of acceptance of kefiyot by the Rishonim both before (§4.33) and after Rabbenu Tam, often following inter alia Rambam (§§4.40-42, 45-46), the ’Abronim (§4.54) and modern posqim (R. Herzog, Dayan Waldenburg, R. Yosef: §§4.57-60);
(e) the issue of whether the position of the Shulhan Arukh needs to be reviewed in the light of the position of Rashbetz, not available to R. Karo (§4.48).

Thus a coerced get, even though considered insufficient by itself, would significantly contribute to a sfeq sfeqa argument (§4.77).

There are also issues as to what measures the Ge’onim actually authorised. Important here is the interpretation of these measures by the Rosh as a form of hafa’ah (§§4.22-24).

We may also ask to what exactly the husband must consent: the get procedure or the termination of the marriage. Both Rabbenu Yerohem and R. Moshe Feinstein appear to take it to be the latter (§§4.61, 89). On this view, a get may be coerced where the husband consents to the divorce, even if he does not consent to participation in the get procedure.

We may also ask when must the husband consent to the get? There is an argument that he may, at the time of the qiddushin, make a non-revocable agreement (supported by an oath) for the writing and delivery of a get, to take effect on stated conditions.

There is a sfeqa whether a woman remarried on the basis of a get me’useh (procured shelo kadin by a bet din) need leave her new husband (§4.70). In effect, some may regard such a get me’useh as valid bed’avad. In any event, it may at least count as a get kol dehu for the purposes of the view (E1, E3 below) that hafa’ah may still be available if accompanied by a get.
Annulment

There is enough authority (including that of R. Ovadyah Yosef) in favour of the use of hafqa’ah today, provided that it is accompanied by a get (even a get me’useh), to constitute at least a safeq (§§5.51-52, 6.9-10), especially if the contemporary situation is regarded as one of she’at hadedaq.

Moreover, a series of mediaeval taqkanot hagahal added new requirements for a valid qiddushin, failure to comply with which resulted in hafqa’ah (§5.36) at the time of the qiddushin itself, and even Rivash’s reluctance to endorse such a measure lema’aseh did not apply where there were haskamot representing a (local) consensus (§5.37). Maharam Al Ashqar (§5.38) and other 15th and 16th cent. authorities (§§5.39-40) still accept that such enactments may be adopted in practice. This would enable the gedolei hador to require that all future qiddushin be made subject to an appropriate condition against ‘iggun, on pain of hafqa’ah.

There are different approaches to the respective roles to be accorded to the spouses on the one hand, the bet din on the other, in relation to hafqa’ah. On the one hand, some proposals give the bet din a “strong” discretion to annul the marriage when they think it appropriate to do so (so interpreting kol haregaddeh ada’ta’ derabbanan megaddesh); others prescribe very specifically the circumstances in which annulment (authorised by a condition) may occur (for example, R. Pipano: §3.83), thus assuming a form of “partnership” between the spouses and bet din in the termination of the marriage (§5.66), and thus reducing the force of the basic objection that annulment violates the biblical principle that termination (other than by death) involves an act of the husband. The basic objection is further met when the hafqa’ah is accompanied by a get kol dehu (§§5.14, 6.24).

The concept of ’umdena has elements of both conditions and annulment (§§3.75-80) and in many cases would provide a sufficient basis, supported by practice, for the declaratory annulment of marriage.

Proposals

We favour maximum transparency as regards the grounds for divorce, the definition of recalcitrance and the halakhic authority for all elements in any
solution, for both halakhic and public policy reasons (§§6.16-18, 6.34-37). This entails the creation of mechanisms (§6.36) for providing all couples, in advance of marriage, with full information regarding the risks they undertake in entering any particular arrangement (including traditional qiddushin unaccompanied by any special conditions).

We advocate a pluralistic approach in which communities accept that more lenient stances than they themselves adopt should be recognised to the extent that they do not inhibit the religious mobility of the children of the more lenient communities. Where the doctrine of sfeq sfeqa is available, but is not applied, any ḥamrot are discretionary rather than mandatory. Failure to comply with them is thus not violation of an issur (so that children born of a second union, after termination of the first in circumstances of sfeq sfeqa, would not be mamzerim: §6.54). Thus such children should be acceptable (bediavad) even within communities which do themselves apply such ḥamrot (lekhatḥillah). This creates the possibility of an “incremental” approach, particularly given the phenomenon of “upwards religious mobility” (§§6.29, 38).

Such an “incremental” approach may commence with the adoption by (no doubt, initially) a minority of Orthodox communities of a form of qiddushin which incorporates elements of conditional marriage, an advance get and annulment, combined in a form designed to take advantage of sfeq sfeqa. Our preferred formula is set out in §§6.48-53. Naturally, the ideal would be for it (or something comparable) to be endorsed and made mandatory for all qiddushin by a taqqanah of the gedolei hador. In the absence of any immediate prospect of such a taqqanah, our pluralistic and incremental approach advocates that particular communities adopt it, on the basis of appropriate halakhic authority (which this Report, of course, does not claim). Assuming a continuation of the present phenomenon of “upwards religious mobility”, this will result in presentation, bedi’avad, of the results of the “combined solution” when second generation children present themselves for marriage in (or, when already married, wish to join) more traditional communities. Acceptance bedi’avad may in time lead to acceptance lekhatḥillah even within such communities, thus paving the way for an ultimate “global” taqqanah (§§6.54-62).
Chapter One

Introduction

A. The Agunah Research Unit

1.1 The Agunah Research Unit was founded at the University of Manchester in 2004 and concluded its work in 2009. Its personnel consisted of Professor Bernard Jackson (Director), Rabbi Dr. Yehudah Abel (Senior Research Fellow), Dr. Avishalom Westreich (Postdoctoral Research Fellow), Dr. Shoshana Knol and Mrs. Nechama Hadari (none working full-time for the whole period). We are indebted to a number of foundations, charitable trusts and individuals, who have supported our work, notably the Leverhulme Trust, the Rothschild Foundation Europe (formerly Hanadiv), the British Academy, the Harbour Charitable Trust, the David Uri Memorial Trust, the Steinberg Family Trust, the Davidson Family Trust, Mr. Romie Tager QC, Mr. Ralph Shaw and the late Dr. M. Ish-Horowicz.

1.2 We have been assisted at various times by a number of visiting Rabbis and Scholars, including R. Yehezkel Margalit, Rabbi Professor Daniel Sperber, Professor Elimelekh Westreich and a distinguished group of senior Rabbis and scholars who participated in a private feedback workshop in July 2008. We thank all who have interacted with our work, both in Manchester and at conference/seminar presentations. Naturally, we alone are responsible for the report which follows.

1.3 This report seeks to synthesise and develop a substantial body of Working Papers published on our web site (http://www.mucjs.org/publications.htm) in the course of our work.


2. Bernard Jackson, “Agunah and the Problem of Authority: Directions for Future Research”, Melilah 2004/1, pp.1-78 (a much expanded, fully documented version of the above
Chapter One: Introduction

lecture, available in both pdf (Acrobat) and Word versions).


10. Avishalom Westreich, “‘Umdena: Between Mistaken Transaction (Kidushay ta’ut) and Terminative Condition” (Working Papers of the Agunah Research Unit, November 2008): http://www.mucjs.org/Umdena.pdf


14. Yehudah Abel, “Herut ‘Olam” (London 1928) by Rabbi Yosef Shapotshnick” (Working Papers of the Agunah Research
24. Bernard Jackson, “Key Points from Agunah Report”. This 5-page Executive Summary is available in both English (http://www.mucjs.org/KeyPointsEng.pdf) and Hebrew (http://www.mucjs.org/KeyPointsHeb.pdf)
Chapter One: Introduction

These papers are cited in what follows by Working Paper and page numbers (plus paragraph numbers where applicable), in the format ARU 12:21, 16:103, etc. Naturally, there are some differences of view and emphasis amongst the members of the research team, even as regards aspects of “the Manchester solution” (§§6.49-50), which are reflected in the above papers and will be apparent also in the individual team member books being published by the Unit in this series.

1.4 The internet version of our report was labelled “draft”, and is now replaced (though remaining available on the internet) with the present print version. Updated versions of the papers of the individual team members are found in their respective books in this series.

B. The Problem and the Search for a “Global” Solution

1.5 Our objective has been the search for a “global” solution to the problem of get recalcitrance (women in the position of mesurevot get, a particular aspect of the problem of ‘iggun). But what, precisely, is the problem? Its definition is a major issue in itself, and the reason for the vastly conflicting claims regarding the number of ‘agunot – at one extreme counting all women who have not been granted a get irrespective of the grounds on which they claim it; at the other, counting only those women to whose husband the bet din has issued a hyyuv (or even kefiyah) order which he has ignored for a substantial period. Since betey din are reluctant to issue such orders, they can themselves limit the number of women who meet that definition. There is moreover a deeper question which informs the issue: is the problem perceived to be that of the

1 Other than the parallel existence of civil marriage and divorce, there is little in our present difficulties which is inherently modern or new. Contrary to some contemporary voices, the present difficulties already existed long before the introduction of civil marriage and divorce. Nor can we blame our present predicament on inhibitions against beating the husband deriving from secular criminal law; the halakhic problem of when kefiyah is permissible is quite independent of such external constraints: see further ARU 2.4-5 (§1.4).

2 On the grounds for divorce, see §§1.29-35 below.


4 Using the criterion of delay (irrespective of whether a hyyuv has been granted), R. Halperin-Kaddari and I. Karo, Women and Family in Israel: Statistical Bi-Annual Report (Ramat Gan: Rackman Center for the Advancement of Women’s Status, Bar-Ilan University, 2009), found that of couples granted a divorce in 2006, 6208 couples (about one eighth) had begun divorce proceedings four or more years earlier (cited by Gordon and Levy (n.3 above), at note 59).
“chaste”) wife who complies with the halakhah and suffers in her “chains”, or is it that of the (“unchaste”) wife who breaks the halakhah by entering into a new relationship despite not having received a get and thereby commits adultery and may give birth to mamzerim? It is apparent that many dayanim regard the case of the suffering (but halakhah-compliant) wife as less serious than that of the defiant (non-halakhah-compliant) wife, partly because there has been (in their view) no breach of the halakhah in the former case, partly for humanitarian reasons directed to the children on the other. We would argue that a woman should be defined as an ‘aganah whenever she has not received a get within 12 months of a bet din having at least recommended (by hamlatsah) that the husband grant it (assuming that the bet din spends no more than 12 months seeking shlom bayit). We would also include within the definition of ‘aganot women who submit to extortionary conditions in order to receive it (though here the remedy must lie in reversal of such conditions, including repayment of any money paid).

1.6 By a “global” solution, we mean one which ideally has the capacity to prevent the problem from arising at all, or else will resolve it in all cases. We have, however, come to realise that this objective is not, in current conditions, best served by a single (“one size fits all”) solution. This conclusion follows from the characteristics of the global Jewish community on the one hand and the nature of the “remedies” on the other. In what follows, therefore, the objective of a “global” solution is understood as a set of solutions which solves the problem for all, though not necessarily by the same means.

B1 The global Jewish community

1.7 The global Jewish community is characterised by its diversity. Not only are we faced by the divide between “Orthodox” and “Progressive” communities; many argue nowadays that the principal fault-line is that between modern Orthodox (or, in Israel, Religious Zionist) and the haredi community. Very often, the differences between them relate not to

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5 Thus, the magiah of R. David Pipano’s responsa (§3.81, below) writes that “amongst these ‘aganot 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 ...”

6 Thus, J. Wieder, “Hafqu’at Kiddushin: A Rebuttal”, Tradition 36/4 (2002), 41, comments: “The probability of the entire Haredi community agreeing to R. Riskin’s solution, be it because they don’t see the problem or because they cannot swallow the solution, is somewhere between slim and none, with slim having left town.”
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Theoretical issues of halakhah, but rather to ma’aseh, the permissibility of their practical implementation (see further below, §2.1). Such differences themselves often reflect differences in values, sometimes referred to as “meta-halakhic” issues. Much of this chapter is devoted to such issues. They have to be taken seriously. Nor is it a matter of imposing the values of one section of the community on another; rather, the ultimate criterion of a global solution (defined above as “a set of solutions which solves the problem for all, though not necessarily by the same means”) is that it does not threaten klal yisra’el, in that intermarriage between the different communities remains halakhically permissible, notwithstanding their different halakhic practices. Thus we are told that Orthodox courts in the US will permit remarriage (without a get) to women whose original marriages were non-orthodox.

1.8 Quite apart from differences between the religious makeup of different communities worldwide (here discussed mainly in terms of the differences between Israel and the US), other factors impede the adoption of any “one size fits all” solution. One is the religious monopoly over marriage in Israel; another is the relative decentralisation of rabbinic authority in the US, as contrasted with Israel. Both factors impinge on the issues of authority discussed in Chapter Two below.

1.9 In the Israeli context, the religious monopoly creates particular problems: the rabbanan is faced with the application of the halakah to communities with distinctly different attitudes to that halakah. Feldblum has argued that the very validity of qiddushin in the case of non-observant women is doubtful, on the grounds that there is umdana demukhakh that non-observant women do not agree to religious Jewish marriage because of the aspect of kinyan. Accordingly, he proposes that non-observant couples

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8 Where, it has been argued, orthodoxy is an option to which many are attracted because of qiddushin.

9 Not universally supported even within the religious establishment: the former Sephardi Chief Rabbi Eliyahu Bakshi-Doron has argued in favour of the introduction of civil marriage in Israel: see “Hok Nissu’in veGerushin – Hayatsa Secharo Behesedeto?”, Tefumin 25 (2005), 99-107.

use “derekh qiddushin” instead of the usual qiddushin. Others, too, have argued that the rabbinate is capable, in theory, of making arrangements for the non-observant community which would eliminate the possibility of ‘iggun. Thus the possibility of a contract of concubinage (pilagshut) between the partners, with alternative formulae for its creation and dissolution, has been discussed: there would then be no requirement of a get for the dissolution of the partnership. Indeed, it has been suggested to us that contemporary posqim may be more inclined to leniency if the problem of ‘iggun were indeed confined to observant women.”

1.10 It is the insistence of some posqim on a “one size fits all” approach (i.e. imposition of their own tumrot on the whole community, refusing to distinguish between religious and non-religious women) that aggravates the contemporary problem. Yet this in itself implies that such an approach, entailing the creation of ‘agunot with its risks of adultery and mamzerut, is preferable to (entails “less sin” than) a pluralistic approach which both addresses the problem within traditional qiddushin and which incorporates forms of union which, though recognised by the halakhah, fall short of traditional qiddushin. One has to ask whether such an evaluation reflects religious politics more than halakhic values. Yet even in terms of religious politics it may prove shortsighted. It is claimed that many couples return to Judaism after the sanctity of qiddushin is explained to them. That possibility is currently inhibited by the absence of a generally acceptable solution.

1.11 Even the rabbinic monopoly in Israel has a serious gap: it applies only to marriages conducted in Israel itself. A substantial number of non-observant Jews prefer to marry in Cyprus or elsewhere rather than submit to rabbinical jurisdiction, though even in such cases the rabbinical courts have assumed a jurisdiction in divorce.” Thus even in Israel there is a need to grapple with the problem of those who marry outside any

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11 See further below, §6.47. Of course, some non-observant couples will (continue to) opt not to marry at all or to marry only civilly (where available). A global solution must address the ultimate Orthodox marriageability of the children of all types of non-qiddushin unions. On the implications of the desire of non-religious couples for a definite married status (if not qiddushin), see ARU 18:20-21.


13 In part, reflecting the sentiment of Rashbets (II 8) – “If she were their [daughter] they wouldn’t have spoken so.”

14 See n.7 above, and Bagatz 2232/03.
(explicit) halakhic institution. It is claimed that where the marriage ceremony was civil or Reform and the case is one of ‘iggun, all batey din are accustomed to permit remarriage without a get (if they cannot obtain a get lehumra), in spite of the assumption that אַלּ אַלָּ אָבְדֶךָ בְּעַלָּ בֵּיתָם. The implication must be that account is to be taken of the differences between different communities in their attitudes to zenut. That in itself entails rejection of “one size fits all”. It is difficult to see why the same approach may not be applied within the observant community.

B2  The nature of the “remedies”

1.12 Though much of the literature seeking halakhic solutions to the problem of the recalcitrant husband debates the relative merits of three broad approaches, conceived as distinct “remedies” – the use of conditions (whether in marriage or divorce), coercion (in its various forms) and annulment (on whatever grounds) – further analysis indicates the close interaction of these remedies, in both historical-conceptual terms and in practice. At root, the issues resolve into two basic questions: (a) how and when may a bet din secure the release of the wife in the absence of an uncoerced get delivered by the husband?; (b) what role is open to the married couple in providing the bet din with the authority to secure such a release? This “interaction of remedies” informs much of the discussion below, even though separate chapters are devoted to the problems of conditions, coercion and annulment, respectively.

1.13 We may note in this context that the principal justification of annulment

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16 Thus the relationship between annulment and coercion is expressed both in the proposition that annulment is possible only in the presence of a get (§§.5.1-54) and the fact that annulment is frequently cited as an additional support for other means of terminating the marriage, such as a compelled get: ARU 11:1-2. For the view that coercion is itself ultimately based on the authority to annul, see R. Shear-Yashuv Cohen, “Kefiyat Haget Bizeman Hazeh”, Tetumim 11 (5750), 198 (based on Radbaz); see also Shut HadRadbaz I, 187, arguing that a coerced get is a valid get because the husband really wishes to do what the Sages say: פִּיךַ בִּרְאָס הַיָּדוֹת (either reflecting the basis of annulment in אֲמִיתָא דַּתְכִי or the Maimonidean justification of kefiyah).

17 This is one of the functions of “conditions”, as appears to have been recognised by the Ge’onim, if we accept the view of the teachers of the teachers of Mei’ri, as discussed in §§3.9-16 below.

18 See earlier ARU 2:65-68 (§5.3); ARU 8:2-3, 36-37 (§§1.5, 7.1-7.2), updated in chs.3-5 below.
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(kol hameqaddesh ‘ada’ta’ derabbanan megaddesh) is that it is based on
an implied condition,” and that the mediaeval taggananot establishing
annulment for breach of additional requirements of qiddushin –
themselves viewed as acts by which the people in effect adopt new
standard conditions (tr’ei bet din) in their own future marriages –
increasingly require that the powers there assumed to implement
annulment be made explicit (§3.91). The same principle may be applied to
conditions in individual marriage contracts.

B3 The nature of halakhic authority

1.14 The very nature of halakhic authority also militates against the adoption
of a “one size fits all” solution. Modern mishpat ivri scholars seek to
understand halakhic authority in terms of secular jurisprudence, where
systemic rules about authority are commonly termed “secondary rules”
(following Hart). They include “rules of recognition” and “rules of
change”, which provide criteria for recognising the validity of existing
rules on the one hand, changes in rules on the other. In some secular legal
systems, such “secondary rules” are defined in a Constitution. Not so in
Jewish law. As Rabbi Abel’s paper (ARU 7) demonstrates, they are
subject to substantial uncertainties, and are on occasion “honoured in the
breach”. Not only does Jewish law lack a legislature; its “rules of
recognition” of what is binding halakah are themselves subject to
debate,” nor is there at present a supreme adjudicatory body, recognised
by all, capable of determining such issues. Moreover, a distinction
between what is permissible in theory (lehalakah) and what is
permissible in practice (lem’aseh) has become commonplace19 and there
is little attempt to define criteria for what is permissible lem’aseh

18 For sources basing annulment on conditions, see R. Shlomo Riskin, “Hafla’at Kiddushin:
Towards Solving the Aguna Problem in Our Time”, Tradition 36/4 (2002), 15, quoting, inter
alia, Maharam of Rothenburg, in Mordekhai, Kiddushin 3:522. “At the time of betrothal he did
nothing wrong, and we judge him according to that time, and say that he betrothed her on
condition that if he later violates a rabbinic regulation ... his betrothal will not be valid.” See
further §§3.82, 85-86.
19 See B.S. Jackson, “Mishpat Ivri, Halakah and Legal Philosophy: Agunah and the Theory of
“Legal Sources””, JSJ - Jewish Studies, an Internet Journal 1 (2002), 24-26 (§4.1), at
20 For example, the very status of the rule of following the majority (rov), and the dispute over
whether it applies in the absence of a face-to-face debate. See §§2.8, 11, below.
21 We are not aware of any parallels in other legal systems. Of course, the American Realist
School of Jurisprudence has emphasised the distinction between what courts do (or do not do)
and what they say, privileging the former in their definition of law. The halakah, however,
goes further, in according the distinction doctrinal status. See, however, n.162, below.
(although, against this, we must balance the availability of a more permissive approach to ma’aseh, in the form of the distinction between lekhattullah and bedi’avad). Issues of authority thus become questions of “whose authority”, and the answer to such questions cannot be given in institutional terms. Rather, they admit of only “personal” (rebbe-type) responses: who are the recognised posqim/gedolei hador of the age, and does any one of them enjoy such pre-eminence that his psak will be accepted by all? The latter question is rarely answered in the affirmative. Questions of halachic authority thus themselves depend upon the particular community to which one belongs, and thus to whom it is anticipated that problems and disputes will be submitted. That in turn may determine the type of remedy to 'iggun which is proposed. Little is lost by such a “pluralistic” approach, provided that an ethos of mutual respect and recognition, as in the traditional view (fortified by a horam of Rabbenu Tam against questioning the get of a qualified Rabbi) that batey din recognise each other’s gittin, is maintained. Sadly, however, there are indications, particularly in the sphere of gerut, that this ethos is currently being challenged. If that prevents intermarriage between different halachic communities, then the objective of a global solution (even as here defined) fails, and thus the unity of klal yisrael is compromised. The best that could then be achieved would be a set of solutions each with a “local” sphere of application. But this, we argue, may prove a vital step in an incremental process towards a truly “global” solution.

C. Jewish law and secular law: the need for a purely “internal” solution

1.15 Our entire work has been devoted to the search for a purely “internal” (halachic) solution, rather than one dependent upon support from the institutions of secular law. That is not because the halakhah rejects in principle all recourse to secular law: a well-known Mishnah provides criteria for the validity of a get even when coerced by gentile authorities,23 So that measures which would be rejected if sought in advance may be recognised ex post facto (bedi’avad). There is authority for the use of this doctrine even in the case of a get me’aseh: see ARU 6:11-12 (§6.7) and §§4.70, 6.43, below.

24 For an interpretation of this horam as a measure designed to reinforce the judicial hierarchy established in France by Rabbenu Tam, see A. Reiner, “Rabbinical Courts in France in the Twelfth Century: Centralisation and Dispersion”, Journal of Jewish Studies LX/2 (2009), 298-318, at 313 (with citation of his earlier studies in Hebrew).

Mishnah Gittin 9:8 (88b): “A bill of divorce given by force (get me’aseh), if by Jewish authority, is valid, but if by gentile authority, it is not valid. It is, however, valid if the Gentiles merely beat (bivin) the husband and say to him: ‘Do as the Israelites tell thee’. On this, see further ARU 17:135-37.
and an attempt has been made recently in Israel to use state action, authorised by the principle of dina’ demalkhuta’ dina’, in order to circumvent some of the halakhic objections to the contemporary use of annulment. Rather, it is for a combination of moral and pragmatic reasons.

1.16 The situation of the ‘agunah in general, and the practice of extortion in particular, represent a manifest ḥillul haShem, a fact which itself provides a basis for halakhic change. We are justified in invoking the concept of ḥillul haShem in the light of the disrepute brought upon the Jewish people and the Torah itself in the eyes of a well-informed and morally critical world – in large parts of which women enjoy full equality before the law – by the irony of a divine Law (whose ways are ways of pleasantness and all of whose paths are peace: Prov. 3:17) being harnessed as the very instrument of oppression. The problem of recalcitrance is regarded by many as one of morality, in that it allows a sinner to be rewarded (ḥal’ea niskar: see M. Hall. 2:7), and thus jeopardises the reputation of the halakhic system as a whole. As such it can be remedied only by internal, halakhic measures. Indeed, the concept of ḥillul haShem means not only that everything must be done within the Halakhah as at present fixed to avoid the desecration of disrepute brought upon the Torah itself in the eyes of a well-informed and morally critical world (as well as within Orthodoxy itself) but also that psak Halakhah should itself be affected by such considerations. In support of this, we may refer to the remarkable suggestion of Hazon ‘Ish,” who discusses a ruling of Rambam apparently contradicting the Talmud (B.K. 38a), which records that an Israelite is

27 See further ARU 2:6-7 (§1.5) and n.26.
28 R. Abel recalls that some years ago he was asked to address a group of teenage orthodox Jewish girls in Manchester on a topic of his choice. Instead, he decided to allow the audience to decide the topics. The first question was: “Why are women second-class citizens in Judaism?”
29 See also the words of the magia to R. Pipano’s teḥuvah, quoted at ARU 13:18 (§70-77), ARU 18:86-87: “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 say 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.”
30 Bava’ Qama’, section 10, sub-section 9.
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exempt from paying damages caused by his ox to the ox of a heathen even if the customary practice of the heathen society is to impose damages in such a case. Against this, Rambam states that the Israelite is exempt only if the custom of the heathen society is not to make owners liable for the behaviour of their beasts. Thus, once general society has raised its moral standards and expects its members to accept responsibility for their animals’ conduct, an Israelite living in that society must do no less and the relevant halakhah must be changed so that neither the conduct of the Jew nor the Law upon which that conduct is based shall constitute a billul haShem. Hazon Ish observes that this ruling of Rambam appears to be based on the view of R. Aqiva’ (B.K. 113a) who, in his dispute with other authorities, states that money owed by a Jew to a heathen who is unaware of the debt (so that non-payment will not cause a billul haShem) must nevertheless be paid (even if not required by dina’ demalkhutha’) “because of qiddush haShem”, i.e. because it is forbidden to fix the halakhah on any matter in a way that would be, by its very existence, a billul haShem and thus thwart the whole point of Torah and Israel, which is qiddush haShem. Of course, it may be argued that this example involves diney mamonot. But is ‘issur veheter any less subject to the moral imperative of qiddush haShem?  

1.17 The pragmatic reasons are twofold. First, such recourse – whether through enforcement of pre-nuptial agreements,” measures delaying secular divorce in the absence of a get,” exposing the recalcitrant husband to risks in respect of the (civil) divorce settlement,” actions for damages (in contract’ and now also in tort”), or the range of civil disabilities now available as sanctions in Israel” – is necessarily “parochial”, depending on the law of the particular jurisdiction in which any Jewish community

31 See further ARU 2:6 n.23. On the halakhic problems, see ARU 17:162-63.
32 See n.37, below.
33 Notably, the (controversial) second New York “Get” Law – the 1992 amendment of the Equitable Distribution Law of 1980, concerning the exercise by the Court of its power of “equitable distribution” of marital property. See further ARU 2:5-6 n.22.
34 See further ARU 2:6 n.23.
35 See further ARU 2:6 n.24; Judge Ben-Zion Greenberger’s July 2008 judgment, in the Jerusalem Family Court, File No. 006743/02; and now Appeal 1020/09 (2011) to the Tel Aviv Family Court (Judges Kovo, Rubenstein and Cherniak), affirming the decision of Judge Sivan, Tel Aviv Family Court (File 24782/98), as yet unreported. See, for the moment, http://www.cwj.org.il/home/cwj-news/telavivdistrictcourt/affirmsgetrefusalsautot.
resides. But not all ‘agunot live in jurisdictions with “get-laws”; that legislative route has to be pursued separately in every jurisdiction where Jews live, and even once legislated may not prove immune from change for quite external, secular reasons. Such reasons may be technical – as the fate of the “Jakobovits amendment” in England illustrates” – but they may also be overtly political, as may be seen from the abolition of religious arbitration in family law matters in Ontario in 2006, once the Muslim community sought to take advantage of it.37

1.18 Second, by their very nature, solutions reliant on recourse to secular law can at best provide “alleviations” rather than real solutions.

D. “Solutions” and “Alleviations”

1.19 We do not demean the sincere efforts of those who have sought to provide case-by-case alleviation, though the use of social (shaming38) and religious sanctions (extending even to the threat of withholding burial rights39) or through the use of secular law. Many women have cause to be grateful for such efforts, and in the absence of more systematic solutions they can only be welcomed and further encouraged. But the very nature of these

37 Family Law Act 1996, s.9(3-4), sponsored by Chief Rabbi Jakobovits; this whole Part of the Act, though it passed all its legislative stages, was never brought into effect for reasons unrelated to the get problem. Later, a similar provision was enacted (separately from any general divorce law reform) in the Divorce (Religious Marriages) Act 2002, a private member’s bill sponsored by Andrew Dismore M.P., and has been brought into effect. Under both the 1996 and 2002 Acts an order that a decree of divorce be not made absolute (in the absence of a get, though expressed in different language) “may be made only if the court is satisfied that in all the circumstances of the case it is just and reasonable to do so.” A stronger version, in which withholding the civil decree absolute would have been mandatory, had been proposed in 1990 by the late Dayan B. Berkovits (in his private capacity): see his “Get and Talaq in English Law: Reflections on Law and Policy”, in Islamic Family Law, ed. Chibli Mallat and Jane Connors (London: Graham & Trotman, 1990), 119-146, at 143-46. See further ARU 2/72.


39 On seiruvim and web sites which publish them, see ARU 2:5 n.17 (the web site there mentioned is now at http://www.getora.com/seiruvim.html).


41 R. Kurfstog, Head of the Johannesburg Bet Din, has indicated that his Bet Din included refusal to allow burial in Jewish cemeteries within the communal sanctions it was prepared to deploy: see International Jewish Women’s Human Rights Watch, Winter 2000/2001, Newsletter 99, pp. 2-3. See further ARU 2:5 n.19.
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remedies depends on human factors: neither social, nor economic, nor religious – nor even physical – pressure is guaranteed to work. The problem will continue to plague us until and unless we find solutions which either prevent the situation of get-recalcitrance from arising at all or provide a set of completely effective remedies (with global application) when it does arise.

1.20 The above forms of pressure, however, are all traditionally regarded as inferior to the use of inducements: the carrot (persuasion by payment) is preferred to the stick (coercion). The strategy of rabbinic encouragement to the family of the ‘agunah to “pay off” the husband in order to achieve a “voluntary” get is attested at least as early as the twelfth century. Indeed, Rabban Tam is not embarrassed to use the language of “bribery” in recommending it:

A case was once decided by me regarding someone who had betrothed the daughter of R. Samuel in Chappes. The one who had betrothed her was ordered to divorce her, and I arranged that they permitted [it] for him (יִסְכֶּהוּ לְשַוֵּר, i.e. they cancelled their ruling that he is obliged to divorce her), and [instead of this] they “bribed” him with money (��מְלָרַד אוּדִי) and goods [to get him to agree].

That language itself implies that the betrother is halakhically in the wrong.

42 Whether the physical coercion of the traditional kefyah or the imprisonment available under Israeli law. The case of the recalcitrant husband who preferred to spend 32 years of his life in an Israeli jail, and die there, rather than release his wife, is often cited. See Jerusalem Post, February 22nd 1997, and further ARU 2:25 n.106.

43 At present, even in the context of the relatively limited remedies provided by current PNA’s, there is a need for forum shopping. R. Jachter writes: “When choosing a Beit Din to resolve a potential problem of Igun, one should choose a rabbinic court which engages in a persistent and flexible manner to resolve problems of Igun. Similarly, the Beit Din designated in one’s prenuptial or postnuptial agreement should be one which is known for its proactive approach to resolving problems of Igun”: “Viable Solutions I”, http://www.tabc.org/koltorah/aguna/aguna59.1.htm.

44 Raban (R. Eliezer b. Nathan of Mainz, 12th cent.; Elon 1994:II.848C): “We advised her relatives to pay the young man some money to free her, and this is what happened.” See ARU 2:41 (§4.2.2) and n.183. In a responsa of Rosh (35:2; see further ARU 2:67 (§5.3.3)), discussed by Elon, the conclusion was: “it is advisable to appease and satisfy him with money to induce him to divorce her”, although Rosh does go on to say that if the man is not willing to accept money “I will support you in compelling him to divorce her”: Elon 1994:II.850f. See also Rosh, Responsa, Ketav 43:3, in n.754 below.

45 Sefer Hayasher leRabban Tam, as adapted from S. Riskin, Women and Jewish Divorce: the Rebellious Wife, the Agunah and the Right of Women to Initiate Divorce in Jewish Law (Hoboken, N.J.: Ktav, 1989), 98 (Heb.), 102 (Engl.). It is semantically possible that the here are words (persuasion), but the context points towards the translation in the text (flavoured by Riskin).
1.21 More recently, the issue has sometimes come to be conceived as one of the husband’s “rights” — in spite of the commonly accepted view that the halakhah is based on duties and responsibilities rather than “rights” (and quite apart from the very ambiguity of the concept itself). Yet even if the husband’s capacity to refuse to grant a get is conceived as a right, it does not follow that such a right is absolute (very few rights are) or immune from the ethical demands of the halakhah as expressed, inter alia, by such principles as lifnim mishurat hadin and hatov vehayasher. Indeed, R. Feinstein has argued that if a husband is willing to divorce his wife, but wants to retain the get as a bargaining chip, then even if he is forced to give up what he wanted to achieve by means of the get, his willingness to divorce renders the get valid.” As Hadari notes, this implies that the husband’s (legitimate) choice whether or not to remain in a marital

46 R. Izirer uses the language of “rights” (zekhut) in his argument in the Rabbinical High Court, (1.2.05) 9(4) DS 6.7, Appeal No. 022290027-21-1, following the Maharashdam, as quoted in a forthcoming article by Susan Weiss: “We will make it perfectly clear that the right [of a husband] to dictate the terms [of the divorce] is not only with respect to money matters, but also with respect to behavior, for example: that she should be prevented from eating certain foods, or wearing certain clothes. While the rabbinic court cannot order a woman to carry out these demands, such demands stand and are obligatory so far as they relate to the terms of the get, even in such circumstances that warrant obligating or compelling a husband to give a get. So long as these are conditions that the wife can fulfill, even though she may have no legal obligation to do so with respect to her ex-husband.” Cf. R. David Bass, “Hatsavat tena’im ‘al yeved bra’al hameyushav beget”, T’rumin 25 (5765 [2006]), 158-59. On the ideological background to R. Izirer’s position, see ARU 17:151.

47 E.g. Moshe Silberg, “Law and Morals in Jewish Jurisprudence”, Harvard Law Review LXXV (1961-62), 306-31; Aaron Kirschenbaum, Equity in Jewish Law Beyond Equity: Halakhic Aspirationism in Jewish Civil Law (Hoboken, New Jersey: Ktav Publishing House, Inc., Yeshiva University Press, 1991), 1-58, cited by Aaron Levine, “Case Studies in Jewish Business Ethics: Introduction”, http://www.jlaw.com/Articles/casestudiesintro.html, who writes: “Halakhah emphasizes duties over rights. Justice Moshe Silberg (Israel, 1900-1975) elaborates on this theme. One example that he gives is how Bet Din (Jewish court) treats a debt. Satisfaction of a debt is actionable, not primarily as enforcement of the creditor’s right, but as a means of compelling the debtor to fulfill his religious duty to pay off his debt. How Bet Din handles a debt is the prototype of Judaism’s whole system of legal obligations. Within the framework of a system that stresses duties over rights, it should come as no surprise that Halakhah allows a market participant little discretion to decide on his own that his particular duties do not apply to the situation at hand.”


49 Justice Englard, in an Israel Supreme Court case of 1997, is cited by Simon M. Jackson, “Kofin Al Midat Sedom in Modern Israeli Court Judgments. (Part 2)”, http://www.torahmitzvah.org/eng/resources/show/Law.asp?id=647, for the view that there is a clear ethical trend common to the Jewish legal tradition concerning the concept of ownership, whose aim is to limit a person’s control over his possessions.

50 ‘1jgrot Moshe’ Even Ha’Ezer 3:44.
relationship is different from asserting that he has an absolute choice at any given moment whether or not to give her a get."

1.22 In this context, two arguments of Rambam are particularly pertinent. First, his justification (distinct from that of the Ge’onim) of divorce for the moredet me’is ‘alay:

The woman who refuses her husband sexual relations – she is the one referred to as “the rebellious wife”. So we ask her why she is rebelling. If she says ‘because he is repulsive to me, and I am unwilling voluntarily to engage in sexual relationships with him,’ we force him to divorce her immediately, for she is not as a captured slave (תְּנַכֵּדָה) that she should be forced to have intercourse with one who is hateful to her.\footnote{See further ARU 17:166-68. Hilkhot Ishat 14:8. Cf. Resp. Tsemah Tsedeq 135, quoted by R. David Bass, Gerushin wa’Aginut li’t Naqudat Mabat ‘Ortoledoqri”, http://www.snunit.k12.il/seder/aganot/view.html: “In this matter (of me’is ‘alay) right is on his (the Rambam’s) side for she is indeed not as a captive that she should be made to have relations with someone who is repulsive to her as it is written (Proverbs 3:17) ‘Her ways are ways of pleasantness etc.’” Cf. ARU 16:32f. \footnote{Hilkhot Gerushin 2:20.}}

1.23 Second, we are entitled to ask in this context whether any “right” of the husband is limited by a concept of abuse of rights. This leads us to consider issues of motivation – which in fact are prominent in this area of halakhah.\footnote{Cf. ARU 16:32f.} Here, too, Rambam’s analysis is pertinent. His famous defence of kefiyeh is based on rejection of any motivation inspired by the yetser hara:

... he whose evil inclination (yetser hara) induces him to violate a commandment or commit a transgression, and who is lashed until he does what he is obligated to do, or refrains from what he is forbidden to do, cannot be regarded as a victim of duress; rather, he has brought duress upon himself by submitting to his evil intention.\footnote{Cf. ARU 16:32f.}

In short, if it is not the woman who is morally at fault, in seeking to get out of the original marriage in order to marry someone else, but if she claims me’is ‘alay precisely because it is the husband who is morally at fault in seeking to “chain her” (as, indeed, is the situation very frequently today, where the motivation is spite or blackmail), then in such circumstances even the Rosh argues that it is possible to follow a local custom and adopt coercion: “If [her husband’s] intent is to “chain” her (דָּבָא לְכָנְו), it is proper that you rely on your custom at this time to force...
him to give an immediate divorce.\textsuperscript{55}

1.24 On insisting on his “rights”, in the face of a decision of the bet din, the husband is either violating a commandment (if there has been a ḥy’yyu, or at least acting (if there has been a mitsvah or hamlatshah) shelo kehogen (the terminology used to justify annulment in the talmudic cases of abduction marriage).\textsuperscript{57} he is abusing the right he has to enter into a marriage which biblically may be valid despite the absence of true consent on the part of his wife.\textsuperscript{52} Motivation is also prominent in the mishnaic account of the woman’s grounds for divorce: they must not be a “cover” for an illicit motivation, that the woman notenet eynehah be’alaf.\textsuperscript{57} As for the husband, this issue raises a deeper conceptual question which we address in the course of this study (§4.90 and elsewhere): is the “right” of the husband to remain married (because this is what he wants?) or to keep his wife chained (even though he does not want to remain married) by refusing to participate in the procedure of termination?

1.25 May it not be said that in a huge number of cases, the insistence by a husband on his “rights” in fact masks a yetser hara of greed or spite? The concept of “abuse of rights” is not foreign to the halakhah, as is shown by recent discussions of kofin al midat sedom.\textsuperscript{57} Indeed, Kirschenbaum

\textsuperscript{55} Resp. 43:8, p.40b, Riskin 1989:126 (Heb.), 128 (Engl.). See further §4.35, below; ARU 2:29-30 (§3.5.2), and ARU 18:53, noting that R. Ovadyah Yosef, in his article “Kol Hamepaddesh ada’ta’ deRabbanan Megaddesh we’Afqe’ino Rabbanan leQuddashin Mineh”, Torah Shebe’al Peh (Jerusalem 5721), 103, has expressed the view that coercion would be possible in a case where (i) qiddushin have been made at the time of the shiddukh – against the will of the Sages and in defiance of a communal enactment, and (ii) the wife claims afterwards me’is ‘alay and (iii) he refuses to divorce her in the hope of making some easy money.

\textsuperscript{57} Yevamot 110a, Bava Batra 48b; see further ARU 11:2-3.

\textsuperscript{57} See ARU 11:2 n.11.

\textsuperscript{58} Mishnah Nedarim 11:12, discussed further below, §§1.29, 31, 33, and extensively in ARU 16, where it is termed the “moral fear argument”. See also ARU 2:5-6 (§1.4) and n.14.

\textsuperscript{59} He may, in some cases, be persuaded to divorce on the grounds that there is no prospect of reconciliation even though his real desire was to remain married. On such a case as presented to R. Moshe Feinstein, “Iggerot Moshe,” Even Ha’Ezer Part 3, no.48, see ARU 17:166-67.

argues, from an analysis of the dictum of R. Yehuda HaNasi that “one may not throw away the waters of one’s well when others are in need of them” (Yevamot 44a), that “Jewish law recognises a general legally enforceable prohibition of the abuse of rights.” While that concept is applied primarily in areas of mammonot, it is not restricted to that context; indeed, its origins appear to lie in the halakhah of ḥalitsah, where the deceased had more than one widow, one of whom was already forbidden to marry a priest (as a result of an earlier divorce). Since ḥalitsah of one widow effects ḥalitsah of the others (without rendering the latter forbidden to priests), early sources already debate the moral duty of the yavam to perform the ḥalitsah on the widow who is already ineligible.” Later, this was transformed into a legal duty, enforceable by kefiyah. Can one imagine, in this situation, that the halakhah would have allowed the yavam to extort money from the “eligible” widow not to perform ḥalitsah on her? And if so, why should the “right” of the husband in an “ordinary” divorce be any greater? It is hardly satisfactory, in this context, to reply in terms of the special status of qiddushin, since that very status is premised upon a monetary analogy – ḥinayn. There is, of course, an internal limitation to this principle: “the prohibition of exercising a legal right out of spite or selfishness, in a spirit denying benefit to others although incurring no loss or injury to oneself” (zeh neheneh vezeh lo ḥasen). But the husband in our context makes no “loss”: he is simply deprived of the very benefit which the halakhic principle refuses to accord to him.” Whether kofin is available where the right-exerciser stands to lose a benefit (though this presupposes that the “lost benefit” is a legitimate one) rather than suffer a loss provokes a dispute between Rabbenu Tam and the Rosh, the former excluding kofin in such circumstances, the latter allowing it. The Rosh addresses Rabbenu Tam’s arguments; on the

64 Mishnah Yevamot 4:11; Palestinian Talmud Yevamot 4:12 (following Korban Ha’Edah).
65 Bet Yosef ‘Even Ha’Ezer 161, citing Rabbenu Yeroahm, who cites R. Meir Todros Halevi Abulafia. Kirschenbaum cites Turei Zahav, Bet Shemuel and Arukh HaShtuah on ‘Even Ha’Ezer 161:2 for acceptance of this view as the definitive halakhah by the ’Aharonim.
67 This distinction is elided by Pava 1980:608-09, summarising the view of Shemuel Shilo: Pava’s summary speaks in terms of loss; his quotation from Shilo (p.77) in terms of benefit. But see Shilo’s discussion of “economic motive” in the footnote below.
68 See Shilo 1980:60-64, based on Tosafot B.B. 12b, s.v. Ma’alman; Resp. Rosh 97, 2.
principle of *hilketa kebrita‘ey*, we may therefore follow the Rosh. And there are, in fact, precedents for the use of *kofin al middat sedom* specifically to justify *kefiyeh* of a *get*: a husband who wants to go to another land may be forced to deliver a *get al tna‘i* (effective if he does not come back within a year), according to a *teshuvah* of Ra’anah. And *Yam shel shelomo* ruled that we compel a *get* in a case where a wife had become an apostate and thus forbidden to her husband on the presumption that she had had relations outside marriage; her relatives requested a *get* for her, in the hope that she would then return to the religion.

1.26 The issue is debated in modern times in a more technical mode: is it legitimate to attach conditions to a *get*? Susan Weiss reports from her case files the following examples of such conditions which have received rabbinic authorization: the husband requests cash; custody; more than his share of marital property, or all of it; the waiver of child support, or part thereof; the waiver of debts incurred for child support; that his children undergo DNA testing; that his wife take a polygraph test; the sale of the marital home before the *get* is given; the return of his mother’s earrings.

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69 Cf. Simon Jackson, “Kofin Al Midat Sedom – When will the courts intervene? (Part 2)”, http://www.torahmitzion.org/eng/resources/showLaw.asp?id=645, citing the Shakh (here in contrast to the Sema) for the view that the mere fact that one person enjoys a certain benefit is not sufficient to prevent his conduct from constituting middat sedom; the benefit to him must also be justified from the ethical point of view.

70 No. 73 (end), *ET* vol. 27 col. 550 note 209.

71 *Yam shel shelomo* to Yev. ch.1 s.6, cited in *ET* vol. 27 col. 556 note 255.

72 E.g., File No. 024612665-21-1 *T* vs. *T* (Jerusalem: RR. Levi, Elhadad and Basri, dissenting) (20.12.99) (holding that the husband’s request for the child was reasonable); rev’d on Appeal File No. 024612665-64-1 *T* vs. *T* (2.5.00) (Sup. Rab. Ct., RR. Daichovsky, Nadav, Sherman), 1(10) Div 9.

73 E.g., File No. 024415721-21-1 *A* vs. *A* (Haifa: Shahor, Naharai, Marveh) (1.2.07) (unpublished transcript available from Susan Weiss) (separated since 2005, still no *get*); 014504328-21-1 *T* vs *T* (Jerusalem: RR. Rabinovich, Eliezerov, Elgrabl) (11.6.2002) (where a woman gives up her rights to the house in exchange for a *get* after 13 years of litigation) (unpublished divorce agreement and decision available from SW); File No. 058040221-25-1. *S* vs. *S* (19.07.95) (Jerusalem: RR. Basri, Levi, Elhadad) (where the court tried to convince the wife to give in to her husband’s demand to transfer the house to him in exchange for a *get*; she received the *get* in 2001 after 11 years of litigation) (unpublished affidavit of wife and drafts of divorce agreements available from SW).


75 E.g., File No. 052644200 *M* vs. *M* (Jer. Rab. Ct.: RR. Maletski, Shapira, Cohen) (20.7.92) (unpublished decision available from SW) (received *get* 9 years later); Appeal File No.
1.27 Those dayanim who agree to the making of such conditions base themselves on a responsum of Maharashdam76 (against the views of Rashbash, Tashbetz77 and Rashba,78 that when the husband is obliged to give a get he cannot make any conditions) but the scope of the teshuvah of Maharashdam is limited since:

(a) Some dayanim interpret the conditions that Maharashdam endorses in a limited way, as referring only to reasonable/justifiable conditions, which can easily be fulfilled, and as relating only to the wife and not others (such as the children).”

(b) Moreover, there are opinions which reject the view of Maharashdam justifying the husband in making any condition, including even demands justified by law.79 Dayan Bass argues that studying the original teshuvah of Maharashdam leads to a different conclusion. He notes that R. Yitshak Elhanan Spector rejects the husband’s demand that his wife leave the city since this is "בֶּן רְכִּבָּה". He reviews decisions in the Israel rabbinical courts” and suggests that they are not a result.

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76 062646849-21-1 P vs. P (Sup. Rab. Ct.: RR. Daichovsky, Bar Shalom, Sherman) (26.08.02) 4(7) DrD 7.8 (describing how a woman was forced to sell her house before receiving a get).
77 Shut Maharashdam, Even Ha’Ezer, 41. Maharashdam’s view is cited briefly by Ba’er Hetev on Shelhan Arukh, Even Ha’Ezer, 154:1. However, Maharashdam is here used as a tool in the conflict between rabbinical and civil courts: the bet din accepts that it is the husband’s right to have the financial aspects of divorce decided according to Torah Laws. See Dayan David Bass, “Hatsavat Tena’im ‘Al Yeved Ba’al Hamehuyav Beget”, Tetumim 25 (5765), 159-160; Pinhas Shifman, “Halahakkah HaYehudit BiMetsi’ut Mishiana: Ma Me’akev ‘Et Me’ukvoi Haget?”; Aley-Mishpat 6 (2007), 36-37. In one case, File 61/82 [82-383], despite 18 years of separation the rabbinical court delayed the get until the husband’s financial conditions were fulfilled.
78 062646849-21-1 P vs. P (Sup. Rab. Ct.: RR. Daichovsky, Bar Shalom, Sherman) (26.08.02) 4(7) DrD 7.8 (describing how a woman was forced to sell her house before receiving a get).
79 Maintaining that the Maharashdam is not correct: see Bass 5765.
81 Bass 5765:157, 161, cites verdicts of the rabbinical court that do not take Maharashdam into account. See also Daichovsky 2006.
82 In a case in the High Rabbinical Court (1-059024273-21; Bass 5765:155-156) where the husband had married a non-Jewish second wife and had a child from her, Dayanim Bar Shalom and Nadav accepted a condition (with a demand for custody abroad and a large sum of money) while R. Daichovsky rejected it due to other reasons (the husband’s initial agreement to make a harsha’ah for a get). The case was passed to R. Mordekhai Elyahu and R. Shalom Mashash who decided that the condition was not reasonable and therefore could not be accepted: for the latter’s reasoning, see “Safeg Kefiyah Beget”, Tetumim 23 (2003), 120-24. The original dayanim changed their mind in the light of this. But in a different verdict (1-21-022920027; Bass 5765:157-59), the High Rabbinical Court (Dayan Izirer) ruled that the husband had the right to demand reduction of the alimony. R. Izirer explained that he referred to conditions the wife can fulfill, even if it is hard for her (“afflu beidomk”); indeed, at first he included also conditions such as that she would not eat things that would make her sick and prevent her from
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of different readings of Maharashdam, but rather a question of “the fifth part of the Shulhan Arukh”, which mandates reading the poskim in the light of considerations of fairness and justice.

(c) The teshuvah of Maharashdam should not be taken out of its specific literary context – fear of misuse of the halitsah for personal goals.\(^{12}\)

\(^{12}\) Bass 2006:151-152.

taking care of the children and that she would wear only modest clothing, but later limited his view to monetary conditions such as reducing the alimony. According to R. Izirer, this ruling is valid both in cases of kefiyah and in cases of hyyuv. In another case, File 61/82 [82\(n_2\)], n.76 above, a local bet din ruled that the demand to cancel retroactively the civil court’s decision [after 18 years of sarvonat get!] regarding alimony and rediscuss it in rabbinic court is legitimate. In the high rabbinic court, Harav Bakshi-Doron rejected the husband’s demand without referring to Maharashdam (perhaps accepting the view of Tashbetz and others). R. Sherman ruled that it was a condition which was impossible for the wife to accept, since as a secular Jew she never brought her cases to rabbinical courts. Rabbi Z.N. Goldberg held that if the condition is justified (where, e.g., the wife took her husband’s money), the husband can delay the get. R. Goldberg however, argues against Maharashdam. R. Tupik held that the case should be returned to the local rabbinical court to decide whether the wife needed to return parts of the alimony to her husband and how much it was possible for her to return.

Susan Weiss in a forthcoming article provides the following documentation of such decisions in the Israeli rabbinical courts which themselves either ignore, limit or reject the approach of Maharashdam:

Appeal File Nos. 029612306-68-1, 053983847-53-4 (Sup. Rab. Ct.: RR. Amar, Daichovsky, BarShalom) (17.7.07), 19(3) DvD 4.5 (excluding Maharashdam when the husband demands custody of child, and attacking the cynical use of the Torah for personal interests)

Appeal File Nos. 031411390-21-1 (Sup. Rab. Ct.: RR. Amar, Daichovsky, BenShimon) (11.1.06) 12(1) DvD 3-5 (excluding Maharashdam when the husband accused of extreme family violence moves to transfer marital disputes to the rabbinic courts)

Appeal File No. 028055143-13-1 (Sup. Rab. Ct.: RR. Bar Shalom, Sherman and Daichovsky) (19.5.03) 5(5) DvD 10,11 (excluding Maharashdam where the husband asks for a sum of money that the woman cannot pay)

File No. 2679/48 Wife vs. Husband (Jerusalem: RR. Batsri, Shrem, Goldberg) (19.07.90) 18 P.D.R 81 (see opinion of R. Batsri)

Appeal File No. 168/54 E vs. E (Sup. Rab. Ct.: RR. Bakshi-Doron, Lau, Daichovsky) (17.11.94) 2(1) DvD 3 (abridged) (holding that visitation arrangements must be determined separately from the get)

024612665-64-1 T vs. T (Sup. Rab. Ct.: Daichovsky, Nadav, Sherman) (2.5.00) 1(10) DvD 9,10 (stating that a child cannot be held hostage for the get)

Appeal File No. 022106561-21-1 K vs. K (Sup. Rab. Ct.: RR. Daichovsky, Nadav, Goldberg) (9.9.99) 16) DvD 7, also discussed by Dayan Bass 5765 (maintaining that it is the right of every citizen to sue in the court of her choice, and that a get cannot be conditioned on transfer of jurisdiction to rabbinic courts)

Appeal File No. 029004991-21-1 B vs. B (Jerusalem: RR. Rabinovitch, Eliezrov, Elgrably) (23.7. 01) (unpublished decision available from Susan Weiss) (claiming that the husband makes impossible demands that do not have to be met).
E. The Stability of Jewish Marriage

1.28 Opposition to solutions to the ‘agunah problem is often expressed in terms of a fear that it would “undermine the stability of Jewish marriage.” In fact, a number of distinct arguments need here to be distinguished:

(a) the relationship between ‘agunah issues and the grounds for divorce (§§1.29-35);

(b) the threat to the sanctity and exclusivity of the marital relationship while it subsists, as justifying the essential role of the husband in the get process and distinguishing qiddushin from other forms of relationship (§§1.36-37);

(c) a particular form of (b), which raises further halakhic issues: the possibility of (legalised) “wife-swapping” (§1.38);

(d) the fear of zenut (§1.39);

(e) to a degree underlying all of them, fear of women’s sexual tendencies, classically expressed in the tav lemeitav maxim (§§1.40-43).

1.29 There is in fact no necessary (logical) relationship between the problem of ‘iggun and the grounds for divorce.” If a woman is defined as becoming

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83 E.g., the argument of R. Uriel Lavi, “Ha’im Nitan Lehafki’a Kiddushin Shel Sarvan Get?”, Teḥumin 27 (5767), 304-310, that the use of annulment risks destruction of the Jewish family. Berachyahu Lifshitz, “‘Al Masoret, ‘Al Samkhut Ve’al Derekh Hahanmakah”, Teḥumin 28 (5768), 82-83, notes the view of R. Weinberg regarding conditional marriage (in his introduction to Berkovits’ Ṭna’i beNissu’in uVeGet 1967), that we should consider also the view that the current status of the Jewish family (in terms of gilay arayot, fear of mamzerim etc.) is much worse than might result from the use of those solutions. Indeed, Berkovits rejected the basic premise on which arguments based on the stability of marriage are used in this context. R. Abel, ARU 18:33-34, quotes him thus: “The ethical and religious fibre of marriage is really dependent upon education and upon the ethical and religious conscience of the married couple, upon the influence of society and upon the conditions of everyday life. From the point of view of human psychology it seems to me that a condition in marriage will not cause an unravelling of the bond between man and wife even in the slightest degree. A person’s conduct in the area of sex and married life is not defined or affected by such distant causes as the possibility of the annulment of the marriage in accordance with a particular condition. On the contrary, I say that the very [existence of the] condition will stress, in the eyes of the couple, the religious and ethical obligation that lies on both of them to lead their lives as a team and to conduct themselves towards each other according to the directives of Jewish ethics.”

84 The lack of correlation between the grounds for divorce and the stability of marriage has also been claimed on the basis of sociological research: see Max Rheinstein, Marriage Stability, Divorce and the Law (Chicago and London: University of Chicago Press, 1972). See also Pinḥas Shifman, Family Law in Israel (Jerusalem: Harry Sacher Institute, Hebrew University of Jerusalem, 1995, 2nd ed.), 1.421-424 (Heb.).
mesurevet get only when a bet din has decided that she is entitled to divorce, but her husband refuses to implement that decision, the grounds for divorce are not affected: they are precisely the grounds on which the bet din decides whether or not the woman is entitled to divorce. As is well-known, different Jewish communities have in the past adopted different approaches to this issue, and such pluralism may well continue into the future. We encounter both fault-based grounds (infidelity, physical and psychological abuse, failure to maintain), other “objective” grounds not based on fault (mum gadol, insanity), as well as no-fault grounds amounting to “irretrievable breakdown”. The basic fear here is that of “unilateral (no-fault) divorce” (particularly, on the part of the wife), often seen as a concession to secular, liberal values but reinforced by a traditional Jewish fear, that the wife may, during the subsistence of the marriage “look astray” (notenet eynehah beher). In one respect, however, Jewish divorce law has always been “liberal”: even after Rabbenu Gershom abolished (for Ashkenazim) the husband’s right to a “unilateral (no-fault) divorce”, the parties to a “dead marriage” could,

15 On the definitional issue, see §1.5, above.
16 R. Broyde in Marriage, Divorce and the Abandoned Wife in Jewish Law (Hoboken N.J.; Ktav, 2001) distinguishes five normative models of exit from marriage, arising from or reflecting different conceptions of the nature of marriage, and maintains that couples may (even must) choose the model of marriage within which they wish to live together. For a summary, see ARU 3 (opening of section: “The Present State of the Debate: Rabbi Broyde’s analysis”); ARU 8:25 n.156. At p.86, he writes: “Each and every prospective couple must choose the model of marriage within which their wish to live together. They codify their choice through a prenuptial agreement regarding a forum for dispute resolution, or through a set of halachic norms underlining their marriage or through both.”
17 See, however, the argument at ARU 17:151-53 for agreement on an updated list of grounds where “the entire community accepts that it would be well-nigh impossible for any reasonable woman to have a loving and intimate relationship with her husband”, and where, therefore, he may be forced to release his wife, including domestic violence, abandonment and persistent sexual infidelity. See, recently, Y. Sinai and B. Shmueli, “Changing the Current Policy Towards Spousal Abuse: A Proposal for a New Model Inspired By Jewish Law”, Hastings International & Comparative Law Review 32 (2009), 155-236, at 222-226.
18 Mishnah Nedarim 11:12. For the husband, however, this was acceptable, at least according to R. Akiva in Mishnah Gittin 9:10 (n.90, below).
19 Responding, on some views, to his surrounding Christian environment. See further §4.44, below.
20 Thus taking a stricter approach than that of Bet Hillel in M. Gitt. 9:10 (“The School of Shamai say: A man may not divorce his wife unless he has found unchastity (devar ervah) in her, for it is written, because he has found some indecency (ervat davar) in her. And the School of Hillel say: [He may divorce her ] even if she spoiled a dish for him, for it is written, because he has found some indecency in her. R. Akiva says: Even if he found another fairer than she, for it is written, if then she finds no favor in his eyes.” The view of R. Akiva there seems never to have been accepted as halakhah, and may be thought inconsistent with the reasoning of Mishnah Nedarim 11:12, that “a woman must not be [so easily given the opportunity] to look at another man and destroy her relationship with her husband.” Of course, the man in the situation envisaged by R. Akiva did have the option of polygamy (unless he had
without restraint (other than attempts to secure shalom bayit), agree to divorce, without the need for any allegation of fault on either side. The problem resides in cases where one spouse regards the marriage as dead but the other (normally, but not necessarily, the husband) either disagrees or insists on exacting a “price”. One understands rabbinic reluctance to authorise a get when there still remains a genuine possibility of shalom bayit (which should not be equated with further time to agree financial terms); conversely, some batey din will regard the absence of any genuine possibility of shalom bayit as itself a sufficient basis for a get, even when one spouse remains recalcitrant.” Indeed, some simply adopt a period of separation as sufficient: R. Hayyim Palaggi would coerce after a period of separation” and R. Brody in his tripartite agreement adopts a period of fifteen months,” the husband stating in the agreement: “Furthermore I recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a Get within fifteen months of her requesting such a bill of divorce” – which he fully appreciates will not be acceptable to all communities.”

1.30 The situation where the wife alone regards the marriage as dead is that of the moredet me’is ‘alay. Those who oppose invocation of this halakhic tradition, on the grounds that Rabbeni Tam invalidated the use made of it by the Ge’onim, trend however to overlook one vital consideration. What proved controversial here was not the grounds for divorce but rather the use of kefiyot in relation to them. The Gemara itself (Ket. 63b) accepts that the wife in such cases has justifiable grounds for a divorce,” albeit


91 See n.98, below.

92 He further argues that one who impedes the divorce will ultimately be accountable, in rendering the couple liable to sin. See R. Cohen 5750:200; R. Riskin 2002:6. See also R. Moshe Feinstein, Yoreh Moshe, Yoreh De’ah 4:15, which Brody quotes thus: “In the matter of a man and a woman who, for these past years, has (sic) not had peace in the house. Since the bet din sees that it is impossible to make peace between them ... it is compelling that they should be divorced, and it is prohibited from either side to withhold a get, not the man to chain the woman to the marriage or the woman to chain the man to the marriage, and certainly not over financial matters.” Brody, Marriage 2001:23, terms this “Marital Abode as the Norm”, where the parties may agree that either has a right to divorce after a specified period of separation.

93 See §6.19, below.

94 See further §§3.94-95, below.

95 See §4.50, below.

96 On whether according to Rabbeni Tam’s school a binyon is nevertheless available here, see §§4.38-39 below. A similar conclusion, that there may be a binyon even where kefiyot is not permitted, appears to endorsed by Rema, Yoreh De’ah 228:20, discussing the case of a couple
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after a 12 month delay (without financial support)." Thus, the view found amongst some modern posqim, sometimes based on a period of separation (§1.29, above), that there is no point in seeking to rebuild a dead marriage (איה תפסות דWarnings למס), itself has a firm halachic basis. Against this background, we are indeed bound to consider the suffering of the wife; that can hardly constitute a threat to the stability of Jewish marriage, where that marriage is already dead. Indeed, the possibility of being chained (treated as התרה in the language of Rambam) to a dead marriage may well prove the greater threat to the stability of Jewish marriage, insofar as it inhibits women from entering into qiddushin kedat moshe veyisra’el.

1.31 The plea of me’is ‘alay can be advanced both where fault is claimed and in its absence. There are many reasons why a wife may claim “he is repugnant to me”. They range from cases of physical defect which might in any event have been regarded as mum gadol, through cases of lesser mum, unacceptable behaviour on the part of the husband (and what is unacceptable may vary from one community to another), to persistent

who had sworn to marry each other but the woman requests annulment of her oath (hatarah) on the basis that she has discovered faults in the man, to the extent that he had become repulsive to her. Rema holds that if she produces good evidence of his unacceptable nature (’amalot), the bet din may annul her oath even without informing him, arguing by a kal va’omer: even if she were already married to him, he would be obliged to divorce her. See further ARU 5:19 (§12.2.13), noting also R. Ovadyah Yosef, Yabia ‘Omer, III, ‘Even Ha’Ezer, 18:13, interpreting Rema as following the ruling of Rabbenu Yonah, who maintains that in a case of me’is ‘alay, although we do not coerce him, we tell him that he is commanded to divorce her, and if he does not do so there applies to him the saying of our sages: “If anyone transgresses rabbinic law it is permitted to call him a sinner”, and citing also ET VI, col. 422, at note 968, where this view is cited in Me’iri in the name of “some of the sages of the [previous] generations”.

The Ge’onim sought to eliminate both the delay and the lack of financial support, perhaps following a contractual condition first found in the Yerushalmi: see references in ARU 9:2 n.8 and (for a different view of the relationship to Palestinian divorce clauses) §§3.12-17 below.


See also Or Zarua per Brody 2001:23; R. Palaggi, Resp. Hayyim VeShalom, vol.2, no.112 (cited for other purposes by Riskin 2002:6f.), who took the view that if a couple is separated for eighteen months and there appears no chance of reconciliation, the Bet Din must coerce the husband to grant a get.

Mishnah Ketubbot 7:9-10, where mumim are presented independently of any me’is ‘alay plea. See, however, PDR 2/188-196; 3/225-234; 6/221-224.

Tashhets II:8 accepts coercion when the husband makes his wife “suffer a lot” (לדרה מצות) in the marriage. May we not define get refusal as itself necessarily producing such suffering? Indeed, some may argue that what constitutes me’is ‘alay at any time is at least in part a matter of social convention.
quarrelling (which may well be the background to the use of the language of “hatred” in divorce pleas, from biblical times onwards”). Though the fear that the woman might use it for ulterior motives (notenet eynehah beaḥer) does not originate in the context of me’is ‘alay, it soon came to be applied in that context. This fear ultimately generated a demand that the woman claiming me’is ‘alay provide ’amatlah (sometimes ’amatlah mevurereṭ). This is hardly objectionable if it amounts merely to a requirement that, in appropriate cases, she is required to corroborate the sincerity of her claim that “he is repugnant to me”.

However, two issues arise here which, though they might appear to be merely evidentiary (the bet din requires independent evidence that she does indeed find him repulsive), in reality affect the substance of the grounds for divorce. First, is she required to produce ’amatlah in every case where she claims me’is ‘alay? If so, this raises notenet eynehah beaḥer to the status of a (rebuttable) presumption. It is difficult to discern a uniform practice here. The matter appears to be within the discretion of the bet din, and may well be exercised in terms of the perceived religiosity of the woman (and the particular community to which she belongs). Secondly, is there a list of “objective” criteria (e.g. domestic violence), one of which must be proved in order to constitute ’amatlah, or may the wife produce any (admissible) evidence of the sincerity of her disgust? If the former, then subjective disgust is no longer sufficient grounds for divorce; some further factor must be proved (very likely amounting to some form of fault). Here, too, it is difficult to identify any formal halakhic rule; the evidence of the pisqey din rabbaniyim suggests that the batey din treat this as a matter of practice. It is however a matter which it is important to clarify, not least if women are to be presented with different forms of halakhically acceptable union and are to make an informed choice between them.

What, then, are the limits on the grounds for divorce? The tradition suggests two, implicit in the terminology already noted. There must not be

\begin{itemize}
\item See ARU 16:37 (Rosh 43:8), 112, 114-116, 202.
\item See further §§4.52-53, 58, 64-66, below.
\item See ARU 16: 152, 191-195.
\item See ARU 16: 131, 35, 146-147, 152-156, 194-195. See further §4.53, below. Susan Weiss reports from her courtroom experience in Israel that many batey din seem to restrict me’is ‘alay to sexual disgust and that some regard evidence of sexual relations with the husband as conclusively negating such disgust.
\end{itemize}
the ulterior motive of entering into an alternative relationship (notenet eynehah beater), and the strength of emotional rejection must be strong (me‘is ‘alay, sin‘ah). This would appear to exclude claims based either on what may be regarded as trivial grounds, boredom or the everyday irritations of marital life.” We may note, in this context, that the halakhah has long (if not always) striven towards an egalitarian policy in this respect.” In Ashkenaz, a combination of the measures of Rabbenu Gershom (restricting the husband’s right of unilateral divorce)98 and Rabbenu Tam (restricting that of the wife, at least in relation to kefiyyah) severely limited no fault unilateral divorce; in Sepharad, the non-acceptance (at least at the formal level) of both the measures of Rabbenu Gershom, and the survival in some communities to modern times of a more liberal attitude to the moredet me‘is ‘alay,100 meant the continuation of no fault unilateral divorce for both spouses. This, indeed, appears to be the significance of the Cairo Geniza Ketubbot edited by Mordekhai A. Friedman, which explicitly provide for divorce on the grounds of sin‘ah by either spouse.101 We may note that this was clearly not then regarded as incompatible with qiddushin kedat moshe veyissra’el, although today it is sometimes put forward as a model of a non-qiddushin form of marriage, whether called shufatit102 or derekh qiddushin.103 As long as it continues to be viewed as within the spectrum of halakhic acceptability, its classification is relatively unimportant: what does matter is maintenance of the availability of intermarriage between halakhic communities opting for different models of marriage.

1.34 The most difficult type of case is the one where the wife claims me‘is ‘alay (without amailah) but the husband responds that he still loves her, wants to remain married to her, and places no conditions on any get. We may ask whether, and for how long, he can really still want to maintain a

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97 See further §4.65, below.
98 A surprising manifestation of this is the application of the “moral fear” argument (n.58, above) in respect of husbands, who may have to prove the sincerity of their divorce claims after the ban on polygamy in the berem deRabbi Gershom, to rebut any possibility that they have the ulterior motive of noten eynah beater. See ARU 16:156-59.
99 Along with the ban on polygamy, which however still remains biblically available, hence the remaining substantial inequality which consists in ultimate recourse where the woman (but not the man) is recalledtrant to a heter me‘ah rabbanim.
101 See §§3.16, 70, below.
102 See §§3.4-5, below.
103 See §1.9, above; §6.47, below.
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marriage with a woman who genuinely finds him repulsive? In such cases, a bet din would presumably make every effort to establish shalom bayit by reconciling her. But at some stage the bet din must surely give up and tell the man that it is hopeless to seek to maintain the marriage, and that for him to keep her is, in effect, to treat the wife as a shevuyah. On Rambam’s reasoning, this might justify “educating” the husband, through coercion if necessary, to let her go. But most beit din would not follow this logic, and may well prove reluctant even to issue a ḥiyuv (absent abuse/infidelity etc. on the part of the husband). Moreover, if the bet din merely “recommend” divorce, the husband could argue that he was following an opposing halakhic opinion or merely ignore the recommendation.

1.35 The sources indicate a relationship between the grounds for divorce and their financial implications. On the one hand, the sincerity of a plea of me‘is ‘alay is strengthened by the woman’s willingness to forego her ketubbah; on the other hand, the presence of amatlah, according to Shulḥan Arukh ‘Even Ha’Ezer 77:3, allows the woman to claim the financial protections of the Ge’onim (for R. Karo, provided that the husband was willing to grant the divorce), which she lost if she claimed me‘is ‘alay without amatlah. Such a distinction has a long historical pedigree, and may be taken as a marker of the distinction between divorce for “cause” (if not “fault”) and divorce without it. Thus some Rishonim distinguish between a case of coercion when the wife receives the amount of her ketubbah, as in the cases of kefityah already authorised in the Mishnah, and coercion without receiving the ketubbah, as in moredet. It represents the converse of the fact that the husband is liable to pay the ketubbah if he divorces “unilaterally” (on the Bet Hillel grounds) whereas he is not liable to pay the ketubbah if he divorces for “cause” (such as adultery).

1.36 Opposition to conditional marriage, as expressed in ‘Eyn Tnai benissu‘in, emphasised the threat it was thought to pose to the exclusivity (and thus

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114 As indicated at §§4.35, 39, below, and in the practice of the rabbinical courts in Israel: see PDR 1/129-139 at ARU 16:158-159; PDR 5/306-310 at ARU 16:141, 143, 173.
115 See §§4.66, below.
116 As may be seen from both the Elephantine marriage contracts (on which see Yaron 1961) and the Genizah ketubbot (§§3.16, 70, below).
117 E.g. Mishnah Ketubbah 7:7. See Tosafot, 63b, s.v. בַּעַל, Ramban, 63b, s.v. בַּעַל, though Ritva himself rejects this distinction. See ARU 9:17.
sanctity) of the marital relationship." Such a condition, it was argued, would mar the ethos and sanctity of marriage in that it would render the wedding bond too easy to dissolve, and would open the way to adultery since a man contemplating an illicit relationship might think: "Maybe she is not married because she needs only go to the civil court and undo her marriage retroactively." We argue below (§§3.25, 27) that this objection loses its force when the condition is formulated in a manner different from that of the French proposal against which 'Eyn Tnai BeNissu'in was directed. Of course, the fear of the authors of 'Eyn Tnai BeNissu'in is not confined to solutions by means of conditional marriage; it may be applied also to solutions by way of annulment (without any supporting condition), which equally lead to the theoretical possibility that adultery (too) can be retrospectively “annulled”. Indeed, when the authors of 'Eyn Tnai BeNissu’in argue that conditional marriage treats Jewish marriage as concubinage because it makes it easy for either side to walk out and dissolve the marriage, they are in effect arguing against any liberalisation of the divorce régime, and the same issues (of sincerity of the wife in seeking a divorce) arise as in the claim of me’is ‘alay.

1.37 R. Hoffman ('Eyn Tnai BeNissu’in, 18) argues that Orthodox use of conditional marriage would be used by the Reform movement to say that what they rid Judaism of openly (get and halitsah) the Orthodox got rid of surreptitiously; this Hilul HaShem, he maintains, would not be obviated

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119 A somewhat different version of this argument, leading to a pluralistic conclusion, is advanced by Hadari in ARU 17, arguing (at 124) that the “absolute unapproachability” of the betrothed/married woman (and thus her immunity from any attempt by another man to seduce her) is something which both husband and wife may feel is required for them to feel absolutely secure in the relationship, and that this requires maintenance of traditional qiddushin, without interference with the power of veto on divorce by the husband.

120 Rabbis D.Z. Hoffmann in Rav Y. Lubetsky, ‘Eyn Tnai BeNissu’in (1930), at 18, P.L. Horowitz at 27, M.S. Hakohe’ at 30, Tenenbaum at 32, Silberstein at 38, Schwartz at 42. See further ARU 4:11-12, with R. Berkovits’s responses.

121 E. Berkovits, Tnai beNissu’in wVeGet (Jerusalem: Mosad Harav Kook, 1967), 57-58, 166-68, suggests that a condition that makes the bet din the arbiters of the matter rather than the civil courts could be halakhically and ethically acceptable, for example one which would retroactively annul the marriage if within two years of a civil separation and the advice of the bet din to divorce he still maintains his refusal to grant her a get. With such a condition, he argues, adultery will remain a serious matter because the marriage will only be retroactively annulled if a bet din says he should give a divorce and he refuses to do so.

122 These problems are discussed by Tosafot Gittin 33a, s.v. ve'afte'inhu. Tosafot raises two problematic cases: (a) anyone can save his adulterous wife (here, his niece) from punishment by annulling the marriage; (b) if the marriage may be retroactively annulled, any adultery is only safek, so how can it be punished? See further n.1042 below.

123 Thus, they argue, replacing Jewish with Noahide marriage as recorded in Yerushalmi Qiddushin 1:1.
even if the condition were to be formulated in a halakhically permitted manner. Rabbi M.S. HaKohen (‘Eyn Tnai BeNissu’in, 31a-b) offers a more technical objection, arguing that such conditional marriage constitutes an abrogation/avoidance (ha’aramah) of halakhah because the condition makes it clear that the couple really want a civil marriage merely dressed up as qiddushin and since we are dealing with a case of pentateuchal (as opposed to rabbinic) law it is impossible to apply the principle of devarim shebelev ‘eynam devarim: although normally unexpressed intentions — here: “We really want civil marriage not true qiddushin” — are of no legal consequence, they are of legal consequence in matters of Biblical law) where the true intention is obvious, and the fact that the parties deny it and claim that they do indeed want a Jewish marriage is of no avail. In short, this (and presumably any other) form of qiddushin, which reflects a desire to create a true Jewish marriage without its attendant possible future problems, is no more than a cover for concubinage.” It is clear that these objections reflect the religious politics of a particular age. Quite apart from technical replies to them (such as the criteria for determining when the true intention of the spouses is obvious), one has to wonder whether, today, the cause of Reform (and other non-Orthodox forms of Judaism) is not in fact furthered by this attempt to impose a “one size fits all” model of qiddushin (the very opposite of R. Brode’s approach). Moreover, there is a strong implication that any Jewish community which does adopt a form of marriage which might be classified as concubinage (despite the halakhic acceptability of that institution) is one with whose children (notwithstanding their own religious orientation as adults) marriage should be discouraged.

1.38 Another concern voiced in ‘Eyn Tnai BeNissu’in is that conditional marriage would legalise wife-swapping, since the wife would be free to marry another by means of retroactive annulment of her first marriage and then to annul the second marriage and return to her first partner.124 The Torah, however, forbids a divorced woman from returning to her husband if she was married to another and her second marriage had ended in divorce or widowhood (Deut. 24:4) and Ramban there explains that this was to make it impossible for people to legally swap their wives and then

124 The rules of ha’aramah are complex; see the summary in ET IX cols. 699-701 at notes 35-58.
125 Rabbi M. S. HaKohen, in Lubetsky, ‘Eyn Tnai BeNissu’in, at 29b bottom – 30a top.
126 Lubetsky, ‘Eyn Tnai BeNissu’in, Rabbis P.L. Horowitz at 27, Zilberstein at 38, Schwartz at 42; see ARU 4:12-13 at §§IX.8-9.
take them back. Here again, the argument is that qiddushin subject to the possibility of retrospective annulment is in effect no more than concubinage (to which Deut. 24:4 does not apply). Whether it would constitute ha’aramah of the halakhic restrictions on qiddushin is here more debatable: whereas spouses might well enter into qiddushin al tna‘i with the specific purpose of avoidance of get-recalcitrance, thus ensuring an escape route which might otherwise not be available, it is surely farfetched to imagine that spouses (“swingers”?) would enter into a particular form of marriage in order to keep open their option to engage in wife-swapping, quite apart from the onerous procedure they would then have to implement in order to keep within the halakhah. Here, in fact, the authors of ‘Eyn Tnai BeNissi‘in do acknowledge that such conduct would be within the hakakah, albeit highly immoral. But does not the status quo itself authorise a form of conduct (get-recalcitrance) which is within the halakhah, but highly immoral? Indeed it may be argued that the very fact that many couples in Israel avoid having a religious marriage because of the image of “religion” and the practices of the rabbinical courts may itself be regarded as a ḥilul haShem which potentially contributes to “wife swapping”.

1.39 The common maxim ‘Eyn ‘adam ‘oseh be’ilato be’ilat zenut may well reflect similar concerns. Its commonest occurrence is in relation to the maintenance (or not) of a preceding tna‘i (and the same may apply to a harsha‘ah) in the face of subsequent marital relations between the spouses. Such relations raise a (rebuttable) presumption of cancellation of the tna‘i, since otherwise (according to this argument) such relations

127 For an early ascription of such behaviour to the peoples of the biblical period see the midrash quoted in Rashi to Genesis 10:14.
128 See further ARU 4:12-13 at §§IX.9, on Berkovitz 1967:67.
129 §§3.48-59, 63, below. Hadari, ARU 135 n.188, notes that the argument of R. Uzziel (Mishpatei Uzziel, 45 & 46, discussed at ARU 12:6-29) uniquely seeks to remove the objection of retrospective zenut from conditional marriage by arguing that so long as a condition makes the continuing validity of the marriage dependent upon the act or intention of a third party, when the marriage is retrospectively void there is no problem of zenut precisely because the husband had no control over the decision to void the marriage (and thus he had every intention of having fully marital relations).
130 Dayan Abramsky held it unnecessary to renew the get given by a soldier going on active military service, each time the soldier returned home on leave, on the grounds that “since the husband grants a divorce for the sole purpose of precluding the eventuality of his wife being an agunah, there is no reason to suppose that he will annul his proxy while on leave.” See J.D. Bleich, Contemporary Halakhic Problems (New York: Ktav, 1977), 153.
131 Berkovits has argued eloquently that even with retrospective annulment during the husband’s lifetime there would be no promiscuity in the case of his condition: see ARU 4:20 (§IX.40(ii)).
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will be rendered *zenut,*

which it is assumed would run counter to the man’s intentions. But any such fear of *zenut* is purely retroactive: at the time of the preceding intercourse, the intercourse was, and was intended as, marital – unless one regards as *zenut* any intercourse which might potentially be so reclassified in the future. The maxim, moreover, begs an important question: what is *zenut?* The term has a very wide range, from actual prostitution to any union short of *qiddushin.* As here used, the connotations of prostitution appear to have been transferred to any form of union which is not halakhically permissible.

It would appear that a fear of women’s sexual tendencies, in the form of susceptibility to temptation if not actively seeking it out, underlies much of the above. This is classically expressed in the maxim *tav lemeitav tan du milmeitav armelu* (“it is better to dwell two together than to dwell in widowhood”), meaning that a woman prefers to be in an unsatisfactory marriage rather than be single. Though any such claim might be related

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132 See further ARU 8:10-12.
133 For the argument that *eyn ‘adam ‘oseh be’ilato be’ilat zenu* does not apply to a woman, see *Haggym Shel Shalom* II number 81; see also ET I, 559-60; ARU 8:11 n.51; ARU 5:42 (§2.1.2.6.11.5). The Sedey Hemed, Ma’arekhet ‘Ishut 30, notes, however, that the *Noda* B’yehudah applies this assumption also to women. Nevertheless, R. Uzziel argues in *Responsa Mishpetey Uzziel* 45 (near the end, s.v. Uvifrat), that even the *Noda* B’yehudah (I ‘Even Ha’Ezer 54) rules that “*eyn nai benissu’in* does not apply to a condition to protect him or her against a loss in spite of the possibility of be’ilat zenu. However, R. Abel notes (ARU 12:27 n.132) that the wording of the Mishpetey Uzziel here appears confused (perhaps due to printing errors) and that he has based his remarks on what he found in the *Noda* B’yehudah.
134 For *Shiltey haGilborim’s* different understanding of “*eyn ‘adam ‘oseh be’ilato be’ilat zenu* as “A person cannot change his legitimate intercourse once it has taken place as such into a promiscuous intercourse,” see ARU 4:22-23 (§IX.47).
135 For arguments that annulment is not necessarily always retroactive, see below, §§5.13-27.
136 See §§3.49-50, below. *Zenut,* in Hadari’s understanding (ARU 17:131), is deliberately leaving open the possibility that another man can have relations with one’s designated woman. “*Eyn adam oseh be’ilato be’at zenu*” (as she reads the Me’il Tsedakah at ARU 17:128) thus means that a man wishes his sexual acts to be carried out in a context in which the woman is exclusively and irrevocably his. On this understanding, a form of marriage in which there is no true *kinyan* is one in which the woman is never completely acquired and the husband’s acts of intimacy might be defined as *zenut* not because of any actual unfaithful activity or planned activity on the part of the woman but merely because the possibility exists of another man’s viewing her as available for seduction.
137 For discussion of the various linguistic problems the maxim presents, see ARU 16:55-56. If “widowhood” is a correct translation, this might suggest that it originated in the context of the justification of *yibbum*; in fact, one of its five occurrences in the Talmud, B.K. 110b/111a (discussed at ARU 10:5-6, ARU 16:57-62), is such a case.
138 ARU 16:9, 55, 65-66, 71, 75, 93. See particularly the examples given in *Kidd. 41a* and (the parallel) *Yeb. 118b,* which concludes by ascribing the motivation “... all such women play the harlot and attribute the consequences to their husbands”, i.e. once a woman is married it becomes possible for her to have affairs with other men and to pass off any children she has from them as her husband’s: see further ARU 5:100.
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to material support, its normal interpretation is related to sexual needs and is supported by the talmudic dictum: “More than the man desires to marry does a woman desire to be taken in marriage.” Such an understanding is also supported by the halakhic rules on onah, going back to the Mishnah, though even this does not exclude the view that the fulfilment of women’s sexual needs within (traditional) marriage also serves the interests of the husband, both as reducing the likelihood that the woman will behave like a “loose cannon” (seeking fulfilment elsewhere), and more generally as a mode of control.

1.41 The halakhic use of the maxim is most frequently discussed nowadays in the context of arguments against qiddushei ta’ut, and thus serves to justify the validity of qiddushin where the informed consent of the bride is questionable. That particular issue is relatively modern, and only one of the five talmudic occurrences approaches it. Three other occurrences relate to different problems of the initial validity of qiddushin: whether a woman may forego the prescribed shaveh perutah, whether a woman may be betrothed through an agent, not knowing what the husband looks like, where the husband had, without her knowledge, made vows before the marriage, but later has them annulled. The final case is significantly different, relating not to the initiation but rather the grounds for divorce: Rabina asks whether a get zikkui given at the time of a quarrel is valid; the issue is then discussed in terms of whether the divorce is an advantage to the wife (aviourav ovet amit) or a disadvantage, in that she would prefer the gratification of her bodily desires (ירמת נותה והנשה וברא ייל). The answer given is the latter, citing tav lemeitav.

1.42 In the context of the use of the maxim to rebut a claim of qiddushei ta’ut, there has been discussion of its status. Rabbi J.B. Soloveitchik maintains

\[^{139}\text{Yeb. 113a; see ARU 16:100.}\]
\[^{140}\text{M. Ket. 5:6-7.}\]
\[^{141}\text{Discussed below, §§3.75-80. See also ARU 10:5-6 note 23, ARU 16: 24, 59-60, 201-202.}\]
\[^{142}\text{B.K. 110b/111a (discussed at ARU 16:57-62): the yevamah faced with a problem of mukeh shebrit. In mediaeval times, this sugya was the basis for annulling marriage in a case of yavam mumar (though for Maharam, only lehalakhah), and has continued to be used (lema'aseh) in modern times: see ARU 10:15-19.}\]
\[^{143}\text{Kidd. 7a, discussed at ARU 16:62-64.}\]
\[^{144}\text{Kidd. 41a, discussed at ARU 16:64-70. This is not a case of mistake; it is one of indifference.}\]
\[^{145}\text{Ket. 75a, discussed at ARU 16:70-75.}\]
\[^{146}\text{Yeb. 118b, discussed at ARU 16:75-76.}\]
\[^{147}\text{Quoted by Rabbi J.D. Bleich, “Survey of Recent Halakhic Literature: Kiddushei Ta’ut: Annulment as a Solution to the Agunah Problem”, Tradition 33/1 (1998), 90-128, at 124-125 n.28; he also quotes a (more general) assertion by R. Soloveitchik, that such hazakot posed by}\]
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that it asserts an ontological (thus, unchangeable) truth about the nature of women, derived from Gen. 3:16 ("And thy desire shall be to thy husband"), which he interprets as "a metaphysical curse rooted in the feminine personality. She suffers incomparably more than the male while in solitude … And this will never change … It is not a psychological fact; it is an existential fact." However, R. Bleich rejects this approach and maintains: "As cited in the relevant talmudic discussion, the aphorism is neither reflective of a psychological truisme descriptive of all women nor of a sociological generalisation regarding the reactions of the majority of women. Hence, any consideration of the possibility of nishtaneh hateva, i.e., that sociological, psychological, economic and attitudinal facts or values may have changed, is irrelevant." But the concept of nishtaneh hateva does not relate to "sociological, psychological, economic and attitudinal facts or values", but rather to "natural" facts. The real issue, as R. Abel argues, is whether, even where nature has indeed changed, we are entitled to change a halakhah which was based on the earlier state of nature. The dominant view, he observes, is that we are not. But even if it is a binding halakhah that (all?) women (really) prefer to be in an unsatisfactory marriage rather than be single, it can hardly be denied that conceptions of what is an "unsatisfactory" marriage are temporally and culturally contingent, so that the application of the law must be variable. Thus, in the context of qiddushei ta'ut, R. Feinstein noted that women in our generation are more stringent regarding defects in their husbands than women of previous generations, and ruled that tav lemeitav may thus not

the Gemara do not represent "transient psychological behavioural patterns, but are permanent ontological principles rooted in the very depths of metaphysical human personality." See further ARU 2:54-55. Bleich 1998:106-107, citing in support the Bet HaLevi, Ket. 75a, who argues that "the Gemara is not making a universal statement applicable to all women but simply acknowledges the possibility that some small number of women might prefer the consort and companionship of a miken shehin to a life of spinsterhood." See also ARU 10:5-6 n.23. Bleich 1998:106; ARU 2:54 n.237. Cf. the approach of Rabbenu Tam, quoted in Shitah Mequbetset to Ketubbot 13b, s.v. that the transitory and in the glosses of R. Aqiva Eiger to BT Pesahim 94b. Cf. Hazon Ish 'Even Ha'Ezer 12:7 who cites Tosafot Avodah Zarah 24b s.v. Parah. See further the discussion in A.S. Abraham, Nishmat Avraham (English), III (‘Even Ha’Ezer and Hoshen Mishpat), New York 2004, 38-39, and in Hanina ben Menahem, Neil Hecht & Shai Wosner (eds.), HaMish ’alet HaHalakhah II (Boston: Institute of Jewish Law and Jerusalem: The Israel Diaspora Institute, 1993), 967-1070. ARU 6:8-9 (§57), citing M.M. Kashar, Mefa’aneh Tsefunot (Jerusalem, 5736), 171-72, and especially note ibid., for further sources (for and against halakhic change) and discussion. Rambam, Guide, II 8, III 14 (end), but noting that R. Yitschak Lampronti, Pabat Yitschak, ‘erekh tzedah, puts forward a limited argument for changing the halakhah in the light of new scientific knowledge.
be applied in our day and age. Indeed, relevant variations, R. Feinstein notes, include the level of religious observance.\(^{153}\)

1.43 In the light of this, the specific relevance of *tav lemeitav* to the termination of marriage may now be reconsidered. Aranoff has argued against those who “contend that the Talmudic phrase *tav lemetav tan du milemetav armelu,* “better to dwell two together than to dwell alone,” is a binding halakhic principle that negates the new *beit din’s* approach to freeing ‘*aganot* from their intolerable marriages.” This is directed against critics of the Rackman *bet din’s* extended use of *qiddushei ta’ut.*\(^{154}\) There may be debate as to the precise scope of the principle of *qiddushei ta’ut,*\(^{155}\) but it is clear that R. Feinstein in principle regarded the logic of *tav lemetav* as leading, in modern conditions, to the release of the wife: she prefers to be free to contract a real marriage rather than be imprisoned in a dead one.\(^{156}\)

\(^{153}\) ARU 16:79, 81. Knol’s PhD study of *tav lemeitav* in the *piske din rabbaniyim* (ARU 16) indicates that it is relatively rarely invoked today. See also R. Broyde’s documentation of the many *poskim* who view the presumption as subject to socio-cultural changes (2001:98-100, 175-176 n.62), and his claim at 174 n.55 that R. Soloveitchik’s view was “limited to opposing the wholesale abandonment of the principle [= of Resh Lakish] rather than merely asserting that it did not apply in any given case or set of cases.” See further ARU 10:5-6, esp. n.23.

\(^{154}\) ‘Iggrot Moshe ’*Even Ha’Ezer* 4:83(2) in the last sentence; ARU 2:54 n.239. See also ARU 10:17, citing ‘Iggrot Moshe, ’*Even Ha’Ezer* 4, 121, for R. Feinstein’s rejection of the application of *tav lemeitav* where the marriage was to a serving soldier going into battle, whose brother was an apostate: “It is clear to everyone that no woman would agree to get married for the sake of so short a period – days or even months – even though [as a rule] “it is better to live as two people (tav lemeitav tan du)”. Cf. Michael J. Broyde, “Error in the Creation of Jewish Marriages: Under what Circumstances Can Error in the Creation of a Marriage Void the Marriage without Requiring a Get according to Halacha”, http://www.jlaw.com/Articles/KidushetauT.html; reprinted with minor differences as “Error in the Creation of Marriages in Modern Times under Jewish Law”, *Dine Israel* 22 (5763/2003), 39-65 (English section): “In the reality of practical halachah, this problem – of what defect is sufficiently serious that the marriage is void – is expressed in the technical literature as a discussion of what the minimally acceptable attributes of marriage are given the modern state of marriage, and the social and economic reality of the times. This varies from time to time, place to place, and as R. Moshe Feinstein notes, from level of religious observance to level of religious observance”, citing ‘Iggrot Moshe ’*Even Ha’Ezer* 4:83(2) in the last sentence of that section. See further ARU 2:54 n.239; ARU 10:6 n.23, citing inter alia the analysis of Rabbi Y.E. Spector and Rabbi M. Feinstein’s views by R. Halperin-Kaddari, “Tav Lemaitav Tan Du Mi-Lemeitav Armalu: An Analysis of the Presumption”, *Edah* 4 (2002), 21-24.


\(^{157}\) See further ARU 16:80 on ‘Iggrot Moshe ’*Even Ha’Ezer* 1:139 (where R. Feinstein writes: “...
Moreover, this revised conception of the applicability of the principle does not stand alone. We must understand the talmudic case of a *get zikkui* given during a quarrel158 to refer to a case where the wife does not really want the divorce: the *get* is held ineffective using the *tav lemeitav* principle. In the converse situation, where it is the woman whose life was made a misery by a cantankerous and miserly husband (who would quarrel with her endlessly and starve her), *Tashbets* ruled that the husband could be compelled to divorce.159 It is clearly not always the case that the *halakkhah* regards it as preferable that a woman remain in an unsatisfactory marriage rather than be single; indeed, this would make a nonsense of the established grounds of divorce available to women. Again, that basic issue cannot be avoided.

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158 Yeib. 118b, discussed at ARU 16:75-76. For later *teshuvot* dealing with the validity of a *get zikkui* given at the time of a quarrel, where the issue is whether the *get* is regarded as an unqualified advantage for the wife, so that the *zikkui* is valid as an application of *zakah lo la’adam shelol befanav*, see ARU 16:78 n.210, citing *Ran* 43; *Terumat HaDeshen* 237; R. Eliyah Mizrahi 68; Binjamin Ze’ev 109; *Netam Sofer* 4, *Even Ha’Ezer* 2:43; *Ein Yitsbak* 1 ‘Even Ha’Ezer 3.

159 See §4.46, below.
Chapter Two

Issues of Authority

A. Introduction

2.1 From the outset of this project, we have stressed the overriding importance of issues of authority: the problem is not resolved simply by reference to measures taken in the past; it consists rather in determining whether authority exists today to implement (and not merely assert the theoretical possibility of) such measures. In this context, appeal is often made to the need for “consensus” – arguably, a concept “foreign” to Jewish law, but is more accurately debated in terms of the claim of *ḥumrah shel ḫeshet ḥish*, which distinguishes our particular problem as one requiring special strictness, such that (as understood in relatively recent times) even one significant contrary opinion is claimed by some to have the status of a veto (§§2.2-2.16). This being so, special importance attaches to the rules of *ṣeqeq seqeqa* (§§2.17-24). Historical research, moreover, may contribute to the construction of such “doubts”, especially where the authority for rejection of remedies itself rests upon historically problematic claims and where historical research may itself unearth data relevant to the rules of *hilketa kebrita‘ey* (§§2.25-37). Such arguments may be combined with the rules relating to authority in times of emergency, in such a way as to overcome the inhibitions felt by many *dayanim* against (i) applying *lema‘aseh* what otherwise might only be available *lehalakhah* (about which R. Ovadyah Yosef has expressed some scepticism”) and/or (ii) adopting *lekhattullah* what otherwise might only be available *bedi‘avod* (§§2.38-41). The chapter concludes with some more general considerations (§§2.42-50).

100 ARU 2:1-7, 57-65.

In the Introduction to *Mishneh Torah*, Rambam justifies the binding character of “all matters stated in the Babylonian Talmud” on the grounds that “with respect to all matters stated in the Talmud there is universal agreement among all Israel [*הכמסי נאם את כל יהודיה*].” Some have seen here the influence of the Islamic doctrine of *ijma* See ARU 1:13-14 and 2:58.

101 He writes at Yeḥuwveḥ Da‘at I (Jerusalem 5737) *Kileley HaḤor’ah*, p. 15 no. 12, that “[i]f a *poseq* concludes his *responsum* ‘so it seems to me in theory but not in practice’ or ‘so it appears to me if [other] posqim will agree with me’ we can assume that this is [merely] due to humility and we may therefore rely on his decision even in practice [and even if other authorities did not express their concurrence]”; see ARU 18:53.
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B. Consensus

2.2 It has become commonplace to hear that any proposed solution to the problem of 'iggan must command a consensus. If this is advanced simply as an application of some general claim that we require a consensus for (any) halakhic change, it is ill-founded.\textsuperscript{163} It appears originally to have emerged in the context of the increasing limitations imposed upon the authority of taqkanot haqahal, particularly in their use of the power of expropriation.\textsuperscript{164} This was itself relevant to marriage, insofar as taqkanot sought to impose additional requirements on giddushin, failure to comply with which might be visited with annulment (using heker bet din). The demand in that context of Rivash (\textit{Resp. 399}) for the approbation of “all the halakhic authorities of the region” (to the implementation\textsuperscript{165} of a taqkanah requiring a minyan and the presence of the communal officials) may be viewed in this light. Moreover, as Elon argues, the possibility that a woman regarded in one place as married could be regarded elsewhere as unmarried – in terms of a local taqkanah – entailed an inherently serious threat to the upholding of a uniform law in one of the most sensitive spheres of the halakhah, that of the 'eshet 'ish.\textsuperscript{166} Later, however, even the “region” became too local a basis for the operation of consensus.\textsuperscript{167} If this analysis is correct, the demand for consensus appears to have been prompted by a problem of “popular” legislation, rather than being a restriction of the talmudic institution of the “majority rule” (of sages). More generally, it may reflect the desire to avoid any communal split.

\textsuperscript{164} See further ARU 8:31 (§6.4.1).
\textsuperscript{165} See further ARU 8:31 (§6.4.2), for the explanations of Morrell (viewing expropriation as threatening the inviolability of property rights and personal liberty and therefore requiring unanimous consent) and Kanarfogel.
\textsuperscript{166} Replying to a question posed to him by Abraham b. Alfial concerning an enactment adopted by the community of Tortosa: see further ARU 2:44-47 (§4.3.4).
\textsuperscript{167} Rivash argues at length for the taqkanah’s validity lehalakhah, but concludes: “This is my opinion on this matter in theory (\textit{\textasciitilde w\textasciitilde \textasciitilde \textasciitilde}) However, as to its practical application (\textit{\textasciitilde \textasciitilde \textasciitilde}) I tend to view the matter strictly; and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakhic authorities of the region concurred, so that only a “chip of the beam” should reach me.” On this, see further §5.37, below.
\textsuperscript{169} Maharam Alashkar (end of the 15th, beginning of the 16th centuries) requires that “... the entire country and its Rabbis, with the concurrence of all or a majority of the communities” come to a decision, in reliance on those leading authorities (\textit{Resp. \#48}, in Elon 1994:II.867f.), partly on the grounds that any individual community has a power of confiscation (heker bet din heker) only in relation to the property of its own members, and so could not effect an annulment where the husband was from a different town. See also Riskin 2002:24.
Rivash, however, gives a different reason for it: “so that only a ‘chip of the beam’” should reach me”, thus reflecting a desire “to divide the responsibility for the decision among as many authorities as possible”.

In fact, we are left here with a paradoxical situation: such a power of communal enactment may, on Rivash’s argument, itself be halakhically exercised without a consensus of rabbinic authorities, but a consensus is required for a formal haskamah for such exercise, since the individual authority consulted is reluctant to take sole responsibility for giving such an haskamah. This is quite evocative of the modern situation, and suggests that had Rivash been asked his opinion after the event (bedi’avad) on a marriage annulled in the light of such a taqkanah, his conclusion might well have been different. R. Abel notes that the desire to share the burden of a practical ruling and the distinction between theoretical and practical halakhah can both be found in the Talmud but has become a dominant feature only in the area of marriage and divorce.

2.3 Perhaps not unrelated to this is the paradox of the demand for consensus on the one hand, and the respect accorded to a gadol hador on the other. Sometimes this may be resolved in terms of a distinction between psak and reasoning. A story is told of an occasion on which R. Hayyim of Brisk had a query regarding a practical matter and decided to turn to the leading authority of the day, R. Isaac Elhanan of Kovno. He wrote: “These are the facts and this is the question; I beg you to reply in a single line – ‘fit’ or ‘unfit,’ Guilty’ or ‘not Guilty’, without giving your reasons.” When R. Hayyim was asked why he had done so, he replied “… decisions of R. Isaac Elhanan are binding because he is the Poseq of our generation, and he will let me know his decision. But in scholarship and analysis my ways are different from his and if he gave his reasons I might see a flaw in it and have doubts about his decision. So, it is better if I do not know his reasons.” On this account, the authority of the gadol hador is treated as charismatic rather than rational.

170 Elon 1994:II.856. See also ARU 7:14-15 (§IV.10).
171 ARU 7:14-15 (§IV.10) on Sanh. 7b and B.B. 130b, and noting that a similar tendency can already be detected in the responsa of Rashba (I no. 1206 at the end); on the latter see ARU 2:42-43 (§4.3.2) for text and commentary.
173 Reflecting an ancient tradition in Jewish law: see n.286, below.
2.4 In contemporary halakhic discourse, however, “consensus” does not appear always to require unanimity. Thus Zweibel writes: “It has been a longstanding policy of Agudath Israel, established years ago when the Moetzes Gedolei HaTorah was under the chairmanship of R. Moshe Feinstein” and reaffirmed many times over the years..., that any secular Law impacting upon halachah... must have a broad base of consensus support from authoritative poskim respected by all segments of the Torah community.”176 Similarly, when R. Riskin argued for the adoption of taqqanot, recognizing that “this can only be done by a large gathering of the rabbis of Israel... so that many authorities share the burden of the decision,”177 he was met by the objection that a “large gathering” is not enough; the “virtual unanimity” of all of the rabbis of Israel was necessary.178

C. The ḥumrah shel ᵒsheṭ ᵒиш

2.5 If claims that we require a consensus for halakhic change are ill-founded when put forward as general propositions, they have greater weight in the particular context of gittin,179 where it is the accepted practice (though not

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175 On the status of an “insubstantial minority”, see further §2.44 (and Appendix A), below.


179 See further R. Abel’s full analysis in ARU 7:13-25 and ARU 16:13, 111, 166, 167, 201ff. Hadari understands the ḥumrah shel ᵒsheṭ ᵒиш to be halakhic parlance for what she describes as the “taboo” that in kinyan-marriage surrounds a married woman and serves to render her unseduceable (ARU 17:115-34, passim; 148). Thus, ḥumrah shel ᵒsheṭ ᵒиш is not a special halakhic category but rather a way of referring to visceral sexual fears. However, Hadari stresses that this depends upon the perception of traditional qiddushin by the particular community concerned, and that (a) the strength of kinyan is weakened anyway in communities which do not perceive the wife to be the “acquisition” of the husband and (b) the mutual trust and respect of which a non-kinyan union may be a marker (or which it may engender) may itself serve to strengthen Jewish partnerships. In a community in which a woman cannot be “forced” by kinyan into sexual fidelity, the most stabilising path may then be to introduce forms of relationship in which her feelings of being free, equal and equally valued will encourage her to remain faithful of her own accord (ARU 17:ch.4 and ch.5 to p.132).

180 E.g., J.D. Bleich, “The Device of the “Sages of Spain” as a Solution to the Problem of the Modern-Day Agunah”, in J.D. Bleich, Contemporary Halakhic Problems, Volume III (New York: Ktav, 1989), 329-343, at 332: “Given the extreme and well-founded reluctance on the part of rabbinic authorities to sanction any procedure which would render the get invalid even according to a minority view, the remedy must avoid the taint of asmakhta in a manner accepted by all authorities.” See also Bleich 1998:118: “... to be viable and non-schismatic, any proposed solution must be advanced with the approval of respected rabbinic decisors and
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 Ārukh, the Rema and the vast majority of the posqim. Even a single stringent opinion would thus have to be taken into account (thus going substantially beyond the view of Maharibal, who speaks of the need to abide by ‘substantial minority’ opinions in matters of gittin and qiddushin).

2.6 The reasons for this may possibly be because the Sages’ extremely strict treatment of ‘erwah is part of a pattern affecting all three major commandments where, when necessary, martyrdom is demanded, one aspect of which is the suspension of the rule of rov and the concern for even insubstantial minorities. This, indeed, is reflected in the debate regarding conditional marriage, where the view that even a condition repeated at ḥappah, yīḥud and biah may be cancelled during the act of intercourse was asserted as normative, on the basis apparently of a single opinion.

2.7 This, however, appears to be a modern innovation. An oft-quoted source for this stringency of approach is R. Yom-Tov Algazi (18th century) who applies this “accepted practice” not only to gittin but also to yibbum and ha’litsah. His opinion is cited in a number of teshuvot of R. Ovadyah

accepted by all sectors of our community.” Cf. Jachter, www.tabc.org/koltorah/aguna/aguna59.7.htm: “…there have been interesting proposals made to solve the Aguna problem which have been rejected by the Orthodox rabbinate. There have been other very innovative suggestions, such as proposals made by R. Yosef Elyahu Henkin (Peirushei Ibray pp. 115-117; see further below, §§3.44-47) and Israeli Chief Rabbi Benzion Uziel (Teshuvot Mishpatey Uziel, ‘Even Ha’Ezer 1:27) which have simply not been accepted. What is crucial to note is that these proposals were not implemented in practice, because the rabbinic consensus rejected these proposals. Radical changes to Gittin procedures require a rabbinic consensus because of the potential for a communal split if part of the community rejects the proposal.”

131 This would rule out not only coercion but even harbutap in cases of me’ ‘alay: see R. Gertner’s Kefiyah BeGet (Jerusalem, 5758), p. 489, section 118, number 5 and p. 531, number 5.


133 ARU 7:22-23 (§IV.37-38). But see also ARU 7:17 (§IV.19-20).

134 See ARU 7:23-24 (§V.3). See also ARU 6:14 (§6.10), on opposition to the application of the modern Israeli version of the harbutap of Rabbeni Tam.

135 For the latter, see Responsa Simḥat Yom-Tov, cited in the next footnote. On whether yeveamah lashuq is considered as ‘erwah, see Simḥat Yom-Tov no. 11, 44c; Yabia ’Omer (Jerusalem 5746) VI ‘Even Ha’Ezer 6:2, p. 296, col. 1, 11th line from base of column (including yibbum and ha’litsah under the heading ‘erwah); ET XXI col. 433 at note 59. For those who do not consider her ‘erwah see ibid., note 71. A briefer summary of both sides can be found in ET VI col. 707 at notes 40-46.
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Yosef.\(^{186}\) But this is purely custom or, at most, of rabbinic origin.\(^{187}\) Thus R. Ovadyah Yosef, *Yabia* ‘Omer VI *Even Ha’Ezer* 6:3, quotes R. Refa’el Asher Qubo:\(^{188}\)

In a case of ‘*ervah* (adultery, incest) although [in any given circumstances] the majority of the posqim\(^{189}\) rule leniently and according to the law of the Torah we follow their lenient position, nevertheless by rabbinic enactment we concern ourselves with the stricter opinion of the minority of the posqim, as Maharal wrote in [his responsa] volume IV (no. 19). A root and base for this is that which we find explicitly stated in the Talmud that in a case of ‘*ervah* the [talmudic] Sages took into account a “substantial minority”\(^{190}\) where this would lead to a stringent ruling (as Tosafot wrote in *Yevamot* 36b,\(^{191}\) *Bekhorot* 20b;\(^{192}\) cf. also *Tosafot*, *Qiddushin* 50b).

### 2.8

A fundamental uncertainty here relates to whether the basic rule of *rov* — which Rambam implied would have justified retention of the geonic measures,\(^{193}\) and which Maharam Alashkar saw as justifying the extension of annulment beyond the cases enumerated in the Talmud\(^{194}\) — applies at all where there was no face-to-face meeting of those comprising the majority with those comprising the minority.\(^{195}\) If it does, the view that the

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186 The matter is extensively examined in *Yabia* ‘Omer: I Yoreh De’ah 3:12; IV *Even Ha’Ezer* 5:4 & 6:2; VI *Yoreh De’ah* 15:5 end; VI *Even Ha’Ezer* 2:6 p. 274a, beginning on the 17th line above the end of the column [in the large edition (Jerusalem 5746)] & 6:2. R. Yosef quotes in these responsa a number of sources in which R. Aligzi’s ruling is found — e.g. Resp. Qedushat Yom-Tov no. 9, 15d & Simḥat Yom-Tov no. 11, 44c. See *Yabia* ‘Omer (Jerusalem 5746) VI *Even Ha’Ezer* 6:2, p. 296, col. 1, 11th line from base of column.

187 In Torah law there is no difference whatsoever, as regards halachic decision making, between *gittin* and *qiddushin* (or, for that matter, *tamets* on *Pesah* on the one hand and all other areas of the *Halakah* on the other; taking into account all opinions in the area of *gittin* and *qiddushin* is purely custom or, at most, of rabbinic origin: ARU 7:14 (§IV.9; see also §IV.11).

188 See further ARU 7:1 (§IV.11), relating this to the status of the majority rule even where the posqim never met in debate: ARU 7:1 (§L2), ARU 7:15 (§IV.12).

189 Including the Shalḥot *Arukh* and the Rema.

190 Of course, this would not explain the practice of accepting the opinions of insubstantial minorities and even of unique opinions. On this, see §§2.9-15, below.

191 S.v. Ha’. See also Tosafot ibid. 121a, s.v. *Velo*.

192 S.v. *Iklaḥ pater*.

193 Hilḥokot Ishut 14:14: see n.800, below.


195 See further ARU 7:1-2, 7:15-16 (§IV.12-13). If the majority rule does not apply by Torah law to those posqim who never debated their disagreements face-to-face, so that min haTorah the matter remains in doubt and it is only by rabbinic authority that we accept the majority (albeit even in cases of Torah law), the concern for minority views in *gittin* and *qiddushin* is more easily understood because now we do not need to postulate a new rabbinic enactment towards stringency in cases of *mahloqaḥ haposqim* touching *gittin* and *qiddushin*; on the contrary, since there is no pentateuchal majority in such cases, we should automatically take the stricter view
concern for minority views in the area of gittin and qiddushin must be a rabbinic stringency is reinforced; if not, the matter remains one of safeq but any ṭamurot derived from minority opinion must still be regarded as merely a rabbinic stringency, according to the majority opinion that safeq de’Oraita’ leḥumrah is, as Rambam says, itself a rabbinic doctrine.  

2.9 Analysis of a teshuvah by R. Moshe Feinstein (‘Iggrot Moshe, ’Even Ha’Ezer I, 79) also leads to the conclusion that insubstantial minority halakhic opinions, even in matters of ‘erwaḥ, need not be considered and that there is no source in the Talmud for those who rule that we must take into account even insubstantial minority, or unique, stringent opinions in the area of gittin and qiddushin.

2.10 Moreover, R. Yosef himself maintains that once a situation of ‘iggun has materialised we revert to the usual rule of rov posqim and the Shultan ‘Arukh. In his summary of halakhic guidelines, he concludes: “We customarily take a strict line in the laws of the grave matter of ‘erwaḥ even against the opinion of Maran and the majority of posqim … but in a case of ‘iggun we are lenient [and follow Shultan ‘Arukh and rov posqim]”. This seems to be the position of today’s Ashkenazi authorities also. Regarding the Yemenite communities, some argue that there existed a dispute amongst their posqim as to whether the Rambam’s rulings were accepted as final even in the matter of kefiyat get when she claims me’is ‘alay. R. Ovadyah Yosef maintains that no such dispute existed; the Rambam’s rulings were, he maintains, accepted on this point too.

2.11 When all hope for a solution of an ‘iggun situation according to rov posqim is lost we may rely, according to the Taz and his school, on (even insubstantial) minority views and even on a lone opinion (even if the

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in all cases of Torah law (as we do in gittin and qiddushin) because safeq de’Oraita’ leḥumrah and a rabbinic enactment is required so that we can rely on the majority in other cases involving Torah law. This rabbinic leniency is more easily understood according to the view that safeq de’Oraita’ leḥumrah itself is miderabbanan: see §2.13, below.

196 See further ARU 7:14-15 (§IV.11-12).
197 For the detailed argument, see ARU 7:18-22 (§§IV.24-35), reproduced as Appendix A below.
198 ARU 7:21 (§IV.32).
199 ARU 7:24 (§V.8).
200 Presumably including cases where, in spite of a ruling of bet din, a get cannot be obtained.
201 Responsa Yeturonek Da’at I, Kileley haHora’ah, p. 32, no. 9. See ARU 6:19 (§7.8); 7:18 (§IV.23).
202 See Posqey Din Rabbaniyim, vol. IV, col. 166, discussed in §2.14, below.
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question is one of biblical law.24 This is based on the view that (i) the law of rov operates, at the biblical level, only where the mahloqet was face-to-face (as in a debate amongst the judges of the Sanhedrin), but a mahloqet amongst posqim who never met, whether due to historical or geographical constraints, is not governed, biblically, by the majority rule and remains a doubt in biblical law and (ii) safeq de’Oraita leḥumrah is a rabbinic rule (the view of Rambam, followed by most posqim). The greater the emergency – for example, the ‘agunah is young, without children, desperate to remarry and facing the certainty of a ruined life – the more likely we are to rely on even a lenient minority view, and even on a single lenient opinion. R. Yosef (§2.13, below) takes the view that lehalakah we can accept both (i) and (ii). In each case, sensitivity to the circumstances dictates what we should actually do.

2.12 Examples and applications of this advocacy of special leniency to resolve problems of ḫgyn may be found in the following sources:

(a) The Taz in ‘Even Ha’Ezer 17, sub-para. 15,25 quotes authorities who were willing to rely on ‘one poseq’ when all hope of releasing an ‘agunah was otherwise lost, though this was in the context of a missing, rather than a recalcitrant husband.

(b) R. Ya’aqov Reischer (c. 1670–1733), Responsa Shevat Ya’aqov III, ‘Even Ha’Ezer 110, permitting a young woman whose husband had disappeared in the ocean but whose death had not been definitely attested, to remarry since this type of ‘agunah is forbidden remarriage only lekhateḥallah. As she was a young lady her situation was she’at hadeq and therefore in her case the lekhateḥallah prohibition

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24 On Morgenstern’s claims in this respect, see ARU 5:2.3 (§3) (on the claim: “All doubts in law and facts are resolved in favour of the Agunah. Even minority views in law in favour of annulment can be relied on”); ARU 5:21-23 (§15) (on the claim: “we rely on Taz ‘Even Ha’Ezer 17:15; Shakh 242; ‘Arokh HaShulḥan Yoreh De’ah 110 who permit us to rely on minority opinions to free an ‘agunah’”)

25 Cited by R. Moshe Morgenstern, who writes (Hatorot Agunot, I, ch.3 p.54): “All doubts in law and facts are resolved in favour of the Agunah. Even minority views in law in favour of annulment can be relied on”. On this, and Taz, Torde De’ah 293:4, also cited by Morgenstern, see ARU 2:60-61 and n.268 (§5.1.4), ARU 5:2-3 (§3). In the latter, R. Abel notes that it does not apply to doubts regarding the facts such as the case of mayim she’eyn lahem sof and that even with regard to doubts in law the Rema there in ‘Even Ha’Ezer rules stringently against relying upon minority opinions, so that one cannot base a decision for leniency on this Taz alone. See, however, §2.20 (end).
could be overridden. R. Yosef Hazzan argues that even in matters of qiddushin and gittin the lenient rulings of the Shulḥan ‘Arukh should be followed (by the Sefaradim) even when these are against the majority of the posqim. He writes in his classic Ḥiqrey Lev:

… from all the writings of the ‘Aḥaronim it seems that also in a case of ‘erwah (adultery and incest) we (the Sefaradim) have accepted his (R. Yosef Karo’s) rulings even when these are the more lenient position. See what I have written in Ḥiqrey Lev to ‘Orah Ḥayyim 95 & 96 … I explained there that in case of an ‘erwah prohibition, although we have accepted the rulings of Maran, it is within the rights of the rabbi issuing a ruling (in a specific case) to rule stringently if he sees that a majority of the posqim … take a strict line (against Maran’s lenient view). In all other matters of the Halakḥah, however, the rabbi issuing a ruling is not permitted to give a strict decision against the view of the Rambam and Maran.209

It is clear from this that the Ḥiqrey Lev would go no further than allowing (though not requiring) a stringent decision (in gittin and qiddushin) against the Shulḥan ‘Arukh if a majority of the posqim are opposed to the Shulḥan ‘Arukh’s lenient ruling. He would not abide by the Maharal’s acceptance of the substantial minority consideration and certainly not R. Algazi’s concern for every single opinion.210

(d) In some cases of qiddushey taʿut R. Feinstein ruled

206 On this amazing leniency it was remarked by Dayan 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 Feuerwerger (Me’iri), ‘Ezrat Nashim I:240 col. 2. On R. Reischer, see further ARU 7:17 n.118.

207 1741-1820. R. Yosef Refa’el Hazzan was Rabbi of Smyrna. In 1811 he moved to Hevron and two years later to Jerusalem where he was appointed Rishon leṬsiyyon (Chief Rabbi of the Holy Land). His monumental work Ḥiqrey Lev, responsa according to the order of the Shulḥan ‘Arukh, was published in 7 volumes between 1787 and 1832. R. Ḥayyim Palaggi was his grandson.


209 For other ‘Aḥaronim who take a similar line to R. Hazzan see Yabia ‘Omer IV ‘Even Ha’Ezer 5:4; VI ‘Even Ha’Ezer 6:2,3; VI Yoreh De’ah 15:1.
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leniently in opposition to a number of outstanding ’Aḥaronim and it seems that it is his ruling which stood, at the time, as a lone opinion. Hence his preference for a get.210 However, in cases where the procurement of a get proves impossible, so that the situation becomes an insoluble case of ‘iggun, R. Feinstein is satisfied that the marriage can be considered void. R. Feinstein thus appears willing to rule as a sole lenient opinion; we may take it that he would certainly disregard all minority opinions.211

(e) In a case in which R. Ovadyah Yosef sat together with R. Waldenberg and R. Kolitz,212 the bet din ordered the application of harḥaqot against the recalcitrant husband (in spite of the ruling of Maharibal who forbade their application), in order to save the wife from ‘iggun.

2.13 There is dispute as to the scope of the lenient approach of the Taz (§2.12(a), above): Shakh and his school213 allow such reliance on a unique lenient opinion when all other possibilities of releasing an ‘agunah have been exhausted only if we are dealing with rabbinic law; Taz and his school214 apply it even if we are dealing with biblical law. However, if we accept the arguments of R. Yosef,215 who maintains (i) that in any maḥloqet where the disputants are in absentia of each other, the majority rule is not applicable in Torah law and the situation remains one of doubt and (ii) that the consensus of scholarly opinion follows the Rambam that a doubt in Torah Law being resolved strictly (ṣafeq de’Oraita leḥamrah) is

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210 R. Feinstein’s call for a get wherever possible in cases where he applies the argument of error does not mean that he considers, even where an error in the qiddushin can be demonstrated, that the marriage is in existence unless and until, when all hope of acquiring a get has been abandoned, release through mistaken transaction is declared. His call for a get is only to satisfy those posqim who do not regard the case in question as one where annulment due to error is justified. According to his own view, there never was any marriage and no get is required at all. See ARU 6:19 (§7.8).
211 ARU 6:18-19 (§7.8).
213 See the summary in ET IX cols. 260-262 and the footnotes thereon. On the implications of this approach, see further ARU 5:22-23 (§15.3.4).
214 ‘Or Zarua’ II Sukkah sec. 306; Responsa of Rashba I no. 253 (as understood by Rashbash, Responsa no. 513); Get Pashut, Kelalim, sec. 6; Rabbi M. Y. Zweig, Responsa ‘Ohel Moshe, Mahadura’ Tanyaḥa’, 123:2.
only rabbinic in nature, it would seem that there is room to consider whether we could adopt the view of the Taz and rely, in an otherwise insoluble situation, on a single lenient authority even in a case of Torah law including, as the Taz says, ‘iggun.’

2.14 But even if we do not go so far as to accept a lone lenient opinion, there is general agreement that, where the get refusal reaches a stage classifiable as ‘iggun, we need not take account of stringent minorities (even if they are mi’ut matsuy and certainly not if they are mi’ut she’en matsuy or unique opinions). In a decision recorded in Pisqey Din Rabbaniyim, Rabbis Hadayah, Elyashiv and Zolti wrote that in a grave situation of ‘iggun when there is no hope of the wife’s returning to live with the husband (as here, where the woman had remained chained for 8 years), the halakhat requires that we must rule like the majority (even if it is not in accordance with all opinions) and not concern ourselves with minority opinions as we find in the laws of gittin. The bet din therefore ruled that it would force him to divorce – provided the wife returned [the payment of] her ketubbah which she had already received from her husband and also gave him, at the time of receiving the get, the sum that had been agreed with her (the equivalent of $15,000).

See ARU 7:15 (§IV.12 and note 111), noting that, according to Rabbi M.Z. Landau in Seferot Melakhim, ch.7, the Rambam would maintain this lenient position even where the doubt is due to an argument amongst the posqim.

See further ARU 7:1-2 (§1.4), ARU 5:22-23 (§§15.3.1-15.3.4). R. Abel at ARU 5:22 (§15.3.2) notes that Rabbi A.Y. Kook, in the tenth chapter of the introduction to his work Shabbat Ha’Arets, argues that according to those, however, who rule that in any matboqet where the disputants are in absentia of each other the majority rule is not applicable in Torah law (where the situation would be considered one of doubt) and is applied only by rabbinic enactment, we may rely, in an urgent case, on a single opinion even if the question is one of Torah law. See ARU 7:1 (§1.2 at note 3). Although this approach regards matboqet haposqim as one of doubt and, therefore, should the question be one of Torah law, we should not be allowed to rely on a lenient minority because saeq de’Oraita’ lehumrah, R. Yosef has shown that the view of the Rambam – that saeq de’Oraita’ lehumrah is only a rabbinic regulation – is the dominant halakhat opinion. Cf. ARU 7:15 (§IV.12). This would have important consequences according to the responsa of R. Ovadyah Yosef in which he reaches the conclusion that there is ample evidence to demonstrate that in any matboqet where the disputants are in absentia of each other, the majority rule is not applicable in Torah law (where the situation would be considered one of doubt) and is applied only by rabbinic enactment. Cf. ARU 7:13-16 (§IV.13).

R. Ovadyah Yosef, Yeshivat Da’at, 1, Kilealy Ha’Halakha, p.32, cited in ARU 7:16-17 (§IV.16 and n.115).

Pisqey Din Rabbaniyim, vol. IV, col. 166, as noted by R. Hayyim Sha’anan, “Oranim Likhfiyat Haget”, Tefumin 11 (5750), 212: “In a grave situation of ‘iggun when there is no hope of her returning to live with him and especially in a case like ours where the woman has sat chained for 8 years we must hand down a [lenient] ruling even if it is not in accordance with all opinions.”
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2.15 Taking these sources together, it follows that before we reach the stage of ‘
iggun all stringent opinions are taken into account but once we cross the
threshold and enter the area of ‘
iggun we abandon the ‘all stringencies’
approach and – even if we do not go so far as to accept a lone lenient
opinion – we rely on the usual halakhic methodology.

2.16 Naturally, this raises again the fundamental question: what counts as
‘
iggun and what as gittin for the purposes of this distinction?

D. Sfeq sfeqa

D1 Dogmatics

2.17 In modern jurisprudence, systemic rules about authority are commonly
termed “secondary rules”. They include “rules of recognition” and “rules
of change”, which provide criteria for recognising the validity of existing
rules on the one hand, changes in rules on the other. In some secular legal
systems, they are defined in a Constitution. Not so in Jewish law. As R. Abel’s study (ARU 5) demonstrates, they are subject to substantial
uncertainties. But the halakah has developed ways of dealing with such
uncertainties, in the form of rules concerning “doubt”.

2.18 Particularly important here is the application to our problem of compound
doubts (sfeq sfeqa). The issue is complicated. The principles of safeq
de’Oraita’ leﬁumrah and safeq deRabbanan lequla provide a useful
starting-point: a double doubt is sufficient to permit a Torah prohibition;
a single doubt is sufficient to permit a rabbinic prohibition. Yet what
constitutes a “doubt” (to be distinguished from mere lack of knowledge)

220 Avodah Heshullah, Y.D. 110, para.111 (end).
221 See §1.5, above.
222 A finely detailed study of safeq and sfeq sfeqa will be found in Sfeqot Melakhim by R. Moshe
Zvi Landau. There is an excellent halakhic summary in R. Yosef’s Yefunweh Da’at, I, Kileley
HaHora’ah, Kileley Sfeq sfeqa (pp. 25-29).
224 ARU 5:33 (§21.2.6.1.1) on Responsa Maharashdam II nos. 110 and 111. On this source, see
further below, §2.22.
225 And this, despite hikista kebatra’ey. Abel, ARU 7:4 (§11.10), observes: “The Rosh (Mo’ed
Qatan 3:20, also cited in Yavin Shema’ah, rule 277 in the name of the Rosh) maintains that
where the dispute is in rabbinic law and the earlier authority rules leniently the earlier authority
should be followed in spite of the rule of batra’ey. This accords with the general rule that in
rabbinic law a doubt should be resolved leniently (safeq deRabbanan lequla’).” He notes that
the Ra’avad applied batra’ey even where this would lead to stringency in rabbinic law, as
mentioned by the Rosh in Mo’ed Qatan there.
may itself be contested, and there are additional issues to be addressed, such as the combining of factual and halakhic doubts and the status of a unique (but not excluded) opinion.227

2.19 In Yabia ‘Omer VII ’ Even Ha’Ezer 6, R. Ovadyah Yosef discusses sfeq sfeqa at length (with regard to removing the blemish of bastardy), concluding that so long as one doubt is shaqul (= evenly balanced, i.e. 50-50) the other need not be. Thus, a double (here, factual) doubt solves the problem of mamzerut. Applying this to legal propositions, a minority opinion can qualify as the second doubt in a sfeq sfeqa; and in fact minority views, even if categorically rejected from Halakhah, are regularly used to create a sfeq sfeqa.228

2.20 The question also arises whether these principles may be applied “reflexively”. Do the rules about safeq apply to sfeiqot in the secondary rules themselves? For example, there are uncertainties in the scope and meaning of the basic rule of hilkhata kebra’ey, such as its applicability as between “halakhic epochs” (particularly relevant in relation to the rejection by the Rishonim of the geonic enactments), the need for specific rejection by the batra of the ruling (and reasoning?) of the gamma, and the conditions required for the application of Rema’s qualification.229 There is little in the halakhah to indicate a negative answer to this question; indeed, some have questioned the very applicability of the distinction between “primary” and “secondary” rules to the halakhah.230 Moreover, majority opinion has it that safeq de’Oraita’ lehumrah is, as Rambam says, a rabbinic doctrine.231 Indeed, the question arises whether each of the rules about authority, considered in this chapter, are de’orayta or derabbanan, since this would determine whether we apply to them

226 For an example of such, see R. Jachter’s comments on R. Herzog’s analysis of the lenient ruling in favour of annulment of the marriages of the “captured” wives of the Austrian kohanim, on the grounds of sfek sfeka: (i) were they raped?; (ii) is annulment possible in the post-talmudic age? See ARU 2:62 (§5.2.3).
227 See ARU 5:32 (§21.2.6 n.99).
228 Yabia ‘Omer Vol.2, Zhit 12:3; ARU 7:15 (§IV.14).
229 See further ARU 7:3-13 (§6.III.2).
230 M. Silberg, Talmudic Law and the Modern State, trld. B.Z. Bokser (New York: Burning Bush Press, 1973), 51, claims that Jewish law, being a system of religious law, “does not define norms for deciding the law, but norms of behaviour” – thus apparently reducing Jewish law (in Hartian terms) to a system of primary rules only.
231 See further ARU 7:15 (§IV.12), citing R. Ovadyah Yosef, Responsa Yechiweh Da’at 1 Kileley HaHora’ah, Kileley Safeq De’Oraita’, no. 1 (and see n.196, above).
safeq de’Oraita’ lehumraḥ or safeq deRabbanan lequla.232 Thus, R. Abel notes that R. Ovadyah Yosef maintains that in any mahloqet on matters whose status is that of Torah law (de’oraita) where the disputants are in absentia of each other (thus most inter-generational and inter-community disputes), the majority rule is not applicable (in biblical law) and the situation thus remains (biblically) one of doubt. But we have already seen (§2.13) that according to R. Yosef the rule that doubts in Torah Law are resolved strictly is itself only rabbinic in nature – which opens the possibility that we may rely, in an otherwise insoluble situation of ‘iggun, on a single lenient authority.

2.21 Are the normal rules of safeq sfeqa applied where the situation is deemed one of emergency? Two issues arise here: (a) there would appear to be no reason why safeq sfeqa should not be used in situations of emergency; the only question is whether it is itself to be applied more leniently, and we see no indication that this is the case; (b) in any event, do we have to distinguish the determination of individual cases in emergency situations from the adoption of qulot on a general basis? Although normally in a situation of urgency (she’at hadehq) issues are dealt with on a case by case basis (as contrasted with a situation of tsorekh hasha’ah, when it becomes possible to “uproot” a Torah law), we may infer from Ma’alot Lishlomo (§3.24, below) that the leniency available in she’at hadehq would extend to the adoption of inai bet din.

D2 Examples of use

2.22 The use of safeq sfeqa in qiddushin and gittin is far from unknown. We encounter it in Responsa Maharashdam II nos. 110 and 111, in relation to the status of the marriage of an apostate:233 he argues that the opinion that an apostate is considered a gentile and therefore cannot contract a marriage, although not accepted as normative, can still be used as a snif to some other doubt in order to create a sfeq sfeqa.

232 See, e.g., ARU 5:13-14 (§10.2.2) on Devar ‘Eliyahu 48, in relation to doubts regarding facts or (substantive) law.

233 See further ARU 5:33 (§21.2.6.1.1), in relation to the (apparently conflicting) views found in Bet Yosef and in Mahari Mintz.

234 Here a snif is equated with a safeq. Not all authorities would agree. See however R. Ovadyah Yosef, Yeḥuwweh Da’at I Kileley Sfeq sfeqa, p.26, number 11, according to which a snif (almost as small as you like) can serve as the second safeq for the purposes of sfeq sfeqa so long as the first is at least 50-50.
‘alay as a snif to another ground, to release a widow from yibbum, even after me’is ‘alay was abolished for married women, and ceased to be used directly in the case of widows seeking to avoid levirate marriage.” Yavetz cites several important posqim who use this ground similarly in levirate cases, among them R. Yosef Colon (Maharik),230 as well as R. Karo himself.231 Yavetz concludes that this ground can indeed serve as a snif to another ground.

2.23 The responsa of R. Ovadyah Yosef provide further evidence of the use of sfeq sfeqa in our context. In Yabia ‘Omer VII ‘Even Ha’Ezer 6,232 R. Ovadyah Yosef was faced with a case where a woman claimed to have been married with ḥuppah and qiddushin; to have separated from her husband without a get and to have married a second husband civilly, a daughter being born during this second marriage. This daughter became observant and sought to marry under Orthodox auspices (an example of the “upward religious mobility” whose importance we stress later in this report). R. Yosef’s permissive response was based on a sfeq sfeqa. The first doubt was whether the first marriage had actually taken place; the second was whether this child was from the first or second husband. Such (here, factual) doubts constituted a sfeq sfeqa and were enough to permit the daughter’s ḥuppah and qiddushin. This is the context in which R. Yosef discusses sfeq sfeqa at length, concluding that so long as one doubt is šaqal (= evenly balanced, i.e. 50-50) the other need not be, so that a minority opinion may qualify as the second doubt in a sfeq sfeqa.233 The argument in Yabia ‘Omer III ‘Even Ha’Ezer 8:20 also shows that R. Ovadyah Yosef is willing in principle to apply sfeq sfeqa in order to rule leniently in a case of ṣaggum.234 R. Yosef there quotes a sfeq sfeqa from Mahari Abulafia in Responsa Peney Yitsaq II no. 12, and a responsum of R. Shalom Moshe Hai Gagin in the work הראות הראות235 ‘Even Ha’Ezer no. 3, p. 30 col. 4. R. Yosef concludes: “Although some question this sfeq sfeqa if there is any other safeq, such as whether the witnesses

234 Resp. Maharik, ch.102.
235 Resp. Beit Yosef, Hitkhot Yibbum veqalitnah, ch.2.
236 See further ARU 5.5 (§5.2.1), 5:96 (§46.21).
237 Thus two minority opinions may never constitute sfeq sfeqa: ARU 18:36 at n.108.
238 See ARU 5:9 (§8.2).
239 It is not clear whether this is Wayashov Yosef (Bereshit 50:14) or WaYeshov Yosef (Bereshit 50:22) and, accordingly, whether the author is R. Yosef Schwarz or R. Yosef Burgel.
were fit for testimony, one can be lenient in a case of ‘iggun.’” He also notes that Me’iri (Qiddushin 65a), amongst others, wrote that in a case of doubtful qiddushin if the wife does not want to go ahead with the nissu’in (= me’is ‘alay), we can coerce a divorce and observes that although one can infer the opposite from some posqim a doubt remains so that we have a sfeq sfeqa and may be lenient.

2.24 There is, thus, a warrant for the general strategy adopted by modern scholars who seek to deploy sfeq sfeqa in the search for a solution to the problem of ‘iggun. Thus, of the overall strategy adopted by R. Berkovits, R. Abel observes: “Although he does not say so, it seems to me that the three approaches to the problem in TBU were meant not as alternatives but as a combined three-fold approach creating a “triple-doubt” effect. If, after all the arguments and proofs, there exists any residual doubt about the halakhic efficacy of the Berkovits – or some similar – condition, we can rely on a get, prepared from the time of the qiddushin. Should there be doubt about that too, we can rely on the operation of retroactive communal annulment which also has its supporters amongst the Gedolei Hapaposqim.” More recently, Dayan Broyde has also outlined a theoretical tripartite solution comprising condition, a harsha’ah for a get and annulment.

E. Doubts arising from historical error

E1 History and Authority

2.25 From the very beginnings of this research project, we have stressed the priority of authority over history in the search for solutions.” That does not mean that history is irrelevant; it means rather that the role accorded

242 See also ARU 18:65 n.249. For an example, see n.55, above.
243 (i) Maybe the halakhah is like the Rif and the Ramban etc., that one can coerce in cases of me’is ‘alay even where there are definite qiddushin; even if the Halakah is not so, (ii) maybe in a case of qiddushin given in defiance of a communal enactment there is no marriage at all.
244 Berkovits 1967, discussed further, §§3.18-21, 28-35, below.
245 ARU 4:37 (§XI.3); cf. ARU 2:69 (§ 5.4.2, end). See further ARU 18:35-36.
247 ARU 1 (§1.1), ARU 2:1-4 (§1.1-1.3), ARU 3:2-3, ARU 8:2-3 (§1).
to historical argument is itself determined by the authority structure of the halakha. Historical study must always be accompanied by investigation of such “dogmatic” questions as: (i) by what authority was any change (including changes in the authority system itself) made in the past?; (ii) do we today possess comparable authority? We are not entitled to argue: “just because changes have been effected in the past, the authority must exist to make further changes today”. But the converse proposition also follows: we cannot argue that “just because changes have not been effected in the past, the authority cannot exist to make changes today”. One aspect of the relationship between history and dogmatics arises when the application of dogmatic rules depends upon historical claims which turn out (from historical analysis) to be problematic. Here, we note some of the complexities involved in determining how both sfeq sfeqa (§2.27) and hilketa kebrita’ey (§§2.28-30) may be applied to this issue, then (§§2.31-37) briefly review a range of issues, considered in detail later in this report, to which they prove relevant.

2.26 It goes without saying that the members of the Agunah Research Unit (even where with semikkah) claim no halakic authority. In approaching these questions, we seek to deploy a combination of academic (historical and analytical) and traditional approaches to the issues. In using academic approaches, we claim no necessary privilege for them. Nor, conversely, do we accept that they may be excluded as “external”. Halakhic argumentation has its own history, and methodological innovation is neither excluded (witness the Brisk school) nor does it exclude interaction with external traditions (witness Rambam). It is for contemporary posqim to judge the value of the argumentation here offered, and to use their authority in relation to it as they see fit.

E2 How far may sfeq sfeqa be used in our problem?

2.27 Does historical doubt regarding the argumentation on which the halakhic rulings of earlier generations have been based constitute a sfeqa? In principle, there seems no reason to deny this, given the fact that sfeq sfeqa clearly applies to both factual and legal doubts, and historical claims may be regarded as claims about facts – not the facts of a particular case being decide in a psak, but nevertheless facts relevant to the psak in that the decision is affected by them. In this context, we need to determine how to “weigh” historical doubts. Where (in provisions of Torah law) there is a need to establish a “double doubt”, of which one (following R. Ovadyah
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Yosef, §2.23 above) must be shaqul while the other may be a “minority opinion”, may the historical doubt constitute either the shaqul or the minority? Indeed, may both doubts (appropriately weighed) be historical? There seems no reason in principle to reject that latter possibility once it is accepted that historical doubt may constitute a safeq.248 The question then arises how historical doubts may be weighed. This will depend upon the nature of the historical doubt, and is discussed further in §§2.31-34 below.

E3 The applicability of hilketa kebatra’ey

2.28 The principle of hilketa kebatra’ey249 also has a clear historical dimension. The principle itself (as generally understood250) affirms that arguments (even minority arguments”) adopted by earlier generations may be reconsidered by later generations, provided that the latter were fully aware of and considered the earlier arguments. Rema formulates the principle thus:

In all cases where the views of the earlier authorities are recorded and are well known (בְּכָלָם תְּנוּנִי) and the later authorities disagree with them – as sometimes was the case with the later authorities who disagreed with the Ge’onim – we follow the view of the later, as from the time of Abbaye and Rava the law is accepted according to the later authority. However, if a responsum by a gaon is found that had not been previously published, and there are other [later] decisions that disagree

248 For an instance of combination of factual doubts in the context of ’iggun, see §2.18 (n.226) above.
249 See ARU 7:10-11 (§ III.18(8-9)); see also ARU 8:30 n.189 on Pithei Teshuvah, Shalṭan Arakh Ḥoshen Mishpat 25:8 (“Since the later authorities saw the statements of the earlier ones but gave reasons for rejecting them, we assume, as a matter of course, that the earlier authorities would have agreed with the later ones. Consequently, this principle applies even to the view of a single [later authority] against [the view of] the many [earlier authorities]”), as discussed by Elon 1994:1269, who cites also Rif, Qiddushin ch.2 for the view that hilketa kebatra’ey is normative even against contrary indications from other talmudic rules such as “Whenever an individual disputes the opinion of a group of scholars, the halakha is like the majority.”
251 In halakhic theory, non-normative views are themselves treated with sanctity: ’elu ve’elu divev elokim bayyim, Erub. 13b. Elon, 1994:1259, quotes Samson of Sens, commenting on M. Edah 1:5 (and relating it to ’elu ve’elu …): “Although the minority opinion was not initially accepted, and the majority disagreed with it, yet if in another generation the majority will agree with its reasoning, the Law will follow that view.”
with it, we need not follow the view of the later authorities (aharonim), as it is possible that they did not know the view of the gaon, and if they had known it they would have decided the other way.\(^{232}\)

2.29 The summary wording of the Enzyklopediah Talmudit states that the *batra’ey* are to be followed against the *gamma’ey* “in those cases where the opinions of the *gamma’ey* are written in a book and are well known. However, in cases of statements or *responsa* of the *gamma’ey* which have not been printed, it is not necessary to rule like the *batra’ey* because it is possible that had they known the opinions of the *gamma’ey* they would have rescinded their ruling.”\(^{233}\) But this in itself poses further questions. In particular:

(a) how well known must the views of the *gamma’ey* be? We have found no explicit discussion of this.

(b) Are the opinions of the *batra’ey* binding if and only if they cite the earlier opinions they are rejecting? This is not suggested by the Enzyklopediah Talmudit, but Radbaz, Maharam al-Shekh, Shakh and Maharashdam all appear to require it.\(^{234}\)

(c) Are the opinions of the *batra’ey* binding if and only if they show that they are aware of the reasoning of the *gamma’ey*, and not merely of the *psak* they are rejecting? *A fortiori*, this is not suggested by the Enzyklopediah Talmudit, but this appears to be the position of Radbaz, Maharam al-Shekh and Maharit al-Gazi.\(^{235}\)

(d) Is it necessary that the *batra’* himself gives reasons for rejecting the opinion of the *gamma’*? There is very little suggestion of this in the sources, but Radbaz goes so far as to require that the *batra’* demonstrate with proofs based on the Talmud that he (the *batra’) is right.\(^{236}\)

(e) What are the consequences of failure to meet these conditions? Here too we find differing opinions: some assume from this the *batra’*’s ignorance of the *gamma’s* view;\(^{237}\) others regard such ignorance only as a possibility.\(^{238}\)

(f) While the statement that it is not necessary to rule like the

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\(^{232}\) *Roma to Shulhan Arukh Hoshen Mishpat* 25:2, as quoted by Elon 1994:1.271.

\(^{233}\) IX cols. 344-45 at n. 29

\(^{234}\) See ARU 7:8-9 (§III.18(2)).

\(^{235}\) See ARU 7:9 (§III.18(3)).

\(^{236}\) See ARU 7:8 n.62.

\(^{237}\) See ARU 7:9-10 (§III.18(5)).

\(^{238}\) See ARU 7:10 (§III.18(4)).
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batra’ in the absence of knowledge (assumed or possible) by
the batra of the gamma’s view is well supported.\(^{299}\) Maharit
accords greater weight to the view of the gamma’ by arguing
that it would presumably have been accepted by the batra’
had the latter been aware of it.\(^{300}\) Moreover, the fact that it is
not necessary to rule like the batra’ in such cases does not
entail the view that it is necessary to rule like the gamma’: a
competent contemporary halakhic authority may use his
discretion to decide between the gamma’ and the batra’
(though some insist that where the batra’ does not know
about the gamma, one must follow the gamma’).

From the above survey it may be seen that the Enzyklopediah Talmudit
does not provide a complete account. While it still represents the majority
of the poskim, in any halakhic discourse it would be important to be
aware of the dissident views cited above since they may themselves
contribute towards a sfeq sfeqa argument.\(^{301}\)

E4 Relationship of hilketa kehatra’ey to sfeq sfeqa

2.30 As noted above, a double doubt is sufficient to permit a Torah prohibition;
a single doubt is sufficient to permit a rabbinic prohibition (§2.18). It
appears, however, at least according to the Rosh, that sfeq sfeqa takes
priority over hilketa kehatra’ey where the two both apply.\(^{302}\) Thus the Rosh
held that where the safeq is in rabbinic law and the earlier authority rules
leniently the earlier authority should be followed in spite of the rule of
batra’ey.\(^{303}\) True, Ra’avad applied batra’ey even where this would lead to
stringency in rabbinic law, but this is itself mentioned by the Rosh, whose
opinion prevails; indeed, even if the matter were left as a safeq, we would
apply safeq derabanan lequlah.

\(^{299}\) See ARU 7:10 (§III.18(6)).
\(^{300}\) See ARU 7:10 (§III.18(7)).
\(^{301}\) On the “reflective” application of sfeq sfeqa to other “secondary rules” such as hilketa
kehatora’ey; see further §2.20, above.
\(^{302}\) Despite other situations of conflict where it takes priority: see ARU 7:3-4 (§III.5).
\(^{303}\) ARU 7:4 (§III.10). See further n.225, above. For the more general proposition that the
halakhah follows the later authority even if that authority is ruling leniently in Torah law, see
ARU 7:4 (§§III.9-10, citing R. Hiqiyah da Silva (‘Peri Haddash’), Mayyim Hayyim, ‘Avodah
Types of historical doubt

In the course of our investigation, we have encountered a series of historical doubts which prove relevant to questions of authority. Several of them concern the question whether the Rishonim had accurate information as to what the Ge'onim did and on what authority the Ge'onim based themselves. Without prejudging such questions, each discussed later in its relevant context, we review here the different types of historical doubt, and their relationship to the issues discussed in this chapter.

(i) New MS discoveries

We noted above (§2.29) the formulation of the Enzyklopediya Talmudit that hilket kebeta'ey applies (only) “in those cases where the opinions of the gamma’ey are written in a book and are well known. However, in cases of statements or responsa of the gamma’ey which have not been printed, it is not necessary to rule like the batra’ey because it is possible that had they known the opinions of the gamma’ey they would have rescinded their ruling.” Newly discovered manuscripts (a dramatic instance of which concerns the Talmud’s account in Ket. 63b of the position of Amemar on the wife proclaiming me’is “alay”) fall within the class of “statements or responsa of the gamma’ey which have not been printed”, and in principle would appear therefore to fall within the qualification of the basic rule. There is, however, considerable controversy about admitting new MS into halakhic debate: while the Hafets Ḥayyim welcomed recently discovered manuscripts, the Ḥazon Ish was suspicious of them and regarded them negatively. The latter

264 Eliav Shochetman, Ma’aseh Haba Ba’averah (Jerusalem: Mossad HaRav Kook, 1981), 151-55, discussing an error in the printed version of Ri ben Peretz in the light of MS sources, and citing Rambam (Hilkhot Malveh seloveh 15:2) on the Ge’onim being misled by a faulty text of the Talmud (see further §2.32 below, at n.274), argues that if a halakhah is based on a source which was found to be a mistake, the posqim hold the view that the halakhah should be changed according to the authentic version of that source. Shochetman also cites Rabbi M.M. Kashter, Haramam vehaMekhilta deRashi (New York, 5703), 34ff. §§4.7-9, below. See further ARU 1:4-5, ARU 2:21-22 (§3.3), ARU 5:17 n.56, ARU 7:6 (III.15), ARU 8:2 (§1.3), 8:15-17 (§§3.2-3.5), ARU 9:1-3, 17 n.102.

265 Cf. Mishnah Berurah (MB) 27:5 and Be’ur Halakhah (BH) 43 s.v. We’elzan h-imino (both references to the ‘Or Zarua’). BH 363 s.v. ‘eyno nitar (referring to Rashba on ‘Eruvin); BH 626 s.v. tsarikh sheyashil (referring to Rabbenu Hanan’el on Sakkah).

approach, however, was categorically rejected by R. Ovadyah Yosef, who argues that newly discovered opinions of Rishonim in manuscripts that had been unknown to R. Karo may be employed as an argument that R. Karo would have changed his ruling had these sources been available to him (thus applying Rema’s qualification to hilketa kebrita’ey). Indeed, R. Yosef has contested a position of the Ḥazon Ish on hilkhot sukkah, which seemed correct in the light of the standard editions of Rambam’s Perush haMishnah, on the basis, inter alia, of the reading in a critical edition (based on recently discovered manuscripts) which R. Ovadyah consulted, and has noted a word added to the text of the Talmud by the Ge’onim. R. Moshe Bleich, while largely following the view of the Ḥazon ‘Ish, notes that a more liberal view towards the admissibility of MSS evidence was taken before the period of “definitive codifications of Halakhah” (and particularly the Shulḥan Arukh).

stress ing divine providence in the transmission of the MSS tradition (but not, apparently, in the discovery of new MSS, qal vaḥomer the now-available forms of electronic searching of the talmudic text, which put the modern generation of talmudic interpreters at a significant advantage compared to earlier generations, notwithstanding the legendary recall and command of the text which some of the latter are reputed to have possessed). See also the references to articles dealing with the approach of Ḥazon ‘Ish in this area in M.B. Shapiro, Between the Ye shivah World and Modern Orthodoxy: The Life and Works of Rabbi Jehiel Jacob Weinberg, 1884-1996 (London: Littman Library of Jewish Civilization, 1999), 196 n.101.

Largely followed by Rabbi M. Bleich 1993:42: “… for halakhic purposes, it is the consensus of contemporary authorities that inordinate weight not be given to newly published material. Even earlier authorities who gave a relatively high degree of credence to newly discovered manuscripts did so within a limited context. Accordingly, formulation of novel halakhic positions and adjudication of halakhic disputes on the basis of such sources can be undertaken only with extreme caution.” He also gives the following account of the view of Rabbi S.Y. Zevin, the editor of the modern volume of variae lectiones: “… a variant talmudic text is significant only when it can be demonstrated that an early-day authority based his ruling upon that version of the text” (based on Zevin’s introduction to the first volume of Didulke Soferim haShalem, n.85). See also n.264, above.


Reema to Shulḥan Arukh Ḥoshen Mishpat 25:2, quoted in §2.28 above.

Yeḥvron et al. III (1980) no.46, p.140, 2nd footnote, lines 2-3: “However, I examined the Rambam’s Commentary on the Mishnah in the [original] Arabic (ed. R. Y. Kafih, Jerusalem 5624) and I saw that the words weyitu la’aretz were not there at all.” This fact fortified R. Yosef’s stand against the Ḥazon Ish. Newly discovered opinions of Rishonim in manuscripts that had been unknown to R. Karo, says R. Yosef, may be employed as an argument that R. Karo would have changed his ruling had these sources been available to him.

Yabia ‘Omer VII, Orah Ḥayyun, 44:6, where R. Yosef discusses the view of R. Ahai Gaon in the She’latot that ḥamets on Pesah is annulled in 60. In the course of the discussion R. Yosef shows that many Rishonim agree with R. Ahai and maintain that the word bemashehu was added to the text of the Talmud by the Ge’onim and is therefore not halakhically binding. See further ARU 7:6-7 n.48; ARU 6:11-12 (§6.6).

ARU 2:23 n.100; ARU 8:17 n.95.
Indeed, we may note that Rambam states that in the course of his research he had found in Egypt a variant reading in two manuscripts of the Talmud (written in scroll form) that were approximately 500 years old. This reading, he argued, accorded with logic and was undoubtedly the true version. A false reading in other versions of the Talmud, he tells us, had led some of the Ge’onim to rule incorrectly. Particularly relevant to our problem is the observation of P.S. Alexander, that “Gaonic commentators regularly solve problems in the Bavli through collation of old manuscripts and through conjectural emendation.”

2.33 Of course, whether the new MS raises an issue of hilketa kebatra’ey will depend upon a precise dating of both the traditional and the new MS. Yet even if the relative dating of MSS is unsure, a variant in a newly discovered MS may be sufficient to raise a safeq as to (a) what was the original talmudic text, or (b) what talmudic text was available to different authorities at different times. It may also provide evidence of a later authority’s interpretation of the talmudic text. The question will then arise as to how we weigh such a safeq (for its usefulness will surely increase if it amounts to shaqul: §2.23, above).

2.34 Somewhat different questions arise from the discovery of “private” halakhic documents, such as ketubbot – particularly, in this context, those which have survived in the Cairo Genizah. Are they to be treated as evidence of the minhagim of various communities, particularly where

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274 Hilkhot Malcheh veLoreh 15:2 (see also ‘Ishut 11:13), noted by Rabbi M. Bleich 1993:3. Most of R. Bleich’s argument is directed towards the emergence of MSS evidencing new post-talmudic views (such as might affect our view of what was the majority position at a particular time) rather than new MSS evidence of the text of the Talmud itself.


276 Rabbi Z.Y. Lehrer, “Manuscripts of the Early Commentaries [Rabbotenu haRishonim] and their Qualifications to Rule on Jewish Law” (Heb.), *Tsefanot IV/4* (July, 1992), 68-73, clearly does conceive the problem as one of hilketa kebatra’ey, in that he argues that when manuscripts to which the ‘Aḥaronim had no access are uncovered and reflect disagreement with the halakhot of the ‘Aḥaronim, these manuscripts should be followed, since we presume that had the ‘Aḥaronim had access to these manuscripts, they would have decided differently. We may assume that R. Lehrer had in mind manuscripts of the Rishonim and earlier.

277 But the halakhot as to how we treat new MSS discoveries is itself subject to hilketa kebatra’ey (hence the dates given for R. Ovadyah Yosef’s statements nn.269 and 271, above).
they appear to authorise departures from the normal rules of divorce.\footnote{\textit{Ketubbot} have also survived from earlier periods (5th cent. BCE Elephantine; 2nd cent. CE Judaea and Arabia) and cast interesting light on the history of the halakhah (see B.S. Jackson, “Some Reflections on Family Law in the Papyri”, in \textit{The Jerusalem 2002 Conference Volume}, ed. H. Gamoran (Binghamton: Global Publications, 2004, \textit{JLAS XIV}), 141-77), but can hardly be taken into account for dogmatic purposes, insofar as they conflict with later talmudic positions.}

(ii) Internal conflicts

2.35 Doubts as to the reliability of historical claims on which dogmatic claims are made may also arise for different reasons. One is a conflict within a single work. A notable example, in the present context, relates to the position of Rabbenenu Tam on \textit{kefiyyah}: did he reject coercion of the man in principle, or only the abolition of the talmudic 12-month waiting period?\footnote{For the texts, see ARU 2:22, 30-31 (§3.3.4 n.97, §3.5.3), ARU 16:38, and see further §§4.33-36, below.} Not only do we lack a critical edition of the \textit{Sefer Hayashar}; we have reason to believe, from the circumstances of its compilation, that it does not represent the \textit{ipissima verba} of the author to whom it is attributed, but rather was compiled by various hands,\footnote{I. Ta-Shma, “Tam, Jacob ben Meir”, \textit{Enc. Jud.} XV. 781, notes that it is preserved in an extremely corrupt state, and even after the great labour expended on editing it, still contains many obscure and inexplicable passages. In its present form it comprises excerpts collected in the days of the Rishonim and represents the work of many hands, including that of R. Tam himself, who repeatedly amended and improved much of it.} perhaps from his lecture notes. The works of most other posqim may not be subject to this latter problem, but that does not guarantee the integrity of their text. Here, where there is an apparent contradiction in the texts attributed to one and the same \textit{poseq}, it can hardly be argued, as is sometimes done with regard to new manuscript evidence, that a traditional text has become hallowed by usage. Either we must leave the position of that \textit{poseq} as one of \textit{safeq}, or (as is suggested in the case of Rabbenenu Tam\footnote{See \textit{Yehowveh Da’at} vol.1, \textit{Kilelei Hahora’ah, Kilelei Hashuhman Arukh} nos.29, 40, 44, for the view that where a \textit{poseq} says one thing then the opposite, one follows the later statement.}) we may have evidence from which to conclude that he changed his mind in the course of his life. We then have to ask which of his two opinions is authoritative. While \textit{hilketa kehatra’ey} might, if only by way of analogy, suggest the later view,\footnote{See further §§4.36, below.} we should also be open to explanations relating to changes in the circumstances with which the \textit{poseq} was faced.
(iii) Questions of interpretation

2.36 In theory, questions of interpretation⁴⁵ ought not to raise issues of sfeq sfeqa, even when academic study claims that a particular interpretation was erroneous. After all, the very purpose of the “secondary” rules of “majority, seniority, finality and consensus” (ARU 7) is to provide means to resolve such questions, thus to resolve doubts. Significantly, however, minority opinions are used for the purposes of sfeq sfeqa,⁴⁶ even though a safeg shakul could be constructed only when the division of opinion was deemed even (a judgment which could hardly be made purely mathematically).⁴⁷ From a secular positivist viewpoint, this might appear to defeat the object of the secondary rules. In fact, it only highlights the difference between the halakhah and secular legal systems. It certainly indicates that the posqim have, in effect, a discretion to review what would otherwise be the results of the application of the secondary rules (for there can be very few questions of interpretation where there is no minority viewpoint). If the posqim nowadays appear increasingly reluctant to exercise this discretion, the very nature of authority in the halakhah is put in issue. Such an approach may bring the halakhah somewhat closer to the model of secular law, but neglects the possibility that the very “weakness” of those secondary rules (from a secular point of view) is in fact part of the design of the halakhah, which is a mix of rational and charismatic authority.⁴⁸ Failure to exercise a discretion, it may be argued, is itself an exercise of discretion. We are entitled to ask why discretion is not exercised as much as on what grounds it is exercised. These are issues which raise fundamental questions about the

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⁴⁵ Of which, of course, there are many in our context, e.g. (a) What was the original meaning of R. Yoseh’s condition (§§3.3-7)? (b) Assuming the traditional text of Amemar’s ruling, did it imply coercion of the husband or not (§§4.7, 11)? (c) Did the ruling of Rabbanan Sabora’, requiring the wife to wait 12 months for her get, imply (as the Ge’onim clearly understood) that after that period the court would compel him (§4.16)? (d) What did the Ge’onim mean (and practice) by compulsion? Were they willing, in the final resort, to override the husband’s resistance, whether by having the court authorise the writing and delivery of the get, or by haɪya’at qidhashin (§§4.20-22)? (e) By what authority did the Ge’onim proceed: interpretation of the Talmud (or a different talmudic textual tradition), taqqumah (based on an emergency situation?), custom (§§4.26-29)? (f) If they were motivated by torekh hasha’ah, did they themselves conceive their measures to be temporary, and if so how temporary (§4.27)?

⁴⁶ See, e.g., Yabia ‘Omer III, ‘Orah Hayyim 12:3 (endy); 7 ‘Even Ha’ezer 6:5, 6.

⁴⁷ Either by deeming “natural division” as equal (e.g. births of males and females), or (occasionally) by actual counting of posqim: see Bi’ur Halakhah to Mishnah Berurah 345:24.

⁴⁸ Already expressed in 2 Chron. 19.6, where Jehoshaphat charges the judges that God will be “with you” (imakhem) in rendering judgment; see also Ps. 82:1 and commentaries to it, warning the judges that they are accountable to God.
role of the dayan, and to which we must return (§§2.48-49).

(iv) Reconstructions of talmudic history

2.37 Several of our analyses of talmudic material involve reconstructions of halakhic history within the talmudic period. We may ask what is the dogmatic status of such pre-final stages (and indeed of the tannaitic material on which it is based). Normally, it is the final conclusion of the Talmud which sets the halakham. However, there are reasons why such reconstructions should not be dismissed as mere history, without dogmatic significance – quite apart from the weight which they may lend to views expressed in post-talmudic literature. According to the Rif, hilketa kebrita’ey does not operate until the period of the Amoraim.  

This is relevant to our interpretation of a central mishnah in our study, Nedarim 11:12, which itself provides an historical account: “Originally (barishonah) [the Sages] said ... The Sages then revised (ṭazru) [their views] and said ...” The fact that a reason was given for the change may support the view that later opinions were not at that stage recognised as superior to earlier ones. There is, moreover, debate as to whether hilketa kebrita’ey operates within the Amoraic period, and in particular whether it favours a later Amora over an earlier one with a greater reputation.” 237 in the debate in Berakhot 17b between R. Yohanan (d. 279 C.E.) and R. Shisha breh deRav Idi, a fifth generation (350-375 C.E.) Amora, the Rif and Rambam accepted the view of R. Yohanan because of his pre-eminence. Moreover, the literary features of the talmudic presentation are sometimes taken into account: when the Talmud records the view of the later Amora first and only then that of the earlier, the halakham is fixed like the earlier authority because it is assumed that that is why the Talmud placed him later in the text – to demonstrate that the halakham accords with his view. 238 Yet even if dogmatic status is denied to pre-final stages of talmudic history, their reconstruction still possesses dogmatic value, for the light it may cast upon the meaning of post-talmudic writings. We shall see, for example, that such analysis supports Rashi’s view on the moredet (§§4.10-16), as against that of Rabbenu Tam, and that it both clarifies the origins of retroactive hafqa’ah and the meaning (and weight) of the need

238 See ARU 7:4 (§III.8) on Bet Yosef to Tur, ‘Orah Hayyim 70 s.v. We’im ratsah. Cf. ET IX col. 343 n. 20.
239 I.e. he is viewed as the batra. Tosafot ‘Avodah Zarah 22a s.v. ‘En. Cf. ET IX col. 344 n. 23; ARU 7:4-5 (§III.11).
for a get in this process (§§5.5-10).

F. Remedies in times of emergency

2.38 In emergency situations, all agree that the *bet din* may uproot temporarily even a negative commandment,\(^\text{260}\) and some hold that such abrogation could, once made, be extended permanently.\(^\text{261}\) There may, however, be a distinction (though not consistently made, at least at the level of terminology\(^\text{262}\)) between “times of emergency” (where such abrogation may be possible due to *tsorekh hasha’ah*) and “times of urgent need” (she’at hadelṭaq, which would justify leniency within the halakḥah).\(^\text{263}\) Clearly, these classifications are difficult,\(^\text{264}\) and there is also an approach which would regard a period of moral failing (“wantonness of the times”) as a reason for greater strictness.\(^\text{265}\) However, R. Shломו Sh Benton wrote in *Ma’alot LiShelomoh*, no. 2: “There is no greater she’at delṭaq than this.” Moreover, R. Ovadyah Yosef has argued that our period, in this respect, is


\(^{261}\) See *Enzyklopediah Talmudit*, s.v. *yesh kosh...*; ARU 6:29 (§8.13). There is also a separate principle, based on the talmudic understanding of *yesh kosh...* under which cases such as this are not treated as precedent.

\(^{262}\) See Riskin 2002:49f., on the use by Rema (commenting on the Austrian case) of *tsorekh hasha’ah* rather than *hora’at hasha’ah*, noting the distinction between them advanced by R. Kook in *Mishpat Kohen* (Jerusalem, 1921, repr. 1984), 143, that *tsorekh hasha’ah* must be based on halakhic precedent and can itself form a precedent for the future. On this account, *tsorekh hasha’ah* appears closer to she’at hadelṭaq as understood in this report. See further n.297, below.

\(^{263}\) On the nature of such leniencies, see §2.39 below.

\(^{264}\) Nor is it clear that innovation is excluded where the times are not so classified. At ARU 18:94-100 (Appendix IV: Historical changes in orthodox practice), R. Abel discusses the history of Orthodox adaptations of the *halakḥah* in the light of contemporary social conditions. While some of them concern pure ritual or *diney mamnot* (albeit of biblical status), others (such as the *berem* of Rabbenu Gershon) are directly relevant to our present concern. Thus, he includes “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 ‘ula‘ay*. 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.”

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more comparable to that of the Ge’onim, using this as a partial justification for reverting to the measures of the Ge’onim (§4.84). Part of the opposition, voiced in ‘Eyn Tnai BeNissu’in, to the proposals of the French rabbinate was that a small sin committed with the knowledge of the public and the connivance of the religious authorities (release from marriage on the basis of a problematic condition) was in fact worse than even a great sin of a private individual committed without the knowledge of the public and without the connivance of the religious authorities (remarriage of a woman on the basis of a civil divorce only, and without any attempt at halakhic justification). In other words, the halakhic authorities should not “connive” in what is perceived as immorality. Yet there is considerable precedent for such “connivance”. The Ge’onim are quite explicit on what motivated their measures. Moreover, many ‘agonot are completely blameless as to the circumstances of the breakdown of their marriage. Are they to be presented with the choice between either committing a “great sin” (but happily without the connivance of the posqim) or suffering indefinitely as a woman chained to a dead marriage (without even the benefits assumed by the maxim tav lemeitav)? Moreover, what motivated the Ge’onim was neither the immorality nor the suffering alone; it was also the recourse to gentile courts. The situation today is not fundamentally different: recourse to gentile courts, applying their own criteria, is increasingly common, not only for (a required) civil divorce, but also to put pressure on the husband to grant a get, sometimes in ways which are halakhically problematic.

2.39 The determination of whether we live in she’at hadékq is important, since, if so, various relaxations of the rules of authority are permitted. It also becomes possible to permit lekhvatullah what otherwise would be

297 R. Shetra Gano writes “After the time of the Savoraim, Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands; and some husbands, as a result of force and duress, did grant a divorce that might be considered coerced and therefore not in compliance with the requirements of the law [as under the law one may not use duress to force the giving of a divorce]. When the disastrous results became apparent, …”. An anonymous 13th-cent. responsa suggests that the talmudic twelve month delay (without financial support) was prompting women to resort to “bad ends” (לְדוֹרֵחַ עָשֶׂה), either prostitution or apostasy. See further ARU 2:24-28 (§3.4.1-3). R. Zerayah Halevi takes the situation as having been regarded as אֹסֶר דְּשֹׁא תִּשְׁאָרוּת, the latter (but not the former) both needing and generating halakhic precedent: see Wieder 2002:71; Riskin 2002:50, citing R. Kook.
298 See further ARU 2:63-64 (§5.2.4), ARU 6:29 (§8.13); ARU 5:11 (§9.3.2).
permitted only bedi‘avad,\textsuperscript{299} and to follow a majority despite opposition from a substantial minority,\textsuperscript{300} or even to follow a minority opinion.\textsuperscript{301} Indeed it is possible to argue, based on positions taken by Rabbi A.Y. Kook and R. Ovadyah Yosef, that we may rely in an emergency situation of ‘iggun even on a lone opinion (and even when dealing with a biblical prohibition).\textsuperscript{302} This has been applied (with one qualification) to R. Moshe Feinstein’s decisions on qiddushet ta‘ut. R. Jachter observes: “Rav Moshe in these responsa certainly stretched the halachah to its outer limits and virtually no other halachic authorities have adopted his position (although a great rabbi may choose to issue a ruling in accordance with R. Moshe’s views in cases of emergency when it is absolutely impossible to procure a Get from the husband).”\textsuperscript{303} Whether every dayan would count as a “great rabbi” is not discussed. We may also note in this context the view of R. Ovadyah Yosef that when we find earlier posqim saying that a particular course of action is permissible lehalakkah but not lema‘a’seh, we can assume that this is merely due to humility and may therefore rely on it even in practice.\textsuperscript{304} However one might regard R. Yosef’s view in normal times, we may certainly regard this leniency as applicable in she‘at hadehq.\textsuperscript{305}

2.40 Clearly, it is easier to apply such leniencies in cases where the “emergency” relates to features of the individual case (thus bedi‘avad), as, for example, where the strain of the situation is judged as endangering the young woman’s life;\textsuperscript{306} indeed, the very concept of emergency has been stretched in cases of ‘iggun to include the fact that the woman

\textsuperscript{299} See ARU 8:32 (§6.4.5). On the status of an illegally coerced get in this context, see §4.70, below.
\textsuperscript{300} Responsa Shevat Ya‘aqov III ’Even Ha‘Ezer no. 110 and other sources in ET VII col. 417, note 140. See ARU 5:49 (§21.2.7), ARU 7:16 (§IV.16), ARU 8:32-33 (§6.4.5) and sources cited there in n.210.
\textsuperscript{302} See further ARU 5:22 (§§15.3.2-3). Cf. §2.13 and n.217, above.
\textsuperscript{304} See n.162, above.
\textsuperscript{305} R. Yosef cites R. Hayyim Palaggi, Resp. Hakkekey Lev ’Even Ha‘Ezer 57; Resp. Oholi Haksid, Yoreh De‘ah 16; Resp. Yad Aharon 165, Hagahot Bet Yosef 17 quoting the Admat Kodesh no.50 lema‘a’seh (even though, according to R. Yosef, the latter had written lehalakkah velo lema‘a’seh). He also cites Sdei Hemed, Kilelel HaPosqim 16:47.
\textsuperscript{306} See Rabbi A. Volkin, Zegan ’Aharon, II.124, discussed at ARU 5:47-49 (§21.2.7).
concerned is young, and may thus face many years in chains. The very fact that in practice greater leniency is exercised once an issue of mamzerut has already arisen appears to reflect the same approach. But however commendable such decisions are, they cannot amount to a global solution. Indeed, even remedies based on emergency (adopted lekhatḥillaḥ) may struggle to satisfy that criterion: even the emergency to which the Ge’onim responded had both geographical and temporal limitations. In an era of globalisation, however, geographical considerations appear less and less significant.

2.41 While the individual bet din, dayan or poseq may be able to deal with individual cases (even to the extent that a contemporary bet din may, according to the majority view, suspend a Torah-law in such situations), and while a local bet din might adopt emergency measures for its own community, greater authority is required for anything of a “legislative” character (e.g. globally to permit lekhatḥillaḥ what otherwise would be permitted only bedi’avad: §2.39, above). To be effective globally, the bet din would need to possess authority recognised across the board, i.e. a bet din of Gedolei HaDor. This would need to be a bet din of Gedolei HaDor acceptable to all sects and communities if the measures taken involved permission to remarriage without a get, since this has possible future repercussions on the entire Jewish people. Whether, in fact, the Gedolei haDor would need to convene as a bet din is far from clear. It may well depend upon the nature of the hiddush. R. Lubetsky in ‘Eyn Tnai Benissu’in wrote: “Therefore, choose some of the Gedolei haDor and if they agree with you who will dare to challenge it?” On the other hand, Maharam Al Ashqar is quoted as saying: “Therefore, if all that country and its rabbis, with the agreement of all the communities or most of them, took a vote and decided to rely upon these great trees [auth] to raise a barrier against, and to impose a fine upon, anyone who betroths in violation of their agreement and their enactment, and to annul the betrothal and requisition it [the betrothal ring] for ever or until any time they choose, I too will support them.” Professor Elon quotes

308 See the article on it in Enzyklopediah Talmudit XXV (n.22), and the comments on it at ARU 5:11-12 (§9.3.3) and ARU 6:29 (§8.13), including the ET’s observation (at 22, end) that R. Feinstein had agreed that this power may be used today.
309 On the authority of even non-ordained judges sitting in batey din in the Diaspora in emergency situations to impose the death penalty, see ARU 6:27-28 n.95.
310 See ARU 4:8 (§VII.9).
R. Shalom Moses Hai Gagin as attacking Abulafia for his use of hafqa'at qiddushin with the words: “It cannot possibly be contended that the world’s great scholars ever gathered together and agreed to rule contrary to the saintly Caro even in a single particular.” This would appear to imply that a convention of the world’s great scholars is indeed capable of making such a ruling (and on the basis of rov: §2.15). The cancellation of the global rabbinic conference in 2006 should not be taken as evidence of the impossibility of such a convention. Dayan Waldenberg, however, adopts a somewhat different institutional route, in advocating the use of coercion “through a general agreement of all the rabbinic courts”.

G. Conclusions

2.42 There are two main obstacles to finding a solution to the contemporary ‘agunah situation. Firstly, there is the fact that biblical law has given the husband the power to refuse his wife a get and has forbidden the wife, thus chained to her former husband, to have relations with any other man. For her to do so would be a capital offence of adultery and any progeny born to her from any such relationship with another Jewish man would suffer the stigma of mamzerut with its tragic and irreversible consequences. The husband on the other hand is free to take another wife and any other children that he fathers would be perfectly kosher. Although there are important constraints on the husband’s behaviour in rabbinic law – including the land-mark excommunication decree of Rabbenu Gershom, a herem of the kadmonim that a man should not make his wife an ‘agunah,” and considerable moral condemnation” – the fact remains that if a recalcitrant husband ignores all these and contracts a new marriage in spite of them, or indeed if he goes on to father children without remarrying, there is little in contemporary society that can be done to him, and his subsequent marriage and children would be recognized by the halakhah as kosher.

2.43 Secondly, there is the customary stringency in deciding any law touching upon marriage or divorce. This means that many remedies that have been proposed as solutions to the problems described in the preceding

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313 Tsits Eliezer 5, 26. R. Waldenberg tried to convince R. Elyashiv of this, but apparently failed to do so. See further ARU 5:18-19 (§12.2.12).
315 See also ARU 18:99 n.376 for a list of biblical verses which may apply to the recalcitrant husband.
paragraph have never been adopted or, if they have, have subsequently fallen into disuse because a minority view, sometimes a tiny minority view, has opposed them. As we have seen above, current practice would refuse the adoption of a remedy if it would fall foul of the opinion of even one recognised halakhic scholar. As an example, we may cite the use of Shiltey haGibborim against Berkovits’ advocacy of conditional marriage.106

2.44 The approach of whether which, in emergency situations, applies still today,117 is, perhaps, the one least likely to get any support from the Gedolei haDor. Hence, there is no hope of changing118 the basic biblical or rabbinic laws described in §2.42 – even if agreement could be reached that we do indeed have an emergency on our hands. Therefore, the only way forward seems to be to try to find a method that will work within the constraints of biblical and rabbinic law. This is still an enormously difficult task but it would be rendered somewhat easier if we were free, where necessary, to rely on the views of most posqim as in other areas of the Halakkhah, or at least if we were able to disregard unique opinions or opinions of an insubstantial minority. In the light of R. Feinstein’s convincing resolution of the apparent contradictions in Tosafot and the Rosh concerning mayim she’eyn lahem sof (see Appendix A, below), it is apparent that there is no source in the Talmud for those who rule that we must take into account even an insubstantial minority, or unique, stringent opinions in the area of gittin and qiddushin. Indeed, once a situation of ‘iggan has been reached, the standard practice is already to rely on rov posqim.

2.45 Furthermore, one must consider whether the situation regarding get-refusal today is one of compelling need (she’at hadelaq), so that we can apply the rule that whatever is normally permitted only bedi’avad is, in a she’at hadelaq, permitted even lekhatillah. In this context, we may recall the words of R. Yehe’el Ya’aqov Weinberg:119

106 See further n.431 and §3.61, below.
117 See further ARU 5:10-12 ([§9.2.1-9.3.3]).
118 Such change would anyway be only momentary according to the Rambam; according to the Rashba, however, once made it could be left permanently in place. See ARU 5:11 ([§9.3.2]).
119 In his foreword to Berkovits 1967. See also Responsa Ta’ahmot Lev (’Even Ha’Ezer no. 14): “Even those who in practice take a strict view because of the stringency of forbidden sexual relations, that is only when they can somehow force him to give a get. Not so in these lands where none can enforce the words of the sages and everyone does as he pleases....” R. Avraham Ibn Tawwa’ah, Responsa Ha’at haMeshulash (printed as the fourth section of Toshiba, Lemberg 5651), Ha’Akha Ha’Sheiti no. 35, p. 13a col. 2, s.v. ’Od ra’iini: “Even those
Rabbi Berkovits [who suggests the introduction of conditional marriage] has no intention, G-d forbid, of arguing against the great authorities of the previous generation [who had forbidden it] … He has only revisited the problem because the situation has worsened: the number of chained wives and the number of these who remarry without a get and go on to have more children, has greatly increased.

If so, in order to avoid ever reaching a situation of ‘iggun we could ab initio deal with gittin and qiddushin in accordance with Shulhan ‘Arukh and rov posqim and ignore even substantial minority opinions, especially as R. Yosef Hazzan and other great posqim have ruled that that is the halakrah even in normal (i.e. non-urgent) circumstances. Once a situation of ‘iggun has been reached, it may be possible in urgent situations to rely on a minority or even a singular opinion (even in matters of biblical law) in accordance with the Taz and his school (§2.13 above). And even his disputant, the Shakh, whose opinion is accepted by Arukh HaShulhan (Y.D, 110-111), agrees that this may be done if the question is one of rabbinic law only.

2.46 Questions of historical doubt, viewed in the context of sfeq sfeqa, may also contribute to the search for solutions, not least when paralleled by differences in interpretation by later authorities.

2.47 Much of the above argumentation is necessarily technical. But beneath the surface, some important “meta-halakhic” issues are also apparent. One has already been raised in §§1.7-11 above: the relationship between a “global” solution and the existence of distinct religious communities within Orthodoxy. This impinges on the technical questions of authority in a number of ways. On the one hand, some forms of authority are necessarily exercised within particular communities, as in the capacity of batey din to respond to emergencies within their own communities. This would create no problems if the criterion of a “global” solution were achieved: mutual recognition of the exercise of internal communal authority. The situation, however, is aggravated by the fact that authority is increasingly exercised beyond the communities of those exercising that authority (a situation given statutory authority by the jurisdictional

who say that one must not coerce a get (in cases of me’is ‘alay) … permit ab initio coercion when the circumstances call for it.” He then proceeds to demonstrate that this is true of the Rosh, Tur, Rashba, Rivash, Rashbets and Rashbash. It is thus clear from their words, he writes, that “even according to those who say one must not coerce, at a time when there is a need for coercion let them use force, for a judge can only be guided by what his own eyes see.”

320 ARU 7:21-22 (§IV:33).
arrangements in the State of Israel), increasingly with the imposition of norms, ḥamrot, which are neither universally mandatory nor conformable to the values of the subject community. The danger then arises that the authorities do not regard those subject to their authority as part of their own community, and may then be more inclined to tolerate consequences which foster alienation from the religious community as a whole.

2.48 Not unrelated to this is the role of the *dayan* and the interests of the community of the *posqim*. When R. Lavi argues that the proposal of new solutions is impudent towards earlier generations (“couldn’t they think about this solution?!”), one has to ask what this implies about the relative importance of the reputation of the community of the *posqim* and that of the community of women suffering as ‘*agunot*.

2.49 More serious than this is the sense of personal responsibility of the *dayan*, and his fear that he will be personally accountable to Heaven for mistakes which lead to adultery and *mamzerut*. The response of Rivash to this, that such controversial decisions should only be taken collectively and on the basis of consensus, insofar as it seeks to spread responsibility (rather than ensure against taking a wrong decision), may be subject to debate. But we now have the voice of an esteemed senior *dayan*, Rav Daichovsky, who tells his colleagues, in no uncertain terms, that it is indeed the duty of the *dayan* to risk his eternal soul in pursuit of what he regards as the just solution, and thus not put his personal interest above that of the parties subject to his jurisdiction.

2.50 In 1998, Rabbi Bleich wrote: “... to be viable and non-schismatic, any proposed solution must be advanced with the approbation of respected rabbinic decisors and accepted by all sectors of our community.” It may well be that such a criterion for a single global solution is currently out of reach. That does not exclude a solution which, though more “schismatic”, still satisfies the criterion of a global solution as stated in §§1.6-7 above. Nor should we abandon the hope that the tide of religious polarisation will eventually recede, leading to a consensus on a solution which will emphasise the unity of *klal yisrael* rather than its divisions.

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321 R. Lavi 5767:304-05.
322 Rivash Resp. 399, discussed at ARU 2:44-47 (§4.3.4).
324 Bleich 1998:118.
Appendix A

The position of R. Moshe Feinstein on stringency in gittin and qiddushin
(Paragraph numbers are those in Rabbi Abel’s ARU 7)

IV.24. The following reference in 'Iggrot Moshe' may shed light on using
mayim she’eyn lahem sof as a source for stringency in halakhic decisions
in the area of gittin and qiddushin.

The question dealt with in this responsum was of a woman who
discovered directly after her wedding that her husband was impotent and
it was not possible for her to acquire a get from him. R. Feinstein argues
that a woman would not have agreed to marry such a man had she known
the truth about him and on the basis of this he declares the marriage a
miqrah ta’ut and releases her without a get. At some point in the debate he
quotes a responsum of the 'Eyn Yitsḥaq who argued that one must take
into account the possibility that this woman belongs to the tiny minority
who would settle even for such a marriage, just as the Talmud concerns
itself with the tiny minority who are lost at sea and survive.

IV.25 At this juncture, R. Feinstein points to an apparent contradiction in the
writings of Tosafot and the Rosh who in some places describe the
possibility of the husband’s surviving in a case of mayim she’eyn lahem sof as being “a substantial minority” possibility (םינפ
םינפ) whereas in other places they refer to it as a “highly insubstantial minority”. The question on Tosafot is not so serious, he says,
because in Yevamot it is the Ri speaking and in Bekhorot it is Rabbanu Tam. In the case of the Rosh, however, it is very serious.

IV.26 Regarding the answer suggested to this in Yashresh Ya’agov at the end
of Yevamot – that the Rosh simply follows Tosafot (even if this leads him
into contradictions) – R. Feinstein comments:

325 Responsa 'Iggrot Moshe, 'Even Ha' Ezer 1, 79.
326 By R. Yitsḥaq Elhanan Spektor (1817-1896).
327 The Talmud does not actually mention “insubstantial” or “tiny” minority in its treatment of
mayim she’eyn lahem sof but the Rishonim understand it to include such cases also. See the
next two paragraphs.
328 Tosafot Yevamot 36b s.v. Ha’ and Avodah Zarah 40b s.v. Kol and the Rosh Yevamot 36b (~
4:5) describe it as substantial whereas Tosafot Bekhorot 20b s.v. Halav Poter and the Rosh
Yevamot, beginning of final chapter (119a = 16:1) and Hullin 12a (~ 1:16 near the end) describe it as insubstantial.
329 Commentary on Yevamot by R. Shelomoh Drimmer.
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Heaven forfend that we should suggest such a thing especially as the Rosh wrote his entire work as practical Halakhah so how could he not have been aware that he was contradicting himself? Besides, the Rosh writes his opinion at the beginning of the final chapter of Yevamot and in Ḥullin 11 like the Tosafot in Bekhorot (that the possibility of survival is insubstantial) although there is no mention of this in Tosafot in Yevamot or in Ḥullin. It is furthermore far-fetched to say that there is an argument here about a fact: whether survivors of a ship-wreck are a substantial or an insubstantial minority. Facts can only be ascertained; they cannot be debated. The alternative solution to this problem proffered by the Yashresh Ya’agov is forced and refutable and the solution suggested in Responsa Ḥistam Sofer ‘Even Ha’Ezer 65 is extremely forced and not at all logical.

IV.27 R. Feinstein therefore says that both statements are true:

Those rescued from the sea constitute a substantial minority but there is only an insignificant minority of people who are rescued and do not inform their family. (For argument’s sake we may say that, on average, of 100 people aboard ship, 30 survive a shipwreck but of these only 1 fails to communicate with his family within 3 months.) So it seems from Rambam, Yad, Nizḥot 7:3, who states that only when the memory of the disappeared father has become lost (}"א Vinciי תִּנְעָלְתָּ בַּהֲנֵיהָ") can his heirs take over his property, because before that we must be concerned for his return since a substantial minority do survive. However, when enough time has passed since his disappearance for his memory to have been forgotton we may assume him dead because only the very smallest minority of those lost at sea survive and fail to contact their family after a protracted period. Tosafot and the Rosh maintain that because of an insubstantial minority the Sages would not have enacted any measure even in a case of a married woman, but since the possibility of survival was substantial (say 25% – a degree of minority possibility which would

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330 I.e., whereas one could argue that the Rosh in Yevamot 36 is simply following the Tosafot (there) in declaring the survival rate of those lost at sea a substantial minority, one cannot explain the apparent contradiction to this in the Rosh at the end of the final chapter of Yevamot and in Ḥullin, where he describes the survival rate as an insubstantial minority, as being due to the Rosh’s habit of following the lead of the Tosafot, because there is no such statement of Tosafot there, neither in the last chapter of Yevamot nor in Ḥullin (but only in Bekhorot – see note 328).

331 S.v. Ḥineḥ mah shekatev.

332 I [YA] presumed this to be a period of 12 months in accordance with the Talmudic (Berahkot 58b) interpretation of Psalms 31:13. I later found that Rabbi Y.M. Epstein in ‘Arokh HaShulḥan makes exactly this presumption based on the same sources. See similarly in Responsa Ḥistam Sofer ‘Even Ha’Ezer 65 s.v. Uviteṣhavah ‘akeret, at the end.
trigger rabbinic enactments in other areas of the Halakah) they had to forbid her remarriage by rabbinic decree until the point of “the memory of him being lost” (‘avad zikro), i.e. a situation where the possibility of his survival had reached one of insubstantiality (say 1%). However, once that situation had been reached they extended the decree and forbade her remarriage (at least ab initio) due to the stringency of the law of a married woman (ḥumrat ‘eshet ish) even beyond the point of ‘avad zikro since some percentage of doubt remains (say 0.5%, 0.25%)\(^\text{133}\) though if such a small percentage (say 1% or less) had obtained initially they would not have passed any enactment against her remarriage. If 0% doubt remained after ‘avad zikro they would not have extended the prohibition any longer and they would have had to enter into the fraught area of “ruling on arbitrary limits” – הגרות ל 时间 – (in this case, time-limits). However, since some doubt, however small, always remains they forbade her remarriage so as not to enter the problematic area of arbitrary limits. We indeed find something similar to this in Tosafot, Qiddushin 11 in the answer of Ram of Narbonne.

R. Feinstein concludes this section with the comment: “I have clarified this matter at great length. It\(^\text{135}\) is well-based and true”;

והארסתי מבחר הרב נון וחברו וידא ונתן אתא

_Translating R. Feinstein’s responsum from ‘facts’ to ‘law’_

**IV.28** From the above responsum of R. Feinstein regarding factual doubts in cases of ‘erwah, is it possible to draw conclusions as to his opinion concerning halakhic divergences amongst the posqim in this area? This question may perhaps be resolved as follows.

**IV.29** R. Feinstein wrote\(^\text{134}\) that Tosafot and the Rosh maintain that because of an insubstantial minority the Sages would not have enacted any measure even in a case of a married woman but since the possibility of survival was substantial they had to forbid her remarriage by rabbinic decree until the point of ‘avad zikro,\(^\text{137}\) i.e. a situation where the possibility of his

\(\text{133}\) For example, where the rate of infestation of a fruit or vegetable is more than 50% the obligation to check it before eating is Pentateuchal. In cases where the rate is less than 50% the obligation is rabbinic. If the rate was exactly 50% (if such an exact measurement were possible) the situation would be one of safeq de’Oraita and the obligation would therefore be Pentateuchal according to the Rashba and rabbinic according to the Rambam.

\(\text{134}\) See, however, the discussion by Dayan Abramsky in Feuerweger (n.206, above), 239 col. 2.

\(\text{135}\) The clarification.

\(\text{136}\) See ARU 7:19 (IV/27).

\(\text{137}\) See above, n.332.
survival had reached one of insubstantiality. However, once that situation 
had been reached they extended the decree and forbade her remarriage (at 
least ab initio) due to the stringency of the law of a married woman 
(ḥumrat ’eshet ’ish) even beyond the point of ’avod zikrō since some 
percentage of doubt remains, though if an insubstantial percentage had 
obtained initially they would not have passed any enactment against her 
remarriage.

IV.30 Thus R. Feinstein argues that an insubstantial minority is insufficient to 
justify rabbinic stringency in cases of factual doubt. Only where the level 
of doubt was initially substantial (though less than 50%) was an 
enactment deemed necessary (and this enactment was then perpetuated 
even beyond the point of insubstantial possibility).

IV.31 Now, minority factual possibilities (of the husband’s survival) in the case 
of mayim she’en lahem sof, as we have seen, are considered by some to 
be more of a halachic problem than minority (stringent) legal opinions in 
cases of ’erwah. Others do draw an analogy from fact to law and apply 
the talmudic concern for even tiny minorities in the case of mayim 
se’eyn lahem sof to the halachic decision-making process also – i.e. as 
regards matters of ’erwah.

IV.32 However, according to R. Feinstein, who says that insubstantial 
possibilities of factual doubt, even in matters of ’erwah, need not be 
considered (save where they are the residue of substantial minority 
possibilities), even if we do compare legal debate concerning ’erwah to 
the case of mayim se’en lahem sof it would still work out that 
isubstantial minority halachic opinions need not be considered because 
such halachic opinions are insubstantial minorities from the start, unlike 
the minority possibilities of mayim se’en lahem sof which are the residue 
of a substantial minority. Whether or not he would take note, in a case of 
’erwah, of a stringency of a substantial minority of the posqim or he 
would differentiate between facts and law, is not clear.

338 See ARU 7:17 (§IV:21) on the opinion of the Ḥagry Lev, who rejects the approach that takes a 
minority view of the posqim into account – although, of course, he accepts the talmudic 
concern for the minority in cases of mayim se’en lahem sof.
339 Eg. Maharibal and Maharit El-Gazi – see ARU 7:17 (§IV:20).
340 And rule strictly against the Shulltan ’Arukh, the Rema androv posqim on the basis of mayim 
se’eyn lahem sof.
341 I have skimmed through all R. Feinstein’s ’Even Ha’Ezer responsa but I have not found 
discussion of this point.
Analysis of the debate

IV.33 We may now be in a position to understand the sources of the four distinct opinions concerning (ab initio) stringency in matters of marriage and divorce.

A Those who do not compare fact (as in mayim she’eyn lahem sof) to law (because in the former case there is always a possibility of the husband turning up, whereas in the latter there is no possibility of the ruling of the Shulḥan ʿArukh and the posqim changing) follow the usual halakhic methodology:

1 The most lenient position is taken by R. Yosef Ḥazzan\(^{[342]}\) who maintains that the Sefaradim should apply the accepted guidelines for halakhic rulings in all other areas of Halakah to the area of ʿerwah also. This means that even lenient rulings of the Shulḥan ʿArukh regarding gittin and qiddushin must be accepted amongst the Sefaradim even when these are against the majority of the posqim. (At the same time, he allows a Sefaradi poseq to give a stringent ruling in such a case if the poseq feels that he cannot ignore the majority opinion.\(^{[343]}\))

2 R. Hazan\(^{[344]}\) also justifies a rabbi taking a stricter stance, i.e. accepting the Shulḥan ʿArukh’s (and, in the case of the Ashkenazim, the Rema’s) lenient rulings – even in the domain of ʿerwah – only when these are supported by most of the posqim.

B Those who do compare fact to law maintain one of the following positions:

3 There are some\(^{[345]}\) who insist on always taking into consideration – in ʿerwah matters – the (stricter) opinion of a

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\(^{[342]}\) See ARU 7:17 (§IV.21).

\(^{[343]}\) Similarly it may be said that the Yemenite community would follow the Rambam’s lenient rulings even against most posqim in all matters – including ʿerwah, though some express doubt about this. See ARU 7:18 (§IV.23). I am at present unaware of any Ashkenazi authority who takes a similar approach to the Rema.

\(^{[344]}\) See ARU 7:17 (§IV.21).

\(^{[345]}\) Maharibal et al. See ARU 7:14-15 (§IV.11).
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substantial minority of the posqim even if this is against the Shulḥan ‘Arukh and the Rema. These authorities compare fact to law and argue that just as the Talmud concerns itself (at least ab initio) with the substantial minority possibility in the case of mayim she’eyn lahem sof49 so must we be concerned for a substantial minority of (strictly ruling) posqim in all matters of ‘erwah.

4 Finally, comes the most stringent camp47 – that of those who maintain that we must take into consideration every strict opinion, even that of a lone poseq. These posqim base themselves on the stringency of the Talmud that disallows (at least ab initio) the remarriage of the wife of one who was lost at sea even if many years have passed since his disappearance though there is but an insubstantial likelihood of his still being alive.29

IV.34 As pointed out elsewhere,49 according to R. Feinstein’s explanation of the theory behind the rules of mayim she’eyn lahem sof, it is not possible to apply the stringency of insubstantial minorities – and certainly not the stringency of singular possibilities – that operates in such cases of uncertainty of fact to cases of uncertainty of law.

IV.35 Moreover,30 the accepted practice amongst the Ashkenazim and Sefaradim is like the fourth group (ab initio) except in a situation of ‘iggun when the second group is followed. To my knowledge, the Yemenites follow the Rambam in all cases.

346 I. e. the husband may be of the 25% (?) who survive ship-wreck.
347 R. Al Gazi et al. See ARU 7:14 (§IV.8).
348 I.e. he may be of the 1% or less who survive and fail to communicate with their family even after a prolonged period.
349 ARU 7:20 (§§IV.29-32).
350 ARU 7:18 (§IV.23).
Chapter Three

The Use of Conditions

3.1 “Conditional marriage” (to be distinguished from “temporary marriage”\(^{311}\)), particularly the use of what we call “terminative” conditions, i.e. conditions which facilitate the termination of the marriage without a get,\(^ {312}\) raises major fears amongst posqim, and the maxim ’Eyn Tnai Benissu’in is often cited as a bar even to consideration of proposals for making marriage subject to conditions. In this chapter, we consider (A) the principal historical sources taken to support and oppose such conditions: the Palestinian tradition of divorce clauses (§§3.2-16), the maxim ’eyn tnai benissu’in (§§3.18-31) and the debate over the ah mumar condition (§§3.32-36); (B) the basic halakhic issues involved in the controversy: the objection in principle that conditions are contrary to Torah-law (§§3.37-38); the respective roles of the husband and bet din in the termination of marriage (§§3.39-47); the effect of termination on the previous relationship (§§3.48-59); and the need to protect the condition against implied revocation (§§3.60-67); (C) different forms of condition: prospective and retrospective (§§3.68-73), “Substantive” and “Validity” (§3.74), Implied conditions and the concept of ’umdena (§§3.75-80), Standard conditions: tna’ei bet din (§3.81); (D) Conditions proposed by modern posqim (§3.82): R. Pipano (§3.83), R. Henkin (§§3.44-47, 67), R. Makovsky (§3.84), R. Uzziel (§§3.41-43), R. Toledano (§3.85), R. Risikoff (§3.86); (E) Some Drafting issues (§§3.87-88); (F) Conclusions on the halakhic status of conditions (§§3.89-92), and (G) Strategic Issues (§§3.93-95).

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\(^{311}\) The effect of Nedarim 29a is that if a man betrothed a woman saying “Be thou my wife to-day, but to-morrow thou art no longer my wife” the betrothal is valid for ever and cannot be undone in the husband’s lifetime, without a get. Contrast the double condition approved in Hidduke haRashba on Gittin 84a (§3.20, below). See also ARU 5:68 (§27.7). See also see n.436, below.

\(^{312}\) Only such a condition is capable of satisfying our criterion of a ‘global’ solution. Conventional PNA’s seek only to incentivise the husband and, though they may well make a valuable contribution to solution of the problem, neither guarantee success nor address the fundamental issues of principle discussed in Chapter One. There is no reason, however, why a terminative condition may not be inserted into a PNA, even as a “safety net” should the incentivisation fail.
Chapter Three: Conditions

A Principal Historical Sources Taken to Support or Oppose Conditions

A1 The conditions of the Palestinian Talmud and the Genizah ketubbot

3.2 Attention has been directed\(^{353}\) to a “Palestinian” tradition of attaching to marriage particular conditions relating to divorce, found in two passages of the Jerusalem Talmud and the ketubbot of the Cairo Genizah. We explore in this section the questions which arise as to the exact meaning of these clauses, the manner contemplated for their enforcement, and their ultimate halakhic significance.

3.3 The first occurs in Jerusalem Talmud, Ketubbot 5:9 (30b), which records that R. Yoseh endorsed the following condition

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\text{R. Yoseh said: For those who write [a stipulation in the marriage contract] that if he grow to hate her or she grow to hate him [a divorce will ensue, with the prescribed monetary gain or loss] it is considered a condition of monetary payments, and such conditions are valid and binding.}
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There is dispute, in both rabbinic and academic sources, regarding the nature of this condition, which is not fully reproduced in the text (an indication, perhaps, that it was well-known\(^{354}\)). We have the protasis: “if he grow to hate her or she grow to hate him”, but the apodosis is left unstated. The English translation here quoted\(^{355}\) represents the dominant academic view,\(^{356}\) namely that there is here an entitlement to divorce (even against the objection of the other party, and without proof of any further “cause”), and this derives support from a clause found in some ketubbot in the Cairo Genizah.\(^{357}\) However, there is also academic support for the dominant (but not exclusive: see §§3.3, 6, below) rabbinic view, that the condition related only to (special) financial terms of (a voluntary)

\(^{353}\) Notably by Friedman, 1980:312-46; Riskin, 1989:30; ARU 2:8-9 (§2.2.1-2).

\(^{354}\) A similar argument is advanced in relation to the abbreviated drafting of some clauses in later Palestinian ketubbot; see ARU 15:21.


\(^{357}\) See further below, §§3.16, 70.
divorce. The latter view is certainly supported by the context in the Yerushalmi (though the latter does not exclude coerced divorce and may even assume its existence as the basis for the financial discussion). In any event, this is not necessarily conclusive as regards the original meaning of the clause, outside that context. It is argued also that it is supported by R. Yoseh’s classification of such a clause as mamon. Yet the Tosefta also classifies as mamon a condition which exempts the husband from providing onah, conjugal rights (see §3.6, below).

3.4 Elsewhere in the Yerushalmi we hear of a case in which a man kissed a married woman. This was not regarded as evidence of adultery; the amoraim rather treated the facts as evidence of “hatred”, in terms of the following condition found in her ketubbah:

If this So-and-so (fem.) hates this So-and-so, her husband, and does not desire his partnership (הָלַעְבַּבְּה), she will take half of the ketubbah.

The Yerushalmi discusses mainly the financial aspects of the condition: whether the woman was entitled to receive at least part of her ketubbah. This implies that a divorce had taken place. There is no indication that the husband in the “kiss case” was reluctant to divorce his wife; the dispute concerned only the financial terms. This has been seen by some as a distinct tradition of marriage (albeit within the concepts of qiddushin and qinyyan), one conceived as a shutafut, and thus admitting of claims to

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359 See further ARU 5:16 (§12.2.4).
360 For the view that the wife is entitled to a coerced divorce on the basis of the halakhah of moredet, see ARU 9:15-16; ARU 15:18-21.
361 ARU 9:16; ARU 15:20.
362 See Friedman, 1980:319-320, on the possibility of an expansive meaning. See also ARU 9:16 (text to note 96); ARU 15:20 (text to notes 80-81).
364 The word: should be read as or according to Saul Lieberman, Hilkhot HaYerushalmi LehaRambam (New York: Bet Hamidrash Lerabanim BeAmerica, 1948), 61, based on Rambam, Or Zaru’a and Me’iri’s version. was adopted by Friedman, 1980:317; Riskin 1989:31 n.16.
365 For this reading (amending תְהִיָּה בֵּיתָךְ), see Lieberman, ibid.; Friedman 1980:329.
366 See n.365, above. See further Friedman 1980:329: “Shutafut ‘partnership’ here clearly denotes ‘marriage’, as in Syriac. This felicitous term is particularly befitting in a stipulation which describes man and wife as equal partners in the business of marriage, each of whom can withdraw from the partnership at will.” Cf. ARU 9:16: “being in a partnership with him means that the wife has the right to a coerced divorce.”
unilateral divorce on the part of the wife, backed up where necessary by *kefiyot*. Dr. Westreich argues that since there are independent talmudic bases for coercion of the husband of a *moredet* to give a divorce, this was probably not the main function of the clause in the Yerushalmi. That function, rather, was to determine in advance the financial arrangements (in the absence of which the wife divorcing on these grounds would have lost the *ketubbat* entirely). This view is supported by the surrounding discussion in the Yerushalmi, both here and in the context of R. Yoseh’s condition.

3.5 Yet the “kiss case” illustrates the utility of the clause also for determining entitlement to divorce. Can we really be confident that this woman, who had manifestly notenets *eynehah* be’*afer*, would without it have been so readily regarded as entitled to a divorce? It is worth asking, also, whether we are entitled to assume that R. Yoseh’s clause did indeed include the *shatufa* clause. Perhaps there were two variations, one entitling the wife to a divorce on the grounds (to use the Babylonian terminology) of *me’is* ‘*alay’; the other (as in the “kiss case”) entitling her to divorce even when she did *notenets* *eynehah* be’*afer*. In short, even if the clause was used primarily to determine financial consequences, its partnership terminology could certainly fortify the woman’s position, particularly in extreme cases like the present (with its public immorality), even if the general law was in her favour. Moreover, the general history of

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367 Found almost explicitly in the Yerushalmi; see ARU 9:5-6, after note 398.
369 By contrast with the function of the clause found in the Genizah *ketubbat*, on which see §§3.16, 70, below. Explaining the divorce clause in the latter context as required for the financial arrangements is not completely satisfactory. The equal distribution of the *ketubbat* which is mentioned in the Yerushalmi was very rare, and every other occurrence of the divorce clause – both in the early Elephantine marriage documents and in the later Palestinian *ketubbat* – has the standard financial arrangement, according to which if the wife unilaterally demands divorce she completely loses her *ketubbat*. It is therefore doubtful if the half sharing of the *ketubbat* was practiced at all at the time of the Palestinian *ketubbat* from the Cairo Genizah. Rather, the function of the clause in the Genizah *Ketubbot* was the grounds for divorce, as part of the Palestinian custom of explicitly writing the court stipulations: ARU 15:21.
371 In the Yerushalmi the right to divorce is based on an explicit tannaitic source: *bet din she’akhreben... yeosote’u*; see ARU 9:5–6.
372 And not only *eynehah*: a man was said to have been seen to *דמונלפ של חנא*.
373 See §§1.29, 31, above.
374 Westreich at ARU 15:19 notes the similarity of language and structure of the two conditions, regarding that of R. Yoseh as a shortened version of that in the “kiss case” (though the reading of the first clause of the condition in the “kiss case” has been amended in the light of that of R. Yoseh: see n.364, above).
the relationship between clauses in *ketubbot* and the general law (the *tna’ei bet din* of *Mishnah* *Ketubbot* 4:7-11) suggests that notarial practice preceded the development of general rules.74 The Yerushalmi clauses may thus well have preceded in origin the development of talmudic rules entitling a woman to a divorce in these circumstances. Prudence might well have dictated continued use of such conditions even after such rules came to be accepted. After all, a woman might, even in those days, encounter a *bet din* with a tendency to *lamrot*. Indeed, it is claimed it was frequently the practice in Eretz Israel (perhaps amounting to a general custom) to include court stipulations explicitly, even though they were not required.75

3.6 The dominant rabbinic view of R. Yoseh’s condition is also supported by the general rules relating to conditions contrary to Torah-law.76 Most pertinent here are the examples given in *Tosefta* *Qiddushin* 3:7-8:77

If he says] “I hereby betroth you ... on condition that if I die you shall not be subject to levirate marriage,” she is betrothed, and the condition is void, as he has contracted out of a Law contained in the Torah, and when anyone stipulates out of a Law contained in the Torah, the condition is void [in talmudic law too]. [If he says] “on condition that you have no claim against me for food, clothing, or conjugal rights,” she is betrothed, and the condition is valid.78 This is the principle: Contracting out of a Law contained in the Torah as to a monetary matter is valid, but as to a nonmonetary matter is void.

This might appear to close the door against a condition obviating the need for a *get*: if the husband’s (in principle, voluntary) delivery of a *get* is “a Law contained in the Torah”, then the capacity to override it by a *tnai* depends upon classifying it as “monetary”.79 The distinction in *Tosefta* *Qiddushin* 3:7-8 might make that appear unlikely. However, divorce does

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74 Westreich at ARU 15:14 makes this comparison in explaining (but not accepting) the claim of the teachers of the teachers of Me’iri, that the geonic measures were based upon use of the condition of R. Yoseh. On the relationship between surviving early 2nd cent CE *ketubbot* and the *tna’ei bet din*, see Jackson 2004a:220-224.

75 ARU 15:21, citing Friedman 1980:15-18, 330.

76 See further ARU 4:29-30 (§§IX.70-76).

77 Translation of Elon 1994b:125; for further discussion, see ibid., at 124-127.

78 In the Babli, the matter is debated in a baraita, *Kidd.* 56a, with R. Meir rejecting the condition completely, but R. Judah accepting it at least insofar as it deals with *mamon*.

79 However, conditions to the effect that ‘you will give me a divorce when necessary’ do not contradict Torah law: see ARU 4:29-30 (IX.72-76) and ARU 18:26-27.
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involve financial consequences (regarding the ketubbah), and this may have influenced R. Yoseh.

3.7 A more radical (and persuasive) view has, however, recently been proposed by R. Yehezkel Margalit, who sees R. Yoseh’s tna’i as part of a pattern of specifically Palestinian conditions which (a) were often more “egalitarian” than the Babylonian tradition, and (b) gave the parties to the marriage a greater discretion to modify the normal incidents of marriage (including the basic ketubbah sum) than is suggested by the

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382 See also Breitowitz 1993:59. M. Kidd. 3:1 already knows of a deferred betrothal, which Z.W. Falk, Introduction to Jewish Law of the Second Commonwealth, Part II (Leiden: Brill, 1978), II.286, compared to the Alexandrian form of ketubbah on which Hillel is said to have adjudicated in T. Ket 4:9:

When the people of Alexandria betrothed women, and then someone came from the market and stole her [and married her], and the matter came before the Sages, they considered declaring the children bastards (manzerin). Hillel the Elder said to them: ‘Bring me the ketubbah of your mothers’. They showed them to him, and it was written, ‘When you enter my house you will be my wife according to the custom of Moses and Israel.’

The Alexandrian provenance of such betrothal practices is confirmed by Philo, De Specialibus Legibus iii.72 (who is critical of them). P. Segal, “Jewish Law During the Tannaitic Period”, in N.S. Hecht, B.S. Jackson, S.M. Passamanek, D. Piattelli and A.M. Rabello, An Introduction to the History and Sources of Jewish Law (Oxford: Clarendon Press, 1996), 137f., sees this form of ketubbah as evidence of “a law allowing one to make a condition under which the betrothal could be cancelled retroactively without the necessity of a get... Thus, by virtue of the conditions laid down in the ketubbah, the acquisition made by the betrothal was cancelled without the requirement of a get even though the act of betrothal did result in the creation of the status of ‘married woman.’” See further ARU 2.9-10 n.40, for further literature.

383 In another respect, too, the Palestinian tradition appears to have been more favourable to the woman. The Mishnah, in introducing the issue of the moredet, had sought to “persuade” her back into compliance by reducing her ketubbah by 7 denarii per week, until it was entirely exhausted (Mishnah Ketubbot 5:7). Whether, at this stage, such exhaustion of the ketubbah was already taken to entail an obligation to terminate the marriage, is not clear. But such a view was not long in emerging. The Tosefta indicates that subsequent to the compilation of the Mishnah, “our Rabbis decreed that the court warn [her] for four and [or] five consecutive weeks, twice each week. If she continues [her rebelliousness] beyond this point, even if her marriage contract is worth one hundred maneh, she forfeits all of it” (T. Ketubbot 5:7). But the account of this in the Yerushalmi states: “The court after them [ruled] that the moredet be warned for four weeks, [at which time] she breaks her marriage contract and leaves”.

Riskin, 1989:14, takes תפורותא הלועה to imply “[with a bill of divorcement]”. At the very least, the formulation does suggest that the wife is here entitled to take the initiative in effectively bringing the marriage to an end. On the history of this tradition, see further ARU 9:3-7. There are also non-rabbinic sources from 5th century BCE (Elephantine) to the 2nd cent. CE Dead Sea papyri which evidence a more egalitarian approach, in some cases going so far as to suggest that the woman could deliver the get to the man. See Jackson 2004.
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distinction between monetary and non-monetary conditions. Thus, it appears to have been possible, by *tnai* (i) to exclude the triple obligations of Exodus 21:10 (*sh’erah, kesutah ve’onatah*), as in the above Tosefta; (ii) to override the husband’s right to inherit his wife’s estate on her predecease; and (iii) to deny the husband his (then) right to take a second wife, by a condition that if he took another wife he would be coerced to give his first wife a *get*. It may well be that the acceptance by Rashba of a condition: “If I divorce you (by a certain time) then you are betrothed to me … but if I do not divorce you (by that time) then you are not betrothed to me” is to be viewed as reflecting the same tradition.

3.8 However this may be, even if the Yerushalmi clauses do validate unilateral divorce by the wife, they do not tell us *how* precisely the divorce is effected in this situation, and in particular what is the position if the husband refuses. Without more information, an entire spectrum of possibilities is theoretically open for consideration, each with some historical (if not rabbinic) precedent: thus we hear at 5th century BCE Elephantine (whose marriage contracts also use the language of “hatred”, which sometimes has the technical connotation of effecting a divorce) of an oral declaration before the assembly, which apparently was sufficient to execute the divorce, one of the Herodian princesses, Salome, is said (by Josephus, who criticises this as contrary to Jewish law) to have sent a bill of divorce to her husband, and a Dead Sea papyrus of the 2nd cent.

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384 Tosefta Qiddashin 3:7-8, in §3.6 above. On the later halakhic attitude to such a condition, see ARU 4:28 (§IX.71 n.81) and 4:29 (§IX.74 at nn.85 and 86), noting a distinction between a condition which denies the existence of rights and one which (as in the Tosefta) recognises but foregoes them. On R. Meir Posner’s use of rejection of such a condition (regarding onah) in support of rejection also of a terminative divorce clause, and Berkovits’ reply, see ARU IV:29 (§§IX.72, 74).

For monogamous conditions, according to which the husband commits himself to divorce his wife if he takes a second wife, see Elimelech Westreich, Temurot Bema’amad Ha’ishah Banishpat Hu’Iyyi (Jerusalem: Magnes Press, 2002), 26-29, noting (at 26) that the earliest explicit example of such a clause is in the Genizah ketubbot. The Elephantine marriage contracts contain a monogamy clause whose breach has been thought to entail automatic termination of the first marriage. Yaron, however, came to reject this notion of “divorce by conduct”; see R. Yaron, *Introduction to the Law of the Aramaic Papyri* (Oxford: The Clarendon Press, 1961), 61-62 (on K7). In any event, the wife could (by her own action) unilaterally divorce the husband at Elephantine.

386 Rashba, Novellae, Gittin 86a; see ARU 4:28 (§IX.70) and see ARU 4:29-30 (§§IX.73-76) for Berkovits’ use of this source. See further n.436, below.

387 Yaron 1961:55 finds evidence at Elephantine of both its original usage as a motivation and its later technical (constitutive) function; for further literature, see ARU 2:9 n.36.


389 Ant. 15:259. See B.S. Jackson, “The Divorces of the Herodian Princesses: Jewish law, Roman law or Palace Law?” in *Josephus and Jewish History in Flavian Rome and Beyond*, ed. J.
CE is thought by some to allude to such a procedure. If, on the other hand, we assume the normal rabbinic procedure, we still need to ask whether the bet din would compel the husband if he proved recalcitrant, and indeed what (if anything) it could do if even coercion failed. Radical answers to this (for the moment, purely historical) question are not to be excluded, given the radical nature of the application of the condition in the “kiss case” discussed above (§§3.4-5). Comparison may also be made of the procedure here to that in the Genizah ketubbot (§§3.16-17, 70, below), which also use unusual terminology and may possibly admit of termination of the marriage by the bet din without a get.

3.9 However, there is support amongst the Rishonim for the view that R. Yoseh’s condition entailed coercion, and indeed formed a basis for the later geonic reforms regarding coercion of the moredet (§§4.17-21, below). Me’iri writes:

And my teachers testified that their teachers explained that the Geonic innovation in this matter is based on what is written in the Western Talmud ... i.e. that anyone who stipulates that if he hates her he may divorce her, with

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307 Riskin 1989:32, writes that by the stipulation the rabbis ensured “that she could virtually initiate the divorce herself. Her power was not truly de jure – that is, upon her stating her desire for divorce, the court would then coerce her husband until he acquiesced, and in the end it would still be he who gave the divorce to his wife – but it provided her with a de facto means of getting both her freedom and a livelihood.” At 166 n.17, he adds: “It may be assumed that the divorce was effectuated by the court’s coercing the husband to give his wife a divorce. It is unlikely that the Jerusalem Talmud discarded the Biblical command: “He shall write her a bill of divorce and place it in her hand” (Deut 24:1).”

308 See, however, the argument of Dr. Westreich in ARU 15, who accepts that the Yerushalmi divorce conditions and those of the Genizah ketubbot are part of a single, continuing halakhic tradition but concludes (at 19) that they both assume the traditional divorce procedure: divorce can be unilaterally initiated by the wife as well as by the husband, on the basis of the spouses’ preliminary stipulation, but the formal execution of divorce is exclusively by the husband (although he might be coerced to do so).

309 See Riskin 1989:82, quoting Me’iri, though Riskin himself, ibid. at 83, argues against this connection. Scholars are divided as to whether this view is historically correct. See Lieberman 1948:61 n. 7; Friedman, Jewish Marriage (n.356, above), at 1325-327, who doubts whether this description is historically possible. On the argument of Moshe Shapira, “Gerushin Bedin Me’isa”, Dine Israel 2 (1971), 124-130, see ARU 15:15-16. See also Jackson 2002:nn.84-85; ARU 15:13-18.

310 R. Menahem HaMe’iri, Bet HaBeturah to Ketubbot (ed. A. Sofer, Jerusalem, 1968), Chapter 5, pp. 269-70.

311 Friedman, 1980:327, even suggests that Me’iri’s teachers’ teachers based themselves also on an actual ketubbah and not only on the Yerushalmi. See §3.10, below (on Ra’avya).
payment of the ketubbah or the tosefet, and similarly (if they stipulate that) if she hates him, that he may be forced to divorce her (שביתת אשה עם תוספת להלבשה), whether on payment of all the ketubbah or with less, everything is valid in accordance with what they have stipulated. And they wrote on this that the Ge’onim innovated as they did because they were accustomed to write in their ketubbot הרא"שה רא"שה ... And after the minhag became widespread, they determined to apply it even where it had not been written [in the ketubbah] as if it had been written.

If we take the words of Me’iri’s teachers’ teachers independently of their context in Me’iri’s text, it appears that they were seeking to legitimate the coerced divorce itself and not [only] the financial aspects. Thus, they interpret שביתת אשה in R. Yoseh’s condition as: “if she grows to hate him, so that he is required to divorce her (שביתת אשה לברכה) whether while [receiving] all the ketubbah or with a small reduction”.³⁹⁶ In the same way, Me’iri’s teachers’ teachers refer to the fear of הבשים להמכות מר השלח (that she may [unjustifiably] “take herself out of her husband’s control”) as the reason for their seeking to find support for the Geonic ruling, which means that they thought that the wife’s option of unilateral divorce under the Geonic ruling needed justification. They thus regarded R. Yoseh’s divorce clause as giving the wife the right to initiate unilateral divorce, and viewed the Geonic enactments as based on the customary use of this clause.

3.10 Mordekhai Akiva Friedman argues that not only were Me’iri’s teachers’ teachers aware of Rabbi Yoseh’s condition in the Yerushalmi; they were also familiar with the real practice in Eretz Israel in their time. He bases this on a source indicating that the Ra’avya (Rabbi Eliezer b. Joel Halevi), who is likely to have been one of Me’iri’s teachers’ teachers, examined a ketubbah that was brought from Eretz Israel and contained a divorce stipulation similar to the divorce clause in the Yerushalmi.³⁹⁷ This actual finding, Friedman maintains, “could have led him to conclude that there was a direct connection between the (Palestinian) clause and the (Babylonian) Geonic enactment.”³⁹⁸

³⁹⁶ Similarly, they mention a clause: שביתת אשה עם תוספת להלבשה ("if she hates him she shall take her ketubbah or part of it and she shall leave"). The addition שביתת אשה to the divorce clause in the Yerushalmi also shows that they understood this clause as legitimating unilateral divorce.

³⁹⁷ See Ra’avya, Mishpetyet Ketubbah, 919 (p. 309): “and I saw a ketubbah which was brought from Eretz Israel and all [i.e. all court stipulations] were written in it. And [also written there were] the law of moredet and the law of mored and all other matters of [the] ketubbah [as] explained / interpreted in [tractate] Ketubbot.”

³⁹⁸ Friedman 1980:327.
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3.11 As for what R. Yoseh’s condition meant, the view of the teachers of the teachers of Me’iri (§3.8) may be supported by a responsum of Rashba, but otherwise stands alone. Rav Hai Gaon and some Rishonim – Ramban and others – explain the divorce clause of the Yerushalmi as a clause which was required for the financial agreements. But each had their particular motivations: R. Sherira Gaon certainly understood the Bavli sugya on moredet as providing the basis for the principle of coercion (§§4.26-27), and therefore the Palestinian divorce clause was not required to be understood as legitimating coercion; on the other hand, many of the Rishonim (Rambam being a notable exception) understood the Bavli as excluding coercion, due to the adoption of Rabbenu Tam’s interpretation of the Talmud, and therefore interpreted the clause of the Yerushalmi as discussing only financial aspects. Indeed, even the use made by Me’iri himself of his teachers’ teachers’ views may have been different from those teachers’ own intention. Me’iri himself opposed coercion in cases of moredet. His discussion of the Geonic measures relates to their financial enactments, according to which the wife would not lose her basic ketubbah (and other monetary components). Me’iri rejects also these financial enactments (אורי אומרים: “it is not correct to rule like them”), but then cites his teachers’ teachers who find some support for them in the customary Palestinian divorce clause. He thus uses the view of his teachers’ teachers to explain the basis of financial provisions for the moredet. Accordingly, the link between the

Rashba no. 176 in Teshuvot Hama Provence (Jerusalem: Dafu Akiva Yosef, 1967), chapter 73 (see also the remarks of the compiler, R. Sofer, at 277), as cited by Margalit, 2010:129. “This is the law of the rebellious wife and of the wife who finds her husband disgusting, but Rabbi Alfasi wrote in his laws that the Ge’onim’s decrees were similar to that which was written in his laws, but it is very possible that the Ge’onim only made these decrees for their own generation as a temporary measure, but now there is no justification to be lenient and Ramban and Rabbi Zerachia haLevi were also of this opinion, Jerusalem Talmud: Rabbi Yoseh said those that insert the penalties for rebellion in the Ketuba, these are financial conditions and are therefore valid.” From the juxtaposition of sources, it may probably be inferred that this latter reference to the Yerushalmi implies a coerced divorce. As for Rashba’s own attitude, see II 1ddusha haRashba, Ketubbot, 64a.

He legitimates some kinds of financial arrangements in cases of moredet: see Teshuvot HaGe’onim (Harkavi edition), 523, where Ramban suggested that the word of word the Palestinian justification of the ketubbah clause; in the Bavli we find הביא הממצה את בחיה (Ketubbot 56a), and similarly in the Tosetta (Kidushin 3:8). The formula הביא הממצה את בחיה is unique to the Yerushalmi: see ARU 15:20.

On Ramban, Ketubbot, 63b, see ARU 15:20.

See Me’iri, Ketubbot, 63b, s.v. gedolei hameluhvim: הלומדים אורי הסiculo מsaid (according to our [i.e. Me’iri’s] opinion the husband is not coerced [to give a geiv]).

Ibid., s.v. zehu (which is אורי הסiculo מsaid, i.e. in the financial [lit. collection] issue the Ge’onim innovated, etc.).
two traditions does not relate to the coerced divorce but rather to the financial aspects of moredet which he himself rejects.

3.12 The view of the teachers of Me’iri’s teachers may nevertheless create a safeg as to the interpretation of R. Yoseh’s condition (§3.12). Indeed, according to their account, even if the agreement not to impose any financial sanctions upon her as a moredet and to grant her a divorce was not written into the ketubbah, it would have been understood and acted upon. Thus we have an interpretation of R. Yoseh’s ruling in the Yerushalmi, proposed by the teachers of Me’iri’s teachers, and stating that an agreement to divorce is binding when written into the ketubbah and, where it is common practice to insert it into the marriage contract, it is effective – countenancing a coerced get – even if not written down.

3.13 The dogmatic weight of the view of the Me’iri’s teachers’ teachers is hardly diminished by the fact that there is little indication that they themselves thereby endorsed the geonic measures; rather, they appear to have offered a (perhaps anchronistic) historical justification for what they regarded as a superseded tradition, against the background of dogmatic acceptance of Rabbenu Tam’s arguments against the Ge’onim. Rabbenu Tam had appeared to argue that the Talmud does not mention coercion. Thus, a different basis was needed for the kefiyoh of the Ge’onim, and this was found in the Palestinian divorce clause. Indeed, Me’iri gives the following account of the motivation of his teachers’ teachers: “And they wrote at the end of their writings that it is better for us to take pains to interpret their teachings (i.e. the teaching of the Ge’onim) than to say that they explicitly uprooted the whole sugya without any reason.” Yet Me’iri’s teachers’ teachers must have regarded the reconstruction, even if historically anchronistic, as possible in dogmatic terms. For them, the Palestinian tradition was sufficient to legitimate the problematic geonic tradition, even in relation to what they (following Rabbenu Tam’s view) probably regarded as non-legitimate coercion.

404 “And after the minhag became widespread, they determined to apply it even where it had not been written [in the ketubbah] as if it had been written”: §3.7, above.
405 The Ge’onim themselves do not refer to the Palestinian tradition of making such a condition as their normative basis.
406 See further §4.25 below.
407
3.14 Moreover, R. Yoseh’s view is not disputed in the Jerusalem Talmud. It is not mentioned at all in the Babi.

There is specific authority for the view that, in the absence of explicit disagreement by the Babylonian with the Jerusalem Talmud, the authority of the latter is unaffected. 409 This is in accordance with the principle of Rema’s qualification to hilketa kebatra’ey: 410 even though the earlier (Yerushalmi) tradition was “recorded”, 411 it may not have been “well known” to the redactors of the Babylonian Talmud. Moreover, the tradition of Me’iri’s teachers’ teachers confirms in this very context that customs and norms lacking a normative basis in the Babylonian Talmud can be justified on the basis of the Yerushalmi. And if such traditions were still relevant for the Rishonim, even centuries after their actual use, surely the posqim of our time too may consider whether there is not a safeg as to whether coercion may still be used when authorised by a term in the marriage contract.

3.15 The fact that Ra’avya, probably to be counted amongst Me’iri’s teachers’ teachers, as noted above (§3.10), appears to have relied for halakhic purposes also upon a clause found in a ketubbah from Eretz Israel which he had himself seen indicates that we may not exclude from the halakhic debate the mediaeval ketubbot discovered in the 19th century in the Cairo Genizah. Not only do the latter indicate a continuation of the Yerushalmi traditions whereby the parties may specify “unilateral” grounds for divorce; they also raise important issues regarding the procedures for implementation of such divorces.

3.16 The language of the Genizah ketubbot as regards the divorce procedure in cases of “hatred” (whether of the husband or wife) is unusual:

And if this Malilha hates this Sa’id, her husband, and desires to leave his home, she shall lose her ketubha money, and she shall not take anything except that which she brought in from the house of her fathers alone;

408 Unlike the condition relating to the wife’s rights within marriage: see n.379, above.
409 Ritba on Kidd. 60a; Maharik 100; ET IX.251 at n.155. Margalit 2010 argues that this is particularly so where the Yerushalmi is explicit and the Babi vague. Rambam’s inclination towards the Yerushalmi is mentioned already by Ra’avya and has been further documented by R. Kraslitchkov, the Poltava Gaon, in his commentaries on the Yerushalmi. See his introduction to the first volume of the ongoing publication of the Talmud Yerushalmi by Makhten Mutsal Me’Esh, Jerusalem. The matter is discussed also by R. Yosef in Yab’I ’Omer, vol.4 OH 35:5. See also Lieberman 1948:61, and J.L. Maimon’s introduction to the photographic reproduction of the Rome 5240 edition of Rambam’s Mishneh Torah, pp. 22-24, s.v. Talmud Yerushalmi.
410 See esp. §§2.28-29, above.
411 Rema to Shulhan Arukh Ḥoshen Mishpat 25:2, quoted in §2.28 above.
and she shall go out by the authorization of the court (היתו כל רביה) and with the consent of our masters, the sages.\(^{412}\)

A second example even uses the “partnership” terminology of the condition in the “kiss case” (§§3.4-5, above):

And if this Rachel, the bride, hates this Nathan, her husband, and does not desire his partnership, she shall [lose] the delayed payment of her mohar and shall take what she brought in, and she shall not leave except by the authorization of [the court].\(^{413}\)

It is not entirely clear whether, according to such *ketubbot*, (a) a get was necessary at all (perhaps the condition was regarded as self-executing\(^{414}\)), or (b), if it was, whether the court would back up its permission with an order, *a fortiori* with coercion (as the teachers of the teachers of Me’iri appear to have thought). The latter view has attracted influential support.\(^{415}\) However, it fails to account for the unusual terminology of בלה ה袪ה (which we have not found paralleled elsewhere). Moreover, a different explanation of the basis of the Geonic measures, itself also probably motivated by a desire to mitigate the criticisms of

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\(^{412}\) TS 24.68, lines 5-7, in Friedman, 1980:II.54 (dating), 55f. On the meaning of בלה ה袪ה, see further §3.70, below.

\(^{413}\) Lines 33-34 of Friedman no.2, JNUL Heb.4 5774 no.98, of 1023 C.E., at Friedman 1980:II.41, 44-45, Friedman’s translation (Riskin 1989:81, offers a different translation, but not differing in substance). See further M. Friedman, “Divorce upon the Wife’s Demand as reflected in Manuscripts from the Cairo Geniza”, *The Jewish Law Annual 4* (1981), 103-126; Jackson 2004:161f., arguing against the view of Katzoff 1987:246, that the clause indicates no greater powers on the part of the court (or the wife) than in traditional halakah, and supporting that of Friedman 1980:II.328-46.

\(^{414}\) But see Dr. Westreich’s argument at ARU 15:11-12.

\(^{415}\) Friedman, 1980:I.346, observes: “We have traced the development of a rare *ketubba* clause over a 1500 year period. Jewish law certainly never empowered a wife to issue a bill of divorce unilaterally and thus dissolve her marriage. However, it was stipulated in *ketubbot*, which, from talmudic times, followed the Palestinian tradition, and the rabbis eventually recognized this as binding law that through the wife’s initiative, if she found life with her husband unbearable, the court would take action to terminate the marriage, even against the husband’s will.” See, however, Friedman at I.336 n.78, where he abandons the interpretations of (in effect) annulment whether with or without a get, but also regards it as unlikely that the phrase can mean “by standard Jewish divorce law”. Friedman’s final view is unclear from these passages. Riskin 1989:80 observes: “Apparently, the courts would force the husband to grant his wife the divorce she sought”, arguing, at 81-83 (and at 2002:32 n.9), for two different traditions, the one of the Land of Israel (reflected in documents in the Cairo Genizah), the other that of the Babylonian Ge’onim. He notes that the Jerusalem Talmud appears unaware of the Babylonian tradition of the *moredet me’is ‘alay;* conversely, the Babylonian Talmud appears unaware of the Palestinian divorce clause. But even if the *taqqanah* of the Ge’onim was not followed in Palestine and Egypt, the converse proposition does not follow: post-talmudic Babylonian practice may have used R. Yoseh’s condition, and the Ge’onim may have regarded it as contributing to the authority of their *taqqanah*: see further ARU 2.26 n.113, and ARU 15.24 (n.418, below).
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Rabbenu Tam (but here unrelated to the tradition of Palestinian divorce clauses), is provided by the Rosh, who writes of the Ge’onim:

... For they relied on this dictum: “Everyone who marries, marries in accordance with the will of the Rabbis” [bKet 3a], and they agreed to annul the marriage when a woman rebels against her husband.\textsuperscript{416}

The Rosh here interprets the geonic practice not as coercion but rather as annulment, using the language of hafqa’at qiddushin.\textsuperscript{417}

3.17 The question as to how the marriage was terminated under the Palestinian divorce clauses may be difficult to answer in historical terms. However, there are dogmatic implications whichever historical answer is given. Either the divorce clause indicates a practice (legitimated by its use in Eretz Israel in the past and cited by some Rishonim), according to which no get was necessarily required in cases of moredet me’is ‘alay, so that, in effect, a preliminary agreement between the spouses could be a basis for marriage annulment. Or the husband was in this situation coerced a get, so that, according to the view of Me’iri’s teachers’ teachers, a preliminary agreement could avoid later problems of get me’useh, when divorce was initiated solely by the wife. And even if we adopt the latter, more traditional, interpretation, historical questions remain regarding the basis of its authority.\textsuperscript{418} More important, for present purposes, is the dogmatic use which may be made of these various

\textsuperscript{416} Resp. 43:8, p.40b. Riskin 1989:125 (Heb.) 126f. (Engl.), and Riskin’s own comments at 129; Breitowitz 1993:50f. n.135, 53. For evaluation of this analysis, see §§4.23-24, below.

\textsuperscript{417} See further §§4.22-24, below, and ARU 2:26 (§3.4.2), ARU 8:18-19 (§3.3.2), ARU 15:5-13 on the Rosh’s interpretation of the geonic measures as a form of hafqa’ah. Of course this is unlikely to have been known to Me’iri’s teachers’ teachers (Me’iri and Rosh were exact contemporaries, born in 1249 and 1250 respectively). However, the Rosh’s own teacher, the Maharam of Rothenburg, cites a responsa of R. Shemuel b. Ah, which uses a plural formulation which, as argued below (§4.21), may indicate court action. Of course, the two explanations are different, but they also both offer dogmatic explanations of how the Ge’onim could have justified immediate kefiyeh for the moredet me’is ‘alay.

\textsuperscript{418} See R. Riskin (n.415 above). Dr. Westreich (ARU 15:24), disagreeing in part, distinguishes the two distinct traditions thus: “The right of the wife unilaterally to demand divorce was practiced in two different traditions: the Babylonian-Geonic tradition and the Palestinian-Genizah tradition (including its precedents in the Yerushalmi). These traditions developed in a similar environment but the sources of authority for this right were different in nature and did not influence each other: a positive law source (the halakha of morede) in the Geonic tradition; custom and contractual agreement in the Palestinian tradition. We have not found sufficient support for the argument that based them both on the same construction (hafqa’ah). Neither have we found support for basing one tradition (the Geonic coercion) on the other (the Palestinian divorce clause).”
justifications of the geonic measures.⁴¹⁹ On the one hand, the argument of
the Me’iri’s teachers’ teachers accords great dogmatic weight to the
Yerushalmi, which may be used to justify customs, norms, etc., even if
they lack a normative basis in the Babylonian Talmud; on the other hand,
the Rosh’s explanation clearly shows that he did not reject any post-
talmudic use of hafga’ah (even in cases of moredet me’is ‘alay), albeit in
the presence of a get.⁴²⁰

A2

The maxim ’eyn tnai benissu’ın

3.18 The maxim ’eyn tnai benissu’ın occurs first in the Talmud,⁴²¹ but Tosafot⁴²²
explain it as ’eyn regilut lehatnot benissu’ın (it is not usual to make a
condition at nissu’ın⁴²³), in that most conditions people would want to
attach to marriage could be resolved one way or another in the (then)
customary 12 month interval between qiddushin and nissu’ın, since
otherwise the fear would arise of retroactive promiscuity (zena’at) should
the condition take effect, that fear leading to a presumption that marital
relations were intended to revoke the condition." Berkovits argues,
moreover, that in talmudic times people behaved in accordance with
Jewish law and ethics; if they failed to do so, the batey din had the power
to enforce compliance so that there was, except in unusual circumstances,
no need for conditional marriage and it was, therefore, not usual to make a
condition in nissu’ın.⁴²⁴ However, since today we often cannot rely upon
people to behave according to the dictates of Jewish law and ethics and
the batey din have no power to enforce their rulings, it is understandable
that conditional marriage becomes a more general requirement. Both on
this understanding, and on that which relates the maxim to the temporal
division between qiddushin and nissu’ın, ’Eyn regilut lehatnot benissu’ın
is no more than a practice dependent upon the circumstances of the time.⁴²⁵

⁴²⁰ On this issue, see further §§5.12, 44-48, below.
⁴²¹ Yevamot 107a, in the context of the qiddushin of a minor; Ketubbot 73a.
⁴²² Yevamot 107a s.v. Bet Shamrai, Ketubbot 73a s.v. Lo’ Tema’.
⁴²³ As opposed to qiddushin. The distinction drawn between qiddushin and nissu’ın in this respect
is based on Yevamot 94b and Ketubbot 72b-74a.
⁴²⁴ ARU 4:3-4 (§HL4), ARU 18:3.
⁴²⁶ See further ARU 4:30-31 (§§XI.77-78), noting and dismissing the following argument of
R. Danishevsky in Lubetsky 1930 (’Eyn Tnai BeNissu’ın): Accepting the word of Tosafot that
’eyn tnai benissu’ın is not a prohibition and means no more than that it was unusual for people
(in talmudic times) to stipulate conditions in nissu’ın (though it was possible to do so), how
can we accept the French rabbinate’s proposal of introducing a condition into all nissu’ın thus
making it usual to stipulate conditions in nissu’ın? Are we not in violation of Tosafot who
Mahari Brunà’s condition of the *ah mumar* (s.A3, below) may also be based on this kind of explanation.\(^{477}\)

3.19 Indeed, the major codes all agree that conditional *nissu’in* is effective. This is the position of the *Yad*,\(^{478}\) *Shulchan Arukh*\(^{479}\) and *Levush*\(^{480}\) and seems to have been recognised even within the collection of 20th century *teshuvot* edited by R. Lubetsky under the title ‘Eyn Tnai Be*Nissu’in* (§§3.21-29, below).\(^{481}\) The commentators on both the *Yad* and the *Shulchan Arukh* are silent on this point, which means they all agree. R. Kook\(^{482}\) described the effectiveness of conditional marriage as ‘obvious’ and it is reported that Rabbi Feinstein\(^{483}\) agreed to the arguments of R. Berkovits in its favour. This is also apparent from the number of *posqim* who have proposed global conditional marriage in practice (§3.82, below).

3.20 The single source\(^{484}\) which elevates the maxim to a statement that such a condition is halakhically impossible appears to be the Rogachover Gaon, R. Yosef Rosen, in *Tsafenat Pané’ah*, section 6, where he rejects a condition stating that if the husband rebels against his wife and marries another woman, his marriage to his first wife will be retroactively annulled. His reasoning is that ‘eyn tnai benissu’in means that a condition declare it unusual? Clearly, R. Danishevsky does not accept that a practice (here, the term used is *regilut*, something whose normativity is even less than that of *minhag*) may be dependent upon the circumstances of the time. The result is the imposition of the non-normative practices of a particular historical group on *klal yisra’el*.

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477 Rashi, Yev. 15a; see ARU 4:33 (§IX.88). See also ARU 4:33 (§IX.90).
478 *Gerushin* 10:19 – without opposition from the commentators.
479 ‘Even Ha’Ezer 149:5 – without opposition from the commentators.
480 *HaBats weHa’Argaman* 149:5.
481 See, for example, the remark of R. Danishevsky (at Lubetsky 1930:35), who mentions only *Shiluy Ha*Gibborim in the name of Riaz as denying the efficacy of conditional bi’amah. See also ibid. p. 43, where it is stated in the Public Protest of the Russian and Polish Rabbinate that a woman who remarries on the basis of the (totally unacceptable and totally rejected) French condition is an adulteress only according to a minority of the *Posqim!* Furthermore, most of the objections raised there against the French condition were not halakhic and all – including the halakhic ones – were shown to be inapplicable to the type of condition proposed by Berkovits and others.
482 Letter dated 3 Tevet 5686 published at the beginning of *Torey Zabiv* by Rabbi S.A. Abramson, New York 5687, quoted in Berkovits 1967:68; ARU 18:33. R. Kook accepts it in principle but does not agree to impose it through a general *taqanah* “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”.
484 Discussed by Berkovits 1967:60-61, who observes that nothing like this argument is to be found in the writings of other *posqim* who deal with conditional marriage.
in nissu’în is impossible during the husband’s lifetime, as violating the
(ritual) acquisition that makes his wife forbidden to all others. This ritual
aspect of the relationship is said to be absolute and not subject to human
conditioning (even though it is clearly subject to the husband’s will, if
exercised through the normal procedures of divorce). But the talmudic
sources from which this argument is derived are normally understood
differently. His argument also conflicts with some views we find in the
Rishonim, particularly in Ḥiddushe haRashba on Gitin 84a, from which
it is clear that a marriage on condition that he will (in given
circumstances) divorce (“If I divorce you (by a certain time) then you are
betrothed to me … but if I do not divorce you (by that time) then you are
not betrothed to me”) is a halakhically valid arrangement.

3.21 Current attitudes to the idea of solving the problem of the ‘agonah
through conditional marriage are often informed by the view that the
publication of ‘Eyn Tnai BeNissu’în in Vilna in 1930, an influential
collection of responsa directed against earlier proposals for conditional
marriage made by the French (and later Constantinople) rabbinate, put the
issue to sleep, despite the later attempt of R. Eliezer Berkovits to
reanalyse the issue in his Tnai BeNissu’în UvGet (1966).

3.22 Civil divorce was introduced in France on July 29th 1884. In order to
avoid the disastrous consequences of Jewish women who had been

435 See further ARU 4:32-34 (§IX.82-92), discussing R. Rosen’s use of the debate regarding
the status of the marriage of the daughter of Rabban Gamli’el in Ye’evamot 15a (contrary to Rashi’s
explanation there). R. Berkovits also maintains that R. Rosen misinterprets the reasoning of
Rav in Ketubbot 73a. R. Rosen’s view was also rejected in Resp. Devor ‘Avraham (III 29),
Seridey ‘Esh (III 22), and Ḥekhal Yittshq (II ‘Even Ha’Ezer 30). Cf. Rabbi S. Daichovsky,
“Nissu’în ‘Ezra’yim”, Teshumim II (5741), 252-66, at 257 and 260.

436 Rashi, Novellae, Gitin 84a; see further ARU 4:29-30 (§IX.72-76). The statement at ARU
5:37 n.121 that qiddushin cannot be contracted for a limited period, based on the rhetorical
question in Nedairim 29a (‘What if one said to a woman, ‘Be thou my wife to-day, but to-
morrow thou art no longer my wife’: would she be free without a divorce?”) concurs with this
ruling of Rashi, where the time limitation on the marriage comes not in the marriage formula
but in an attached condition making the marriage dependent upon the delivery of a get at a
future point in time.

The Talmud there states that a woman has no way of entering a marriage which she will be
able to leave without her husband’s consent. Rashi asks why she cannot enter the marriage on
condition that the husband will divorce her at some future time, so that if at that time he refuses
to divorce her the marriage will be retroactively annulled and she will anyhow be free. He
answers that indeed she could do so but (for other reasons) that answer would not solve the
Talmud’s problem there and that is why the Talmud did not suggest it.

437 For a detailed review of both the historical background to ‘Eyn Tnai BeNissu’în, and
Berkovits’ replies to its arguments, see ARU 4; ARU 18:4-38. See also §3.24 below on the
haskamot to Ma’alot LiShlomo and §3.27 on the position of R. Hayyim Ozer Grodzinsky in
relation to ‘Eyn Tnai beNissu’în.
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divorced civilly remarrying without a get, the French rabbinate, after failed initial attempts at a solution by way of communal annulment and the recognition of the State divorce as a get, 439 sought the advice of Rabbi Eliyahu Ha'zzan, 440 who suggested, somewhat guardedly, the introduction of conditional marriage. 441 It is important to be clear about the nature of the earliest French proposal (of 1887 442 ), based on Rabbi Ḥazzan’s teshuvah, against which the teshuvot collected by Rav Lubetsky 443 in ‘Eyn Tsni Benissu’ in were primarily directed. 444 The proposal was for a nai stating: “If the State should divorce us and I will not give you a divorce according to the Law of Moses and Israel, this betrothal shall not be effective.” A later version, proposed in 1907, amended the marriage formula to read: “Behold you are betrothed to me on condition that you will not be left an ‘agunah because of me, so if the State judges should divorce us this betrothal shall not be effective.” The arguments in ‘Eyn Tsni Benissu’ in were initially communicated privately, resulting in the withdrawal of the proposals. It was only after pamphlets were published in London in 1928 and 1929 by Rabbi Yosef Shapotshnik, 445 declaring the author’s intention to solve the ‘agunah problem by a combination of

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439 R. Weil in 1884 proposed to use haqqah and recognize state divorce as a valid get; the rabbinic fraternity at home and abroad were consulted at the end of 1885 and responded with a unanimous no. see Lubetsky 1930:2. Cf. Gabrielle Atilia, Les Juifs et le divorce. Droit, histoire et sociologie du divorce religieux (Bern: Peter Lang, 2002), 213 at n.5, quoting L’Univers Israélite IV (1885), 101-03.

440 Born Smyrna 1840. He became a member of the Jerusalem Rabbinical College in 1868, Rabbi of Tripoli in 1874 and of Alexandria in 1888 (where he served as Chief Rabbi until 1908). In 1903 he presided over the Orthodox Rabbinic Convention at Cracow. He authored many works. His responsa, Ta’alumot Lev, appeared in three volumes: Léghorn 1877, Léghorn 1893 and Alexandria 1902. Responsa Ta’alumot Lev, III 49, as quoted in A.H. Freimann, Seder Qiddushin VeNissu’in (Jerusalem: Mossad Harav Kook, 1964), 389, para. 4. See further ARU 4:5 (§§IV.2-6), ARU 18:79.

441 For 1887 – as opposed to 1893 given by Freimann 1964:389, para. 4 – see Lubetsky 1930 (ETB)5, col. 1, top. 442 Opposition to the 1887 French proposal precedes the publication of ‘Eyn Tsni Benissu’ in. In 1893 R. Zaddaq HaCohen of Paris consulted R. Spector in Kovno and received a negative reply. After the death of R. Zaddaq HaCohen the French Rabbis made their second (1907) proposal. It was only when they resisted the opposition from R. Lubetsky that the latter alerted the gedolim whose teshuvot are collected in ‘Eyn Tsni Benissu’in. In the light of those teshuvot, the French Rabbinate backed down. It was only in the light of subsequent events that the teshuvot were published. For a detailed account, see ‘Eyn Tsni Benissu’in, 1-15. Though both proposals are mentioned, ‘Eyn Tsni Benissu’in fails to mention the fact that it was directed against the responsa of R. Ha’zzan.

444 Hērut ‘Olam (London 5688/1928) and Liqrow La’Asirim Deror (London, 5689/1929): see Freimann 1964:390. We have had access to Hērut ‘Olam but not Liqrow La’Asirim Deror. On the former, see ARU 14. Freimann also records that Shapotshnik opened an “international office” for this purpose, and claims that he even went so far as to forge the signatures of leading rabbis to promote his work.
condition and annulment, that 'Eyn Tnai BeNissu'in (without supplementation to address post-1907 proposals) was published.

3.23 In the meantime, a different form of condition was proposed by the Constantinople Bet Din in 1924, in a pamphlet entitled Malberet Qiddushin 'al Tnai (Constantinople 5864), according to which the marriage would be retroactively annulled (and the kesef of the qiddushin would be retroactively deemed a gift), so that the woman would require neither get nor ha'ltissa, if (1) the husband abandons his wife for a substantial period without her permission or (2) he refuses to accept a ruling of the bet din [to give a divorce?] or (3) he becomes mentally ill or (4) he contracts an infectious/contagious disease or (5) his wife becomes subject to a levirate marriage to an uncooperative brother-in-law or one who has disappeared. To further fortify the condition, the Constantinople rabbinate sought to institute a communal enactment providing for annulment whenever the conditions laid down in the agreement were not fulfilled. This annulment would be effective even after the nissu'in and years of living a married life together. It was also proposed to adjure the couple at the qiddushin that they would never cancel the condition.

3.24 Probably related to the Constantinople condition was that in Resp. Ma'alot Lishlomo, 'Even Ha'Ezer Siman 2,7 written by R. Shlomo HaCohen [Itzban?] of Morocco, who proposed that if the husband disappeared (as in war) or refused to give a get through the bet din, then the money/ring should be regarded as a gift, and who required repetition of the condition at the first bi'ah together with a statement that if the condition took effect all subsequent intercourse should be regarded as pilagshut. This proposal is not mentioned in 'Eyn Tnai BeNissu'in and it is not clear whether it was available to the writers of those teshuvot. However, the author claims that Resp Nofet Tsufim and Resp. Qiryat

446 See Freimann 1964:391f.; Riskin, 2002:27. This was later rejected by R. Ben Zion Uzziel of Israel (and others), and was never implemented: see ARU 12:13 (§XXXI). Support for the Constantinople proposals was voiced by Rabbi Eliyahu Ibn Gigi of Algiers and R. David Pipano of Sofia: see ARU 13:6 (n.29), ARU 18:79 (App.II [no.3]).

447 Available at www.hebrewbooks.org. R. Itzban was born in 5641 (1881) and died in 5709 (1949). His responsum therefore could not have been written in the light of the first French proposal of 1887 and is temporally somewhat too close also to the second proposal of 1907. He may well have been prompted by the Constantinople proposal of 1924, but we cannot be certain. He refers to the situation in France, where men were divorcing their wives through the civil courts. The responsa were apparently published posthumously by a nephew. The latter mentions that R. Sakali, the author of Responsa Qiryat BeNahah David, studied with R. Itzban; another pupil was R. Moshe ben Gigi. On the contributions of the latter two, see n.611 below.
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Hanah David agree with him. When published (posthumously), it attracted haskamot from posqin who must by then have known 'Eyn Tnai BeNissu'in: Dayan Shalom Mass (who knew the author), R. Ovadyah Yosef and R. Mordekhai Eliyahu.

3.25 The crucial weakness of the French proposals had been that they gave no role to the bet din: the condition authorised termination of the marriage solely on condition of action by the secular state (in granting a divorce) and, at most, the failure of the husband to grant a get (irrespective of whether a bet din considered that the wife was, in the circumstances of the case, entitled to a get). It would thus apply in every case where civil divorce action was initiated by the wife, but resisted by the husband. For these reasons, it appeared a direct threat to the stability of Jewish marriage, providing in effect for divorce on demand by either spouse. The Constantinople proposal, on the other hand, did not suffer from this problem. Rather, it built on traditional Jewish grounds for divorce, each of which occurred only in (relatively) exceptional circumstances.

3.26 On the other hand, Rabbis Gertner and Karlinsky446 point to a letter sent by R. Hayyim Ozer Grodzinsky to R. Hillman, Av Bet Din of London, in which the former writes of his astonishment to hear of the Constantinople proposal, and from which it is apparent that R. Grodzinsky understood the opposition recorded in R. Lubetsky’s ‘Eyn Tnai BeNissu’in as being directed against any type of condition. The relevant section of the letter reads as follows.

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 …

3.27 However, whereas it is clear that R. Grodzinsky himself was opposed to any type of conditional marriage (as RR. Gertner and Karlinsky stress), it is difficult to see any proof of this stance in the text of ‘Eyn Tnai

446 ‘‘Eyn Tnai BeNissu’in: HaMa’arav Al Kedushat HaYikua BeYora’el’, Yesharun 10 (5762), 749-50; see ARU 13:11, ARU 18:90, 92-93. The full article was published in three parts: Yesharun 8 (5761) 678-717 (part 1), 9 (5761) 669-710 (part 2), 10 (5762) 711-750 (part 3); for an overall discussion, see ARU 13, and on this particular issue ARU 19:11-16.
BeNissu’in itself.\(^{449}\) It is also important to note that the public declaration of the Russian and Polish rabbinate (which is signed, amongst many others, by R. Grodzynsky himself) in ‘Eyn Tnai BeNissu’in apparently accepted that even the French condition, though not to be used, would, if put into practice, work [at least possibly] according to most Posqin.\(^{450}\) Finally, we may note also that R. Grodzynsky did not in fact say that it is forbidden to institute any global condition in marriage but rather that “one should not” do so. This implies that it is possible to formulate a condition that would be halakhically effective and halakhically permitted to be used though still practically proscribed as a matter of policy. We may compare the observation of R. Ovadyah Yosef in Yabia ‘Omer (IX OH 1:2) that from the wording of the SAOH 2:6 (“It is forbidden to walk (‘asur lelek) with an erect gait and one should not walk (welo yelek) bareheaded”) one may conclude that it is not forbidden to walk about with an uncovered head.\(^{451}\)

3.28 The concept of conditional marriage was advocated again by R. Eliezer Berkovits in his Tnai BeNissu’in UveGet of 1966, in which he distinguished unacceptable from acceptable forms of condition in terms of the involvement of the bet din. The distinctive features of the R. Berkovits proposal\(^{452}\) were that (a) unlike the French proposals, it did

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\(^{449}\) Indeed, Berkovits 1967:166-71, has argued that all the evidence in ‘Eyn Tnai BeNissu’in is to the contrary.

\(^{450}\) This is also noted by RR. Gertner and Karlinsky 5762:694 n.68 (in a reference to ‘Eyn Tnai BeNissu’in), where it is remarked that there was a surprising difference between the opinion of the French condition as expressed in the private letters of R. David Karliner, R. Hayyim Ozer Grodzynsky 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 several (kammuh) posqim” (not even rov 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 (safeg ‘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).” 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 [at least possibly] worked according to most of the posqim. See also the last line of the quotation from R. Grodzynsky in §3.26, above: “…the children born would be possible mamzerim with whom it would be impossible to marry.”

\(^{451}\) Yabia’ ‘Omer (IX OH 1:2).

\(^{452}\) Berkovits does not propose an exact text for any such condition but offered various suggestions for making the marriage dependent on the bride’s never becoming an ‘agunah through lack of a get; see 1967:166.
make operation of the condition dependent upon a decision of the bet din, and (b) unlike the Constantinople proposal (not considered in 'Eyn Thal BeNissu‘in), it confined itself to get refusal in the face of a request or order of a bet din to do so. Moreover, on R. Berkovits' model, a get from the husband is demanded and is usually given; it is only in the rare cases when he refuses though the bet din says he ought to give it that the marriage will be terminated without a get. R. Berkovits recognised important weaknesses in the French condition and does not set out to defend it; he argues that the objections in 'Eyn Thal BeNissu‘in were aimed only at the condition(s) proposed by the French rabbinate and that nowhere in that pamphlet is a ban on conditional marriage per se promulgated.

3.29 In his Thal BeNissu‘in UveGet, R. Berkovits conducted a broad and profound examination of the talmudic and rabbinic texts relevant not only to conditional marriage, but also to two other possible solutions to the problem: (i) written authorisation (harsha‘ah) at the time of the qiddushin for the writing of a get should it become necessary in the future, and (ii) communal annulment of marriage. As to conditional marriage, he responds in detail (at pp.57–71) to all the arguments in 'Eyn Thal BeNissu‘in, taking full and respectful note of the opposition of the Gedolim to the solutions proposed by the French rabbinate in 1887 and 1907. On the basis of this analysis, he concludes that solutions to the "agunah" problem can indeed be found within the Halakhah and argues that the wholesale opposition of the leading halakhic authorities (cited in 'Eyn Thal BeNissu‘in) was properly directed at the specific French proposals which, R. Berkovits himself agrees, were halakhically and ethically wanting. He seeks to provide independent support for conditions, harsha‘ah and annulment, conceived as independent, alternative remedies. In what follows, we argue (with others) that a combination (with variations) of such remedies has a better prospect of success.

433 Berkovits does not limit his suggested condition to cases where the Talmud says kofin or yoti (we coerce him to divorce or he must divorce) but includes all cases where it is proper, becoming, to do so – using the term min hara‘uyy (one could also describe the required behaviour as kehogen). By this, he appears to mean cases where the bet din acknowledges a moral obligation to give a get (we might describe it as a bayyav bediney shamayim) rather than cases where the husband is in the right but is asked to act piously beyond even moral obligations (middat tashidat).

434 See further ARU 4:12 (§IX.7) on Berkovits 1967:57-58.


436 Berkovits 1967:57-58, 106-108; see further ARU 4:11-12 (§IX.6-7).

437 See also ARU 18:34.
3.30 Two distinct questions arise as to the role of the bet din in respect of tena‘in, one in relation to the grounds for termination, the other regarding the termination itself. As for the grounds for termination, these may either be stated in a tnai or unstated. If they are unstated, then clearly the bet din will grant a recommendation (hamlatshah, sometimes the stronger mitzvah⁴⁵⁸ or reshuyit), obligation (ḥiyuv) or a form of coercion (kefiyot) only on grounds it regards as halakhically recognised. Whether it is open to the spouses to include in the tnai grounds for termination which go beyond those generally recognised (in their particular community) is an issue which arises from consideration of the Yerushalmi’s “kiss case” (§3.5, above). Clearly, however, the role of the bet din in declaring the terms of the tnai as satisfied or not gives it a de facto supervision over the grounds for termination, and thus provides an answer to those who would see in the use of tena‘in a threat to the stability of marriage (§§1.29-31, above). But is the role of the bet din simply declaratory (of the fulfillment of the condition, by virtue of which the marriage is terminated), or is it constitutive? In the latter case, the role of the tnai would be, in effect, to empower the bet din to annul the marriage in circumstances in which hafqa‘ah is not normally available. The former analysis appears to be the better: the language of ḥafqa‘ah is not used in this context.⁴⁶⁹ Moreover, the declaratory analysis retains a role for the husband:⁴⁷⁰ by his (as well as his wife’s) will (as expressed in the tnai) and act (refusal to comply with the mandate of the bet din to issue a get), the marriage is terminated.

3.31 Yet controversy attaches to the precise halakhic status of Berkovits’ work. It has not hitherto received serious consideration, but has often been dismissed (without necessarily having been read) on the basis of the teshuvot in 'Eyn Tnai BeNissi‘in. It has nevertheless received influential support.⁴⁷¹ Thus Rav Y.Y. Weinberg wrote in his initial ḥaskamah: “There is no doubt that this work merits publication and broad deliberation by the leading halakhic authorities ... I have not seen the equal of this work amongst the books of the various ‘Aḥaronim amongst contemporary...”

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⁴⁵⁸ On the distinction, see ARU 18:69: mitzvah is where a bet din says that though he is not legally obliged to divorce he has a moral obligation to do so; hamlatshah is where the dayanim simply advise that a divorce take place.

⁴⁵⁹ Moreover, even forms of hafqa‘ah (as encountered, particularly, in qiddushei ta‘u‘it) may be declaratory. See ARU 15:3 n.8.

⁴⁶⁰ The importance of which is stressed by Hadari in ARU 17; for its application to conditions, see 17:169-71 and n.241.

⁴⁶¹ See further ARU 18:34-38.
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authors.” In his introduction to Tnai BeNissu’in UveGet, R. Weinberg describes the negative attitude of ‘Eyn Tnai BeNissu’in as predicated (only) on Shiltey HaGibborim beshem Ratz. Rav Menahem Mendel Kashef (who later sought to discredit R. Weinberg’s haskamah*) is said initially to have been enthusiastic about the proposal of conditional marriage;” indeed, Marc Shapiro states that he is in possession of a copy of a letter sent by R. Kashef to R. Berkovits congratulating the latter on the publication of Tnai BeNissu’in UveGet! Shapiro has also published a letter from Rabbi Moshe Botchko to Rabbi Leo Jung, dated 31 Dec. 1965 (three weeks before R. Weinberg’s death), which states:

Rabbi Weinberg has received your telegram as well as your letter in connection with the work of Dr. Berkovits. However, he is not well at all these days – may the Almighty grant him Refuah Shelema. He asked me to write to you on his behalf, and to let you know, that he has not changed his mind at all, and he thinks that it is a very good thing, that the work should be printed in the Hanoam, to stimulate the discussion and the clarification on the matter. He asked me to state it, in unequivocal terms, that he stands 100% to his previous mind, and he really does not understand what has made Rabbi Kashef suddenly change his mind, since he wrote to Rabbi Weinberg that he is thrilled with the work.

Rabbi Leo Jung, in an undated letter to Berkovits, states that he heard from R. Moshe Tendler that R. Moshe Feinstein expressed theoretical approval of Berkovits’ position.” The late Dayan Berel Berkovits wrote in 1988 that “... I think that the way forward is to reopen that avenue and to re-examine it”. More recently, Dayan Brody, while acknowledging that “the custom and practice is not to use any conditions in a marriage”, has written: “(T)he tna procedure – if correctly followed – works for

462 As published in Berkovits, Tnai beNissu’in uVeGet. In the second and third paragraphs, R. Weinberg points out that Berkovits never intended to dispute the prohibition of the earlier Gedolim but was arguing that since we find ourselves in an emergency situation far worse than anything which obtained in the previous generation, and since the condition he was proposing met all the criticisms of the French condition voiced in ‘Eyn Tnai BeNissu’in, there is good reason to believe that those Gedolim would have acceded to the Berkovits proposal. Cf. also Seridey ‘Esh III:25 (‘Mossad” edition), chapter 3, near the end of the responsum s.v. Unit orivet (= 1:90, ‘anaf 3, 56, first para. in the “Committee” publication); see further ARU 5:1 (§1.5.1) on these two editions.
463 Notably Berkovits’ claim that the letter from R. Weinberg published in 1989 by R. Kashef, regretting the haskamah, was a forgery: ARU 4:38-39 (§XI.10), ARU 18:36.
464 Goldberg and Villa 2006:143 n.255.
466 Shapiro 1999:190-192, esp. 191 n.83, and see Mintz (n.496, below).
467 Shapiro, ibid.
468 See further ARU 4:39 (§XI.12).
almost every imaginable contingency, including those currently not present ... when a *tnai* is made at the time of marriage, and kept in effect during the sexual relationship and then the *tnai* is breached, the marriage
ends without any divorce, as if there never was a marriage. Nevertheless, the marriage is fully valid until such time as the condition is breached.”

A3

*The ah mumar condition*

3.32 One point of contention between the authors of *’Eyn Tnai BeNissu’in* and R. Berковитс is the relevance to the debate of the (generally accepted) condition of Mahari Bruna regarding the *ah mumar.* Following a ruling of R. Yisra’el Bruna (c.1400-1480, Germany), in his Responsa, Rema held valid a clause annulling the marriage in the event that the husband
dies childless, where the husband (at the time of the marriage) had only
one brother, who had abandoned Judaism for another faith:

> If someone takes a wife and he has an apostate brother, he may marry
> her stipulating a … condition that if she finds herself bound to the
> apostate for levirate marriage [or *halitshah*] then she shall not have
> been married [in the first place]. (Rema, *Even Ha’Ezer*, 157:4)

3.33 Much of the contemporary debate on the possible use of a terminative condition to solve the problem of the mesorevet *get* revolves around the significance of a basic factual difference between this problem and that of the *ah mumar.* In the latter case, the original husband is dead; in the case of the mesorevet *get* he is still alive. It is claimed in *’Eyn Tnai BeNissu’in* that some, following R. שמעון ב. דavid *Ha*Levi in *Nakhalat Shivah*, maintain that only a condition that takes effect after the husband’s death, such as Mahari Bruna’s, can be valid. In *Nakhalat Shivah* 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

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470 See further ARU 4:18-19 (§IX.34-35); ARU 8:7 (§2.4); ARU 10:9-10; ARU 18:16-17.

471 It might be argued that while the infrequency of the operation of the *ah mumar* condition stems from unusual circumstances utterly outside the couple’s control – a combination of widowhood, childlessness and the brother-in-law’s apostasy – the problem of *get* recalcitrance is a problem completely within the control of the partners involved and the *Bet Din*. See Berkovits 1967:32-34; ARU 4:17 (§IX.29).

472 Lubetsky 1930 (ETB):30, footnote.
in nissu’in. He answers that we do not find conditions in nissu’in such that, if she leaves him during his life his intercourse becomes retroactively promiscuous, 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 – we do find such a condition in nissu’in. 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 Nahalat Shivah would not agree to any condition that would retroactively dissolve a marriage during the lifetime of the husband.

3.34 In reply to this argument, R. Berkovits notes that such a question had been posed to the Noda BiYehuda. It seems that the questioner had seen this distinction in Nahalat Shivah and asked the Noda BiYehuda 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 the husband to practise illicit intercourse that will become apparent after his death any more than if it will become apparent during his life! Berkovits, however, notes that Nahalat Shivah examines only the case of vows and blemishes mentioned in the Talmud (Ketubbot 72b-74a), where breach would create retrospective promiscuity, and rejects the underlying distinction, that a dead husband does not care about the possibility of retrospective zenut while a living husband does. Berkovits, moreover, holds that a marriage terminated by an acceptable condition does not in fact create a situation of retrospective zenut (§3.59); hence the permissibility of both the ahmumar condition and that of Berkovits.

3.35 It seems, then, that this undermines the basis for a distinction between a condition retrospectively annulling a marriage already terminated by the death of the husband, and a condition terminating a marriage not already annulled by the death of the husband. Interestingly, Rav Kook wrote about the reluctance to use such conditions other than in relation to yibbum in terms not of any objection in principle, but rather because of

473 And therefore we fear that he will cancel the condition at nissu’in.
474 R. 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.
475 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: see ARU 4.16 (§IX.25). We therefore fear that the condition will be foregone at nissu’in.
lack of the necessary expertise: 476

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. 477

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 calm consideration – to
the practical concerns of earlier generations. 478

3.36 Mahari Bruna’s condition has, in fact, been broadened in order to solve
additional problems of problematic yibbum/ta’lisah (for example, when
the brother of the groom suffers from mental retardation and the like).
One such decision was that of the Turey Zahav, in the name of his father-
in-law the Bayit Ḥadash (ibid., sub-para 1), regarding a man whose
brother’s whereabouts are unknown:

And it seems that the same law applies to one who has a brother who
has gone abroad and it is not known if he is alive: he also is allowed
to marry on a condition that if he dies without children and nothing
will be known of him (the brother) that she will not be married, and it
is permitted to make such a condition even ab initio (lekhatchillah). 479

B Basic Halakhic Issues Involved in the Controversy

B1 The objection in principle that conditions are contrary to Torah-law

3.37 A possible objection in principle to terminative conditions is that they are
contrary to Torah-law, and thus invalid according to the criterion of the
Tosefta (§3.6, above). However, according to the Rishonim this objection
holds only if it is already clear at the time of making the condition that its

476 Letter dated 3 Tevet 5686 published at the beginning of Turey Zahav by Rabbi S.A. Abramson
(New York 5687), and quoted in Berkovits 1967:68.
479 Bah, ‘Even Ha’Ezer, 157, s.v. vent’r’e dehu hadin. Full details of this condition are set out inter
fulfilment will necessarily violate Torah-law. We noted in §3.20 above the acceptance by Rashba, Ḥiddushe haRashba on Gittin 84a, of the halakhic validity of a condition: “If I divorce you (by a certain time) then you are betrothed to me … but if I do not divorce you (by that time) then you are not betrothed to me.” The question arises whether such a condition is contrary to Torah law (and not classified as mamon) insofar as it may override the will of the husband at the time of the termination of the marriage. However, the condition here is not that he shall divorce against his will. No-one forces him to marry this woman and if he agrees to the condition (to divorce) because he wants the marriage, at least for a time, then he also wants to give the divorce because he wants the marriage. True, it may be that when it comes to giving the divorce he may have changed his mind and not want to give it, but this is not at all clear at the time of making the condition and the Rosh already ruled in section 33 of his responsa that so long as it is not clear at the time of making the condition that the fulfilment thereof will be against the Torah such a condition is not “a condition against the Torah”. Therefore, since he betroths on condition that he will divorce, at the time of the condition he intends to divorce willingly and so is not uprooting anything in the Torah by means of this condition.

3.38 Care is, however, required in the drafting of any ṭnai, in order not to endorse a condition contrary to Torah law. The condition should not state that the marriage is not subject to some aspect of the law (which would amount to uprooting a Torah law in a matter not generally regarded as one of mamon), but rather should indicate that the marriage is conditional on a particular state of facts not taking place. Responsa Noda’ BiYehudah draws the distinction as follows:

Now regarding the fact that the groom has an apostate brother, and the overseer gave a letter into the hands of the bride’s father, that if the

400 The condition is thus not that he has no right to withhold divorce nor even that he has foregone his right to withhold divorce, but that he is agreeing now to willingly divorce her in the future if that becomes the proper thing to do.

401 It is possible to reconcile this ruling of the Rema with Tosefta Qiddushin 3:7, which rules that a condition excluding yibbum is invalid, on the following grounds: the Tosefta deals with a man who betroths a woman on condition that (though his marriage will remain valid) the laws of yibbum will not apply. This type of conditional clause is invalid as it runs contrary to religious law, which says that every married woman is bound by the laws of yibbum. The Rema, on the other hand, is dealing with a man who betroths a woman on condition that she will not find herself in a situation requiring yibbum. This condition is valid because it does not contradict the Torah, in that the Torah nowhere says that a married woman must eventually find herself in a situation requiring yibbum. See further ARU 10:10.
groom should die without surviving children that his wife would not be subject to yibbum – in this also he acted incorrectly … since this condition that [he is marrying her on condition that] she shall not be subject to the levir is a condition against the Torah [so the condition is cancelled and the marriage is unconditionally valid]. Rather, it is necessary to stipulate that the marriage shall not take effect [if she ever finds herself in a situation requiring yibbum]. (Mahadura’ Qama’, ‘Even Ha’Ezer, siman 56)

We may recall that the example here given goes back to the classic exemplification of conditions contrary to Torah-law in Tosefta Qiddushin 3:7-8 (§3.6, above). Elsewhere, the possibility of admitting such conditions is based on the husband’s committing himself to forego rights (rather than denying their applicability).

B2 The respective roles of the husband and bet din in the termination of marriage

3.39 An important issue in halakhic debate concerning conditions is the respective roles of the husband and the bet din: while bet din supervision in some form is clearly necessary to prevent abuse of the system, there is a strongly felt reluctance to take matters entirely out of the hands of the husband, in effect authorising a form of haqqa’ah (§3.39). More specifically, this raises two issues already noted (§3.29): whether the condition itself specifies the grounds for termination on which the bet din should act, and whether it gives the bet din the role of declaring the marriage to be (prospectively) terminated by virtue of fulfilment of the conditions (which involve an act or omission of the husband), or authorises the bet din to annul the marriage (a constitutive act). Contemporary poskim differ significantly in the respective roles to be accorded the husband and the bet din, as may be seen in particular by contrasting the proposals of R. Uzziel (§§3.41-43) and R. Henkin (§§3.44-47).

3.40 We have seen that it was the effective delegation of the power to terminate marriage to the civil courts which occasioned the powerful critique of conditional marriage in ‘Eyn Taui BeNissu’in. Yet questions arise even when the condition reserves that power within Jewish hands: are those hands those of the husband or those of the bet din? This raises important issues: while bet din supervision in some form is clearly necessary to prevent abuse of the system, there is a strongly felt
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reluctance to take matters entirely out of the hands of the husband,\(^{452}\) in the light of Deut. 24:1, 3. Normally, termination by the husband is via a get. Where the condition specifies that some other act of the husband brings the marriage to an end, can we regard such an act as a form of get (even bedi’avad, extending the concept that a get me’useh is still a get, albeit an invalid one)? And where the condition specifies the bet din as the agent of termination of the marriage, does that entail the view that such termination is a form of hafqa’ah, thus raising the questions of authority debated in that context (§§5.43-53, below)? The answers to both these questions will depend in large measure on the drafting of the condition, and have been little discussed hitherto. Nor do all the proposals made in the last century include specific drafting. In this context, two proposals stand out, one (that of R. Uziel) placing termination in the hands of the bet din (§§3.41-43), the other (that of R. Henkin) placing termination (primarily) in the hands of the husband (§§3.44-47).

3.41 In 5695 (1935-36), R. Benzion Meir Hai Uziel\(^{453}\) proposed\(^{454}\) making the marriage conditional on the continuing acquiescence of the local bet din, the bet din of the locality/country\(^{455}\) and the bet din of the Chief Rabbinate in Jerusalem, who would thus be empowered to retroactively annul the marriage in cases of ‘iggun. Despite this formulation, however, it is clear from what he writes later, in response to R. Zevin, that he intended only a conditional marriage, and not a hafqa’ah by the bet din.\(^{456}\) His preference for a conditional marriage dependent upon the will of the bet din appears to have been based upon the view that such a condition could be regarded as in the interests of the spiritual well-being of the marriage, which (all agree) would exclude any question of retrospective promiscuity.\(^{457}\) The formula he recommended was: “You shall be betrothed to me with this ring for as long as no objections are raised during my lifetime and after

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\(^{452}\) See ARU 17:133-36, 163-64, 169.

\(^{453}\) 1880-1953. Sephardi Chief Rabbi of Israel 1939-1953. His responsa Mishpetey Uziel were published in four volumes in 1947-64.

\(^{454}\) Responsa Mishpetey Uziel ’Even Ha’Ezer nos. 45 & 46 as per Freimann 1964:391-92, para. 9. No. 45 was first published in HaMaor (yjyur 5695), and prompted responses from RR. S.Y. Zevin, Yisrael Kark and E.Y. Waldenberg. No. 46 replies to these responses. See further ARU 12.6-30, including discussion of the responses.

\(^{455}\) Possibly following the proposal of R. Ya’aqov Moshe Toledano in his Responsa Yam HaGadol (Cairo 1931) no. 74, as described by Freimann 1964:391 para. 8 (see further §3.85 below), that a condition be made at every marriage making it dependent on the continuing agreement of the local bet din, so that if they see that he has not acted fairly with her they can retroactively annul the marriage.

\(^{456}\) See ARU 12:17 (§XXXI), reporting Mishpetey Uziel ’Even Ha’Ezer 46.

\(^{457}\) See ARU 12:15 (§XXXVI).
my death by the court in the city, with the agreement of the district court of the state, and the decision of the court of the chief rabbinate of Israel in Jerusalem, and on account of a persuasive claim of causing my wife to be an aguna." This means in effect that the betrothal takes effect provided that the bet din never subsequently objects to the marriage. This reflects R. Uzziel’s view that a condition which gives such a discretion to the bet din (or other outside body), thus taking it out of the hands of the spouses, avoids any problem of retrospective zenut. We may note that R. Uzziel made his proposals after the publication of ‘Eyn Tnai BeNissu’ in; indeed, in responding to R. Zevin’s invocation of ‘Eyn Tnai BeNissu’ in, he maintains that other permitted avenues (which were not there ruled out as forbidden) are not closed to us. Here, the condition cannot take effect until a bet din (presumably, the local bet din, then endorsed by the civil court and the court of the Chief Rabbinate), determines that the woman has a persuasive claim that her husband caused her to be an ‘agunah. We may note three aspects of this drafting: (a) the woman does not still have to be alive; this is clearly designed to aid any children born as mamzerim; (b) there is explicit reference to her ‘agunah status, but without further definition of what that is understood to mean; (c) it is not clear whether the need to persuade the bet din that the husband had “caused her” to be an ‘agunah would be defeated by a claim that the wife had contributed to the situation.

3.42 R. Uzziel makes a strong distinction between conditional marriage where termination is in the hands of the bet din and conditional marriage where termination is in the hands the spouses. The latter, he argues, is too close to a business partnership (thus clearly rejecting the shutaful model), where the dissolution of the agreement is determined by either one of the parties being dissatisfied with the continuation of the partnership. R. Uzziel considers such conditional marriage worse than concubinage – which, he accepts, is (as long as it lasts) itself a marriage-type...

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438 See Riskin 2002:27f, noting that the proposal was rejected by most of the generation’s rabbinic authorities.

439 R. Uzziel maintains that wherever the Talmud says that the Sages made intercourse promiscuous it speaks only of cases where he betrothed by intercourse and they decreed that that single act be considered one of promiscuity. See further §3.52, below.

440 See ARU 12:8 (III). Moreover, against the argument that his was no more than tinkering with the French and Constantinople conditions, differing only in minor details, he replied that, as is well known in the world of Torah, the smallest variation can change the ruling from exemption to obligation and from prohibition to permission: ARU 12.9 (§IV).

441 His condition did contemplate the death of the husband, in order to prevent yibbum.

442 See further §1.5, above.

443 On which, see further §3.4, above.
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arrangement. Conditional marriage, however, which can be annulled at any moment because circumstances have arisen that one side does not like, cannot be considered even a marriage-type situation and is really a type of $zenut$. 

3.43 R. Uzziel cites Ritva’s interpretation of Rashi in Shittah Mequbetset to Ketubbot 3a to prove his point. Rashi is there said to explain that kol hameqqadesh does not mean that he is marrying on an implied condition which depends upon him, for then there would be no problem with giddushey bi’ah because they would be automatically cancelled by the condition, just as would giddushey kesef.\(^4^{45}\) Rather, for Rashi (according to Shittah Mequbetset), it means that the groom marries on the implied condition that the marriage can only be undone by a get but he agrees to any get that the Sages declare valid, even if it is biblically void.

3.44 The use of a condition (here in the get) which explicitly brings a (here, delayed) get into effect was proposed in 1925 by Rabbi Yosef Eliyahu Henkin in Perushey Ibra (5:25).\(^4^{46}\) His proposal was:

At the time of the qiddushin and the huppah the husband shall order the writing of a get that will take effect after the husband’s last intercourse with his wife if, after that, he dies without surviving descendants or he becomes insane and remains so for three years or he leaves her an ‘agueah for three years whether through unavoidable circumstances or willingly and the Bet Din of Jerusalem before whom the claims shall be brought will recognise that they are true. So it shall be if the claim is that he is not fit for matrimony or that he has disgusting blemishes such as the various types of leprosy r’v.l. In all these cases the get shall take effect after the final intercourse if and when the Bet Din set up for the purpose clarifies that the particular case before it is included in the enactment.

\(^{454}\) The second piece beginning ‘Od katan.

\(^{455}\) A problem noted by Ramban – see Shittah Mequbetset there, s.v. Hatinah.

\(^{456}\) However, R. Adam Mintz, “Rabbi Henkin and The First Heter Agenot in America”, http://seforim.blogspot.com/search?label=Adam%20Mintz, dates the publication of R. Henkin’s proposal to 1928, and its withdrawal (in the light of the Louis Epstein controversy) to 1937 (http://seforim.blogspot.com/search?label=Adam%20Mintz). One wonders whether R. Henkin was aware of R. Pipano’s proposal (§3.83 below) when he retracted (though he may have considered that that, like his own proposal, was no longer viable in the light of ‘Eyn Tnai BeNissu’in). See also R. Mintz, “The First Heter Agenah in America”, JOFA Journal V/4 (Shavuot 5767), 14-15, and see further ARU 6:4 (§3.1), ARU 18:88-91.

\(^{457}\) The marriage formula would then include “according to the Law of Moses and Israel and according to the conditions of the enactment of the [Jerusalem] Bet Din [for Marriage]”. It appears that R. Henkin envisaged that this bet din would also deal with all cases invoking the procedure.
Various features of this proposal are noteworthy: (a) it deals with both yibbum and 'iggun; (b) it includes recalcitrance along with other forms of 'iggun and indeed mumim which occur after marriage; (c) it also apparently grants the bet din a wide discretion to declare that the husband “is not fit for matrimony” (although in context this may have been intended to refer to physical incapacities); (d) it makes it clear that the role of the bet din is declaratory (unless the get fails: see §3.44, below); the termination is thus generated by the act (or omission) of the husband in bringing into effect an advance “get” (both complete and delivered) which he himself had earlier, and entirely willingly, authorised.”

3.45 R. Henkin’s proposal uses a “validity” condition (§3.73, below), at least as regards the kashrut of the get, created not by tnai in the ketubbah but rather as a result of a general taqkanat haqahal with an initial 50-year duration, in which the marriage was annulled only if his primary strategy, that of the (immediate) delivery of a get al tnai, failed, whether for halakhic or other reasons. The condition is thus activated by the act (or omission) of the husband in bringing into effect an advance “get” (both complete and delivered) which he himself had earlier, and entirely willingly, authorised; the role of the (specified) bet din is clearly to declare that the conditions for the coming into effect of the conditional get have been fulfilled. The taqannah would provide that “all Jewish marriages supervised by a rabbi be on the condition that if the aforementioned circumstances of ‘iggun come about and the get is no longer in existence or is void according to the Halakhah then the qiddushin shall be retroactively annulled” (but by virtue of the condition).

3.46 Some time after publishing this proposal R. Henkin was shown a copy

498 “The get shall be written in meshib’ script under the auspices of the supervisor of the qiddushin and in a very curtailed version – as enacted by the Bet Din. It also should not be called a get but a sefer petor (document of release) by enactment of the Bet Din. The groom shall deliver it to her before witnesses and she shall place it in an area belonging to her and under her auspices.”

499 On the issue of bererah, see §6.34, below.

500 “They shall set the period of the enactment at 50 years and thereafter if the Bet Din finds that there is no need for it they shall nullify it even if the Bet Din be inferior to the previous one.”

501 Cf. ARU 8:3 n.3, and the suggestion made in §5.57, below.

502 Mintz 5767:15, plausibly suggests that this must have been after February 1931, when R. Henkin wrote a letter to R. Louis Epstein (of the Conservative Movement) in response to receipt of the latter’s Hatza’ah Lema’an Takanat ‘Agunot (New York, 1930), which Mintz describes as “in no way dismissive of his [Epstein’s] efforts”. Later, in 1937, R. Henkin contributed an essay to Sefer LeDor Aharon (Brooklyn, NY: Agudat Haravbanim, 1937, now available from HebrewBooks.org), a collection critical of R. Epstein’s work. R. Mintz quotes R. Henkin as distancing himself from R. Epstein, who had cited R. Henkin, mentioning at the
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of R. Lubetsky’s ‘Eyn Tnai BeNissu’in, as a result of which he withdrew it, and when the second edition of Perushey Ibra was published he arranged to have the words hadri bi (“I have retracted”) printed alongside the text of the proposal. R. Berkovits expresses his admiration for the humility of Rabbi Henkin’s retraction but maintains that it was based on a mis-reading of ‘Eyn Tnai BeNissu’in, which was in fact aimed only at the French condition and did not forbid any condition.

3.47 We may wonder what might have been the fate of R. Henkin’s proposals had it not been for his partial retraction, and the perception that any conditional marriage was now excluded. One may speculate that it may in any event have proved controversial, insofar as it involved a combination of conditional get and conditional marriage authorised by taqganaḥ from a senior body in Jerusalem, to be set up for this purpose. Substantively, however, it has considerable merit, and may well admit of modifications which would render it even more acceptable.

B3 The effect of termination on the previous relationship

3.48 An influential objection to terminative conditions has been the fear of retrospectively reducing the relationship between the spouses to one of zenut (a concept with a wide range of connotations), which, though not rendering any children mamzerim, has occasionally been suggested (and probably more than occasionally felt) to risk conferring on them some kind of spiritual blemish. Because of this fear, marital relations are presumed to revoke any condition, on the assumption that this is preferable to the parties (or at least the husband) to the retroactive promiscuity (zenut) which would ensue should the condition take effect; moreover, some question whether it is permitted at all to make a condition that would, on its being triggered, convert retroactively every act of

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same time that he had retracted his proposal in the light of ‘Eyn Tnai BeNissu’in, “for even the greatest scholar has to follow the majority view”. This vividly illustrates the intrusion of denominational politics into the issue. Would R. Henkin have so readily retracted had he not been cited by R. Epstein?

503 Gettner and Karlinsky (Part 3) 5762:746, first new paragraph.
505 On this issue, see §§3.26, 28, above.
506 §§3.18, 33, above, and ARU 4:14-15 (§§IX.20-21).
507 Though this does not, of course, entail mamzerut for any children born before the annulment, there is apparently a sense in some circles that such children may be “spiritually blemished”. See ARU 18.61, citing Bet Hillel, Mishnah, Gittin 79b and Gemara and Rashi there (ETV col. 600 at notes 14-16); the issue is addressed by R. Pipano: see ARU 13:15 (§59).
marital intercourse into zenuṭ. To the extent that the fear of retrospective zenuṭ is well-grounded, measures are required to ensure against such revocation (section B4, below). In this section we examine this fear. Some say that even an irreligious couple not concerned about promiscuity would still prefer the definite relationship of an unconditional marriage to the comparatively uncertain relationship of a marriage predicated on a condition. Moreover, we must take account of the financial implications of retrospective termination, and the need to make prior arrangements for the wife’s future financial support, given that the ketubbah also would be annulled and the wife would thus lose all her post-marital rights under Jewish law. An initial observation is that the problem would be entirely avoided (for the "chaste" woman, at least) if the condition could be drafted so as to terminate the marriage only prospectively, an issue addressed below (§§3.68-73).

3.49 The concept of zenuṭ has been debated since tannaitic times. A baraita in Yebamot 61b offers no less than six different interpretations of zonah:

Surely it was taught: zonah implies, as her name [indicates, a faithless wife]; so R. Eliezer. R. Akiba said: zonah implies one who is a prostitute (muḥkeret). R. Mathia b. Išeresh said: Even a woman whose husband, while going to arrange for her drinking [i.e. the sotah procedure], cohabited with her on the way, is rendered a zonah. R. Judah said: zonah implies one who is incapable of procreation (eylonif). And the Sages said: zonah is none other than a female proselyte, a freed bondwoman, and one who has been subjected to any meretricious intercourse (shenibʾalah beʾillet zenuṭ). R. Eleazar said: An unmarried man who had intercourse with an unmarried woman, with no matrimonial intent (shelo lešhem isḥut), renders her thereby a zonah!

R. Eleazar thus held that an unmarried man who had intercourse with an unmarried woman renders her a zonah only if the intercourse was without matrimonial intent (shelo lešhem isḥut). Significantly, he here attaches more importance to the character of the intended relationship than the procedure for constituting it.

508 See ARU 6:2 (§2.3), ARU 12:11 (§XXV). There is an ’issur against pre-marital sex, but it is only derabanan.
510 See R. Uziel, Responsa Mishpetey ’Uziel ’Even Ha’B’er 44 and similarly R. Eliyahu Hazzan, Resp. Ta’alumot Lev ’Even Ha’B’er 1.5.
511 As discussed by Prof. Yosef Fleishman in a forthcoming study which he has kindly made available to us.
512 Cf. our argument regarding the nature of the will required of a man for a valid get: §§4.61, 90.
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3.50 One may wonder whether the opinion of R. Eleazar should be taken as a serious explanation of the *shenib’alah be’ilat zenuf* of the ḥokhamim, or whether it has more the sense of *nikra zonah*. The former view, however, appears to inform much of the halakhic discussion. Thus, if a marriage is retrospectively annulled, the spouses become, retrospectively, unmarried, and their intercourse is retrospectively rendered *be’ilat zenuf*, provided that it was with no matrimonial intent (*shelo leshem ishut*). Few would seek to equate, in moral terms, all the various categories listed in the opinions in this *bara’ita*, and the use of the (equally generic) English term “promiscuity” is hardly more helpful in this regard. But the very range of the terms *zonah/zenuf*, fortified by its biblical usage, inevitably creates a connotation which contributes to the fear/horror of *be’ilat zenuf* – even if it is entirely “innocent”.

3.51 In any event, an alternative explanation of the maxim that ‘*Eyn ‘adam ‘oseh be’ilato be’ilat zenuf* is that a couple may hesitate about conditional marriage on the grounds that, even before the condition takes effect, their sense of security in the exclusivity of their relationship may be undermined by the knowledge that it could be terminated by virtue of the condition. In other words, the *zenuf* here is not, on this view, a retrospective characterisation of the intercourse of the couple after their marriage has been annulled, but rather a description of the state, during the marriage, of “leaving one’s wife available to other men” – a reference to the fact that, whatever status the union then had, it was no longer *qiddushin*, with the greater sanctity/exclusivity (and thus psychological security) that that entails (§1.34). On this view, a couple may hesitate about conditional marriage on the grounds that, even before the condition takes effect, their sense of security in the exclusivity of their relationship may be undermined. This, however, is not necessarily the same issue as that of *be’ilat zenuf*. Even a relationship which is less than *qiddushin* will constitute *zenuf* only if it is not *leshem ishut*. The question thus becomes the meaning of *ishut*: is *pilagshut*, for example, a form of *ishut*?

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513 Used of Tamar (*Gen*. 38:15), Rahab (*Josh*. 6:17 etc.), and frequently of Israel’s faithlessness in the prophetic marriage metaphor, idolatry being equated with adultery.

514 On this alternative reading, moreover, there should be no fear of retrospective *zenuf*: during the marriage, the man wanted the wife as exclusively his sexual partner; others in a community which takes even non-*kinyan* partnerships seriously also related to the wife as exclusively his.

515 See §§4.49-50 above, and §§3.58, 60 below on the *Noda BiYehudah*.

516 Bilhah is described as a *palegesh* in *Gen*. 35:22 (but also as both *’umah* and *shifrah* in *Gen*. 30:3-4), but this does not prevent Rachel from giving her to Jacob le’ishah in *Gen*. 30:4. Later, in *Gen*. 37:2 she is described (with Zilpah) as one of the *n’shiut* of Joseph’s father. Ramban
If it is, then according to R. Eleazar in the baraita, it is not zenut.

3.52 R. Uzziel maintains that there is no issue of zenut when the relationship was conducted on the basis of qiddushin and nissu‘in, even if later annulled by a condition involving an act of the bet din, since where the breach of the condition is externally-triggered, i.e. dependent on a third party (e.g. on condition that a bet din never objects to the marriage), there is no question of promiscuity. He supports this view from the Gemara itself (Yevamot 107a), supported by Tosafot in Gittin 81b s.v. Bet Shammai. Indeed, where the condition makes the marriage dependent upon the will of the bet din (in the interest of the spiritual well-being of the marriage), not only do all agree that there is no question of retrospective promiscuity but, on the contrary, making qiddushin and nissu‘in on such a condition is a mitsvah, as stated in Shitah Mequbetset.

3.53 Moreover, R. Uzziel argues, wherever the Talmud says that the Sages made his intercourse promiscuous it speaks only of cases where he betrothed by intercourse (and they decreed that that single act be considered one of promiscuity), and even then he accepts the view that though the intercourse is rendered ineffective to create qiddushin, it is not itself promiscuous (zenut). What the Sages decreed in such cases was that that single act be considered one of promiscuity, so that it should not effect betrothal. Similarly, he maintains, in every place where there is mention of the Sages having made [all] his acts of intercourse [during his retroactively dissolved marriage] promiscuous, this means that the acts suggest that their status increased to that of full wives after the deaths of Rachel and Leah, but their children were born before then. See also A. Tosato, Il Matrimonio Israelitico (Rome: Biblical Institute Press, 1982), 41-42.

517 See ARU 12:12 (§§XXVI-XXVIII) and 14-16 (§§XXXII-XXXVII); more generally, ARU 12:6-30 for a detailed account of the argumentation in Mishpetch Uzziel ‘Even Ha’Ezer nos. 45 & 46, including discussion of the responses of Rabbis Zevin, Kark and Waldenberg.

518 See further ARU 12:12 (§XXVII).

519 Shitah Mequbetset to Ketubbot 3a, towards the end of the second section beginning od katav, citing Tosafot.

520 See further ARU 12:12 (§§(c)(ii)XXVIII), noting also R. Uzziel’s argument from Rashi in his commentary to Berachot 27a, s.v. shemem’anim ‘et haqetannah, on marriage to a minor girl who later declares refusal: both here and where one marries on a condition that is later breached, there is no retrospective promiscuity since the relationship was formed, and the marriage was lived, on the basis of qiddushin and nissu‘in. It may be embarrassing for the couple because others may look on it, retrospectively, as ‘living in sin’ but the truth is that there is no actual promiscuity.

521 As R. Uzziel argues later (see ARU 12:14 (§XXXIII)), even this decree of the Sages does not make the intercourse promiscuous vis-à-vis the husband (or wife), only vis-à-vis the marriage.
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[only] appear to be promiscuous. He then demonstrates that both Tosafot and the Rambam agree to this. The latter writes:

Question: Concerning 'Eyn 'adam 'oseh be'ilato be'ilat zanit. The true meaning of the matter is as follows. When we see that he has relations with a woman and treats her as his wife we do not say that maybe he intended [the relationship] as promiscuity, because there is an assumption that a person would not make his intercourse promiscuous. According to this assumption we say that [if] one betrothed with an item worth less than a perutah and we afterwards saw that he had relations [with the woman he had married] we do not say that this was in reliance on the original qiddushin (which were invalid) but we say that anyone who has intercourse does so for the purpose of licit relations (and therefore she would need a get). Regarding 'the Sages made his intercourse promiscuous' there is no problem because it is the Sages who made it [so] but he did not commit a promiscuous act and intended only licit relations with his wife.

R. Uzziel then lists the Rishonim from whose words it may be inferred that they agree with this: Ramban, Re’ah, Don Crescas (pupil of the Re’ah), Ritha, and Rashi – all of whom say that the power invested in the Sages to annul marriages is vouchsafed them by the groom’s declaration (kol hameqaddesh ...) being taken as the equivalent of “on condition that the Sages never protest”.

3.54 Similarly, R. Berkovits argues that in the case of Mahari Bruna’s condition, even if the qiddushin are retroactively annulled, the woman will not be considered to have been a concubine, since a concubine can leave the marriage whenever she wishes with or without her husband’s agreement so that the marital bond is loose (“a semi-harlotry”), but a marriage based on the condition of Mahari Bruna cannot be annulled without a get. For different reasons (the need for the bet din to sanction the termination under the condition), the wife in a conditional marriage as envisaged by Berkovits cannot leave the marriage whenever she wishes,
and so this too cannot be considered concubinage. Even if the marriage was retroactively annulled due to the breach of the condition, says Berkovits, it would still not be viewed as having been zenu or pilagshut. Since his proposed condition results in a marriage which she can exit only with a get, and there would be annulment only in a minority of cases (where there has been a civil divorce and he has been told/advised by a bet din to give a get and he has refused to do so), there would be no possibility of promiscuity. In this context he stresses that the husband has far more control over the situation than under the condition of Mahari Bruna: he needs only to avoid being recalcitrant, and the condition will be maintained. Conversely, the annulment of the marriage is not in the wife’s hands but is dependent entirely upon the husband and the bet din. It follows, therefore, that so long as he has not acted in a way that will cause the marriage to be annulled she has the status of a definitely married woman.

Others argue that even if fulfilment of the condition depends upon the spouses rather than the bet din (and is thus internally-triggered), there is no retrospective promiscuity (whether zenu or [prohibited] pilagshut) on breach of the condition, since the couple lived together willingly on the basis of their (albeit conditional) qiddushin and nissu’in (again, in effect: lesheam ishit, to which the existence of a civil marriage may be relevant).

527 All his arguments are summarised in ARU 4:14-28 (§§IX.20-69). He argues, for example, that the concern for retroactive illicit intercourse is relevant in the cases in the Talmud (Ketubbot 72b-74a) and Shulhan ‘Arukh (‘Even Ha’Ezer 38:35) where the condition refers to the present status of the wife, for example where the groom made qiddushin on the condition that the bride is not subject to vows. The groom knows that at any moment it could become apparent that she has misled him and that he was tricked into marrying her so that the marriage is really non-existent. If this happened after intercourse it would be the case that he has engaged in sexual relations outside marriage – bi’at zenu. To avoid this possibility it is presumed that, if he has not discovered, between the qiddushin and nissu’in (a period of 12 months in talmudic times), that she is subject to vows and he nevertheless enters nissu’in without repeating his condition, he has foregone the condition. Thus either the qiddushin become retroactively unconditionally valid or the act of intercourse functions as an unconditional qiddushin. See ARU 4:16 (IX.25). ARU 4:17 (§IX.28).
528 Berkovits 1967:32-34.
531 On the latter, see §§3.58-59, below.
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3.56 Where there is both civil marriage and qiddushin, a further argument against retrospective zenut was made by Rabbi David HaKohen Sakali, Rosh Bet Din in Oran, Algeria, in 1936: 535

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.

3.57 The view that there is no problem of be’ilat zenut has, however, been challenged. R. Auerbach 534 argues, in the context of one of the talmudic cases of retrospective annulment,” that there is nevertheless a problem of bi’at zenut, since the view of Ramban,” Rashba” and others is that in practice the Sages do not annul the marriage; rather, the husband foregoes the cancellation of the agency and so the get is valid, which these Rishonim understand to be because he fears that his bi’ot will otherwise be declared zenut. Of course, this argument for be’ilat zenut presupposes that the husband’s fears are halakhically well-grounded: such fears are indeed explicitly mentioned by the Rishonim, but does that necessarily

533 Responsa Kiryat HaNoah David II 155-58 as per Freimann 1964:393, para. 13.
535 Gittin 33a, Yevamot 90b; see §5.14, below.
536 Ramban in the name of Rashbam, Ketubbot 3a, s.v. shavyuha; ibid., Gittin 33a, s.v. kol (we may note, however, that Ramban seems not to accept this interpretation).
537 Rashba, Ketubbot, 3a, s.v. kol; ibid., Responsa, 1162. See also Pene Yehusha’u, Ketubbot, 3a, s.v. ‘afke’enuhu and s.v. kol.
 imply their halakhic endorsement? R. Auerbach is, indeed, aware of the fact that others dispute such zenut.  

3.58 Some consider that where the terminative condition takes effect, the preceding relationship becomes not zenut but rather the (superior status) of pilagshut (concubinage). But even Rambam, the leading protagonist amongst those who forbid concubinage to anyone but a king, does so (according to Radbaz Responsa IV 225) only as a rabbinic prohibition. R. David Sinzheim, however, argues that conditional marriage is permissible, even if we accept that Rambam’s position is that concubinage for a layman is prohibited by biblical law: the situation is one of doubt, in that there is, at the time of the marriage, no certainty that the couple are entering concubinage because it may well be that the condition will never be broken and the liaison will prove to be qiddushin and not pilagshut.  

R. Sinzheim also mentions that Mahardakh (Morenu HaRav David Kohen) suggests in a responsum that the Rambam would permit retroactive concubinage created as a by-product of a marriage annulled due to a broken condition. This, moreover, is argued by the Noda’ BiYehudah, who says that the Rambam prohibits a layman to have a concubine only when her liaison with her husband is one of concubinage only, but if the couple enter into conditional qiddushin then even if the condition is broken and the qiddushin retroactively annulled, the Rambam agrees that there is no prohibition whatsoever.

3.59 However, a majority of posqim permit pilagshut, so that the prohibition itself is a matter of safeg, and Rambam himself considers any doubtful

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538 E.g. Shittah Mekubetset, adopted by Maharsham and others: see R. Auerbach 1974. See also Mat’alot Lishlomo (§3.24, above) and R. Sakali (§3.56, above).
539 See §§6.46 for the view that sheva berukhot may be recited at ceremonies for the creation (ab initio) of (inter alia) pilagshut.
540 Responsa Bet Naftali (Brooklyn, New York, 5766) number 45, part 1, s.v. We’od vesh lomar (p. 276, col. 2), though made in the context of the conditional marriage of a groom who has an apostate or missing brother.
541 As does R. Uzziel: see ARU 12:12 (§XXVIII). For further considerations, see ARU 12:12-13 n.55.
542 The Rambam himself (followed by most Posqim – see Responsa Ye’arweh Da’at 1 Kileley HaHorah, Kileley Safeg De’Oraita, no 1 and ARU 7:15 (§IV.12 and n.110)) maintains that all doubtful prohibitions are permitted by Biblical Law. Hence according to the Rambam a conditional marriage would at most be only rabbinically prohibited (because it is possibly concubinage, i.e. it is a safeg ‘issuer’ and in any rabbinic matter the rule (agreed to by all) is that we should follow the lenient view – in this case the view that concubinage is permitted! See further ARU 5:106-07 (§47.21).
544 See n.232, above.
biblical prohibition as only rabbincally proscribed. Thus, even if the Rishonim were evenly split on the question of the permissibility of pilagshut for a layman, we would be dealing, in the case of conditional marriage, with a doubt (the 50-50 split of the posqim concerning definite pilagshut) in relation to a rabbinic prohibition (the possible biblical prohibition of conditional marriage that might prove to be pilagshut) and safeq derabbanan lequla.

B4 The means of protecting the condition against implied revocation

3.60 In the previous section, we considered the arguments that (i) retroactive annulment, resulting from a condition in the marriage, may produce a state of zenut, and (ii) that fear of such an outcome is sufficient to create a presumption, arising from marital intercourse, that the condition is thereby revoked. For those who do not accept the contrary arguments of R. Yechezkel Landau in Noda BiYehudah, R. Uziel and R. Berkovits, it becomes necessary to provide a means of ensuring against revocation of the condition. Indeed, the implied revocation through the assumed fear of be’ila’at zenut is not the only possible threat to the condition. What if the husband decides unilaterally and explicitly to revoke it?

3.61 One theoretical strategy to protect the condition against the threat of implied revocation is repetition by the husband of the condition (before witnesses) at ḥappah, yitḥud and bi’ah. This entails repetition of the condition before the first bi’ah – and before witnesses (outside the door) – and even (for some) before every occurrence of bi’ah. Moreover, if it is public knowledge that a couple is living together as man and wife, no further evidence may be required to establish that they are having intercourse for the purpose of (unconditional) qiddushin.545 Indeed, the most extreme version of this view, that of Shilley haGibborim (R. Yehoshua Boaz, late 15th – early 16th century),546 quoting Riaz

545 Bet Shemuel, ‘Even Ha’Ezer 31:9, sub-para. 22, quoting Re’ah; for expressions of this view in ‘Eyn Tnai BeNissu’in, see ARU 4:14-15 (§IX.20). On the view of Re’ah, see ARU 4:41-41 (Appendix), noting inter alia that many Rishonim (e.g. Rambam, Ishut 7:23 and see Magid Mishneh there, Rashba, Rosh, Tur) dispute it: Re’ah expresses this opinion in the case of a minor who never objected to her (rabbinic) marriage; Rivash (resp. 6) rejects outright the opinion of Re’ah in a case not involving a minor.

546 See ARU 4:21 (§IX.42), ARU 7:23 (§V.3), ARU 18:17. For expression of this view in ‘Eyn Tnai BeNissu’in, see ARU 4:21 (§IX.42), noting that R. Danishevsky (at p.35) observes: “Though there are posqim who disagree with this and maintain that if an explicit condition were made at nissu’ in and bi’ah it would be effective, who will be able to tip the scale against Riaz and Shilley haGibborim who quoted him?”. Berkovits 1967:25, describes Shilley haGibborim (beshem Riaz) as “the only dissenting voice”, thus reflecting the view that we
(R. Yeshayahu Aharon Zal of Trani, Italy, end 13th cent), has it that even where an explicit condition was declared immediately before intercourse, during the intimacy the couple will make an unconditional commitment to each other – i.e. the intercourse would become an act of unconditional betrothal. Against this, however, the authority of Tosafot, Rosh, Rif and Rambam may be cited. At the other end of the spectrum, the Constantinople rabbis, supported by R. Pipano, maintain that, according to most posqim, if one betroths a woman on condition and then weds her without repetition thereof, her requirement of a get is only rabinic. Moreover, even the objection of Riaz – if, indeed, relevant to our problem – may be overcome if the groom made clear at the repetition at bi’ah that he means his condition to obviate the need for a get.

3.62 Even if the condition is best repeated, that does not necessarily entail repetition on every subsequent occasion of marital relations. R. Lubetsky and the Hungarian Rabbis themselves appear to have accepted, on the analogy of the condition of Mahari Bruna, that it would suffice for the condition to be made (in the hearing of two valid witnesses, from outside the room) at qiddushin, ḥuppah, yifḥad and again at the first

follow a single opinion le również. On understandings of and replies to the claim in Shilley haGibborim, see further ARU 4:20-23 (§§IX.41-49).

Ketubbot, Perq HaMaddir. Berkovits 1967:46, notes that there is evidence that even Riaz – whom Shilley haGibborim is quoting – himself would agree that if the groom declares that he remains insistent on his condition the condition will remain in place.

Berkovits 1967:25.

For sources and discussion, see further ARU 4:21-23 (§§IX.43-49), ARU 18:17-20. Berkovits 1967:45, 62, adds also Rabbenu Yeroham. I. Warhaftig, “Tnai BeQiddushin WeNissu‘im”, Mishpatim I (5725), 206 n.28, records that the Me’irin on Ketubbot 73a cites an opinion like that of Riaz in the name of the Geoney Sefarad and rejects it.

ARU 13:13 (§§55).

On the difference between present proposals for conditional marriage and the conditional cases of the Talmud (vows and blemishes), to which the ruling of Shilley haGibborim in the name of Riaz is relevant, see ARU 4:21 n.50; ARU 18:17 n.43.

Cf. the argument of Berkovits 1967:25-7, 61-62, based on his novel explanation of the position of Shilley haGibborim (see ARU 4:23 n.59 and ARU 4:19 (IX.37)): 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 however ARU 4:23 n.57.

Pitḥey Teshuvah ‘Even Ha’Ezer 157, para. 9.

ARU 4:15-16 (§IX.24), leading to the conclusion that conditional marriage was impossible, given the practical impossibility of achieving this. Of course, technology might be invoked here, perhaps in the form of a message to a voicemail system.
Chapter Three: Conditions

bi’ah. Of course, the need to repeat at nissu’in a tnai entered into at qiddushin goes back to the period when the two were separated in time (customarily, by a year). Nowadays, when qiddushin and nissu’in are performed together, there is no reason to think that the parties intend the condition at qiddushin to be cancelled at nissu’in; indeed, even the Ḥatam Sofer states (in the context of the condition of the ah mumar) that the repetition of the condition at the various stages of nissu’in is only a stringency and is not essential.

3.63 However, it is disputed whether marital intercourse does create a presumption of revocation, and thus whether there is any need to repeat the condition. Some maintain, as a matter of principle, that bi’ah does not entail an implied revocation of the condition. In particular, it is argued that the condition is for the benefit of the woman, and that there can be no presumption that she would forego it: there is, in fact, an argument that 'Eyn 'adam 'oseh be’ilot be’ilot zeni is not applicable to a woman. Indeed, it was on that very basis (adatha dehakhi) that she agreed to the marriage in the first place. This, it might be argued, should at least reverse the hazaqah, making it necessary for the woman to declare before witnesses her release of the condition, if she wishes to do so. Nor can the husband unilaterally forego the condition against her will. The Rashba and the Ran, moreover, maintain that foregoing a non-monetary condition is ineffective.

3.64 The Ḥatam Sofer regards repetition as a stringency over and above basic halakhic requirements. In the Talmud, the problem of nissu’in cancelling

555 ARU 4:15 (§IX.23).
556 Berkovits notes that this was already pointed out in Responsa Terumat haDeshen (end of no. 223) and in Ḥatam Sofer (ibid. s.v. We’omnun): see ARU 4:20 (§IX.40(i)).
558 Discussed in detail in ARU 4:14-21 (§IX.20-41). Berkovits argues that if there is a clear declaration that the procedures of nissu’in are subject to the same condition as that expressed at the qiddushin, there is no question of the intercourse being intended as an unconditional act of marriage. See ARU 4:19 (IX.36), citing Ikalat Meboqeq (‘Even Ha’Ezer 38:49) in the name of Mvagid Mishneh, Rosh and Hagahot Asheri. The Bet Shemuel (‘Even Ha’Ezer 38:59) adds Tosafot to these sources.
559 Cf. Berkovits 1967:37, citing Responsa Me’il Tsedqah no.1: see further ARU 4:20 (§IX.40(ii)); ARU 8:10-11 (§2.6.3); ARU 13:14 (§58), ARU 18:11-12, 16.
560 ḤaGLim shel Shalom II number 81; ARU 5:42-43 (§21.2.6.11.3). See also ET 1, 559-60.
561 Tosafot, Yeveamot 107a., s.v. ‘Amar Rav Yehudah: see ARU 4:3 (§II.4), suggesting that the status of the inference may be merely a suspicion, rather than a presumption.
562 As Berkovits 1967:37, points out, an unconditional betrothal cannot be effected without her consent. Cf. ARU 8:10-11 (§2.6.3).
563 ARU 13:14 (§58), on Ran to Răi, Ketubbot 73a, s.v. Garsinan baGemara.
A widespread view is that the condition may be safeguarded against implied revocation (and also fortified against explicit revocation) by the use of an oath. An oath supporting a *ketubbah* obligation to grant a *get* to avoid *yibbum* is in fact found in ketubbot of Sephardi Jews in the Ottoman empire. R. Pipano (§3.83, below) would have both bride and groom swear that they will never forego the condition; the witnesses who sign the *ketubbah* attest that “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.”

3.66 More than a century earlier, Rabbi Aqiva Eiger (1761-1837, Germany) had already proposed, in the context of the condition of Mahari Bruna, an oath which would be non-annullable, that the spouses would never forego

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504 As noted by Noda’ BiYehudah, R. Aqiva Eiger, Haham Sofer and ‘Arokh HaShulhan.
505 *Ibid.*, s.v. *We’Ommam*.
506 See ARU 4:20 (§IX.40).
507 In ‘Eyn Tnai BeNissu’in (see ARU 4:15-16 (§IX.24)) and elsewhere.
508 A form of self-compulsion: see ARU 17:158, presupposing halakhic man to be a man of honour, compelled by his own (binding) word.
510 ARU 13:14 (§58).
the condition at any future intercourse. Its form would be an oath *al da’at harabim*, the termination of which is thus dependent on public consent; we could then rely on the presumption that he would never transgress his oath (a far more serious offence than promiscuous intercourse), neither at any stage of *nissu’in* nor at any act of intercourse. Though this may well have been intended *in terrorem*, rather than as an automatic means of guaranteeing the preservation of the *tnai*, the latter view is found amongst some *posqim*. A variation on this is an oath taken before a *bet din* in which the husband swears that he would never make a new (unconditional) marriage with his wife and that, should he break his oath and marry her (unconditionally), the *qiddushin* will not be effective. The use of an oath is also included in R. Toledano’s proposal that couples agree at the *qiddushin* to post-betrothal annulment (§3.85).

3.67 R. Henkin (in *Perusheh Ibra* 5:25) proposed to deal with the problem of implied revocation through his *taqkanah* (§3.44, above). He envisaged that the *bet din* “shall enact that ... all the acts of intercourse from the *qiddushin* onwards shall be promiscuous”. He sought to reinforce this by having the *bet din* impose a *herem* on the husband and wife that they “not intend nor agree that the acts of intercourse should be for *qiddushin* [which would] not [be] in accordance with the aforementioned condition.” This, he argued, would remove all problems of detailing, doubling and repeating the condition, as well as the *get*-related problems of *bererah* and concerns over “intercourse for the purpose of unconditional marriage”, since *kol hameqaddesh ‘ada’ta’ derabbanan megaddesh* would be applied to such a general enactment of the contemporary sages. Of course, such a *herem* measure may well not prove effective outside the religious community; the *taqkanah*, on the other hand, would apply to all marriages entered into while the *taqkanah* was in force.

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571 *Pithei Teshuvah* ‘Even Ha’Ezer 157:4, para. 9, citing Resp. R. Aqiva Eiger no.93; ARU 4:20-21(§IX.41). R. Brody in his Tripartite Agreement (2010:12) has the groom recite that he declared to the bride under the *bappah*: “I take a public oath that I will never remove this condition from the marriage” (citing Responsa R. Akiva Eiger 93) ... “Even a sexual relationship between us shall not void this condition” (citing Bet Shemuel ‘Even Ha’Ezer 157:6) ... “My wife shall be believed like one hundred witnesses to testify that I have never voided this condition” (citing *Pithei Teshuvah* ‘Even Ha’Ezer 157:8, Resp. Bet Meir 6).

572 See *Pithei Teshuvah* ‘Even Ha’Ezer 157:4, sub-para. 9.


574 See ARU 18:89.
**Agunah: The Manchester Analysis**

**C**

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**Different Forms of Condition**

**C1**

Prospective and Retrospective Conditions

3.68 The benefits of a condition which brings the marriage to an end prospectively rather than retrospectively are twofold. First, any argument that a shadow is cast upon the status of the previous relationship is thereby excluded. This may be perceived as an advantage in communities where, on the one hand, the fear of zonot is entrenched and where, on the other, the problem of 'iggun is that of the chaste wife. Second, we avoid both the conceptual and dogmatic problems associated with hafq'ah: the role of the bet din in the termination of the marriage becomes declaratory rather than constitutive (§3.29), and represents a “partnership” model of the relationship between the parties and the community institutions (§5.66).

3.69 However, there is a general assumption that the operation of such a tna'ah is equivalent to retrospective annulment of the qiddushin, treating it in effect as a condition authorising hafq'ah (itself assumed to be retrospective). Indeed, in Tsits Eli'ezer I 27, R. Waldenberg argues at length that if a condition annuls a marriage during the husband’s lifetime, retroactive promiscuity will always result (a position which Berkovits contests). Yet hafq'ah itself has not always and necessarily been viewed as retrospective (§§5.13-27); Tosafof (according to some later opinions: §5.22) envisaged circumstances where hafq'ah in the case of a cancelled get was only prospective; and Shemuel Atlas argues at length that annulment is never really retrospective (§5.25).

3.70 There is, moreover, evidence from the Cairo Genizah ketubbos of a tna'ah which may have been intended to terminate the marriage with only prospective effect:

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573 Breitowitz 1993:58 n.164, is clear that conditions in marriage, though they be conditions subsequent, operate nunc pro tunc. Similarly, Bleich 1998:107 writes: “As with all conditions of marriage, if the condition subsequent is violated or unfulfilled the marriage is retroactively and automatically null and void.”

576 On the relations between explicit conditions, implicit conditions ('umdina) and hafq'ah, see ARU 10, esp. at p.20.

577 See ARU 11:3-4; §§5.28-41, below.

578 On R. Berkovits’ response to this argument, see ARU 4:16-18 (§§IX.25-32), ARU 6:2 (§2.4), noting that Hattam Sofer vol. IV (Even Ha'Ezer 2) no. 68 speaks only of the condition of Mahari Bruna when he declares that even in the event of annulment there would be no retrospective zonot, though Berkovits, 1967:54-56, argues that Hattam Sofer would say the same to his condition also.
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And if this 'Aziza, the bride, should hate this Mevasser, her husband, and not desire his partnership ... and she will go out by the authorization of the court and with [the] consent of our lords, the sages ... (וְאִם יֵשֵׁנָה לְאֶפֶס בָּתָל רֹּאֵהוּ עַל עָבֶרֶר) 579

The meaning of the unusual וְאִם יֵשֵׁנָה לְאֶפֶס בָּתָל רֹּאֵהוּ has been debated. 581 According to one view, it may indicate a divorce granted by the court itself (without any participation on the part of the husband), similar to the apparent implication of the use of plural formulations in some accounts of the Geonic kefiyyah. 582 An alternative view is that וְאִם יֵשֵׁנָה לְאֶפֶס בָּתָל רֹּאֵהוּ means termination of the marriage prospectively, from now on, the only issue being whether that is done by a get given by the husband, or merely by declaration by the court that the conditions of the relevant inai have been fulfilled. In either case (as in the first two stages of the internal talmudic development of hafqa’ah: §5.7, below), the effect is prospective rather than retrospective termination of the marriage.

3.71 Notwithstanding the historical inter-relationships between the two, there is a distinction between hafqa’ah, classically viewed as a constitutive act of the court which annuls the marriage with retrospective effect, and a terminative condition which is activated by the act and will of the parties (always including the husband), the role of the court (assuming that the inai is regarded as valid) here being simply declaratory, confirming the facts required by the condition to bring it into effect. If so, any view that hafqa’ah is necessarily retroactive would not determine the issue for conditions, which may then be capable of being made prospective in effect.

3.72 There is, however, a poverty of authority for a terminative condition with a purely prospective effect, with the exception of a condition which anticipates the giving of a future get. Though the halakhamah rejects “temporary marriage” (qiddushin lizman, in the form of a declaration stated in the qiddushin itself that “Today you are my wife and after five years you are not my wife”), Rashba accepts “conditional marriage” in the form: “if I divorce you within five years, we are married; if I do not

579 Ketubbah no. 1, lines 23-24, in Friedman 1964:II, pp. 9 (Heb.); 13 (translation).
580 And the parallel וְאִם יֵשֵׁנָה לְאֶפֶס בָּתָל רֹּאֵהוּ in TS 24.68, II.5-7; see §3.16, above.
582 Jackson 2004:161f.; Friedman, n.415, above.
583 Discussed below, §4.21.
divorce you within five years, we are not married.” Under such a condition, the marriage may be terminated by get on the last day of the fifth year with purely prospective effect; a day later, the marriage is terminated automatically, but with retrospective effect.

3.73 It may well be that for any other form of terminative condition to operate prospectively, a tagqanah would be required, authorising a condition which states explicitly that it is intended to be of only prospective effect. We see no reason why this should be excluded in principle. In the absence of such a general tagqanah authorising prospective annulment (in the light of tsorekh hasha’ah), prospective termination may best be achieved by a non-standard get (by harsha’ah or a delayed get).

C2 “Substantive” and “Validity” conditions

3.74 An innovative form of condition found in some modern proposals is what we may call a “validity condition”, stating that the marriage shall never have taken place if the halakhic validity of the substantive conditions (stating the circumstances in which the marriage will terminate despite the husband’s recalcitrance) is not accepted. Thus, R. Henkin, whose primary proposal was the (immediate) delivery of a get al tna’i (not qiddushin al tna’i), uses a “validity” condition (at least as regards the kashrut of the get), created not by tna’i in the ketubbah but rather as a result of a general taqqanat haqaqah: “if the aforementioned circumstances of ‘igger come about and the get is no longer in existence or is void according to the Halakhah”. This (limited) validity condition thus comes into play only if the primary strategy, that of the (immediate) delivery of a get al tna’i, fails, whether for halakhic or other reasons (§3.45): there is thus a major factual doubt as to whether it will ever come into effect.” There appears no reason in principle to object to such conditions on the grounds that the condition relates to a matter of law rather than fact. We have seen that in the area of safeq, too, no distinction appears to be drawn between the two spheres.

584 See Hiddushe haRashba on Gittin 84a, §3.20, above.
585 Of course, this would function as a remedy for the “chaste” wife, who waits for termination of the marriage before initiating a new relationship.
586 R. Broyde’s tripartite agreement does include such a harsha’ah, but it is not made sufficiently clear (as it is in R. Henkin’s model) that retrospective termination of the marriage comes into play only on the failure of such a harsha’ah (for whatever reason) to produce a get.
587 Compare the argument from Responsa Bet Naftali at n.543, above.
588 See also §§3.94, on R. Broyde’s use of this strategy.
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3.75 Some have suggested that there may be no need for an explicit condition at all. The issues of revocation (and related questions of who should make the condition) highlight the question of the basis on which a woman enters qiddushin kedat moshe veyisra’el. Already in 1933 (well before recent debates over the scope of qiddushei ta’ut), R. Moshe Schochet, in advocating that a gathering of leading halakhic authorities debate the introduction of conditional qiddushin and nissu’in in order to avoid the need for a get should a situation of ‘iggun arise, observed: “For it is certain that there is a definite assumption (אומסאנא דרמב) that she did not marry on such an understanding” and therefore the marriage might be retroactively annulled even if no explicit condition was made.” Similarly, we have seen that Professor Feldblum argued that there is an ’umdena demukhakh, at least as regards non-religious women, in relation to the qinyan aspect of qiddushin (§1.9, above).

3.76 There would appear to be a firm theoretical basis for such suggestions. The halakhah recognises the concept of unspoken conditions (‘ada’ta’ dehakli lo’ qiddeshah ‘atsmah), which can be used in relation to marital defects arising after nissu’in, as where a husband399 or even the levir himself400 becomes a mumar in the course of the marriage. Whether this could be extended to a recalcitrant husband deserves investigation. After all, the husband commits himself in the qiddushin formula to qiddushin kedat Moshe veyisra’el, which Ritba explains as a form of condition ( kapsam תחת genomes על מתא שירטמה המילה),401 – as, indeed, appears to be assumed by the justification of haqqa’ah by the maxim kol hameqaddesh ‘ada’ta’ derabbanan meqaddesh (§5.33, below).

399 Responsa ‘Ohel Moshe (Jerusalem 5663) no. 2 as per Freimann 1964:393, para. 12.
401 See Responsa Maharam Mintz, number 105, quoted in Responsa Seridey ‘Esh III 25, p.71, arguing from Maharam (quoted in Mordekhai, Yevamot, siman 30): we can say that she did not accept the qiddushin on such an understanding and that therefore she is free to remarry without balitsh. See further ARU 5:50 (§21.2.11).
402 See further §3.77, below.
403 See ARU 11:5 and n.23. This may also be the view of Rashi: see Rashi 2002:12-14. A letter of R. Herzog addressed to R. Weinberg, printed at the beginning of Resp. Seridey ‘Esh III.25 (= 1:90), cites a statement of R. Shelomoh Kluger (Maharshaq) in Resp. Isdushey ‘Anshey Shem that since the groom declares in his marriage formula that he is acting “in accordance with the Law of Moses and Israel” he is, in effect, making a condition that the qiddushin depend upon his adherence to the Jewish faith. Should he apostatise, therefore, there will be no marriage. R. Herzog finds the suggestion “astonishing” (see further ARU 5:40 (§21.2.6.7.4)). We find the same suggestion in the responsa of Mahari Qatsbi, number 10 (see n.590, above).
This issue is also relevant to the concept of qiddushei ta‘ut, which has been applied by R. Moshe Feinstein in several cases, including one involving a mistake of law. One main condition for applying it is that the defect existed at the time of marriage; only then is the transaction defined as mistaken. However, 'umdena is a potential tool for terminating marriage due to a later defect, which occurred only after marriage. Already in Haggay Lev, R. Yosef Hazzan cites Baba Qamma 110b-111a for the view that, were it not for tav lemeitav, we would have presumed that a woman who finds herself before a leprous brother-in-law would not have married her late husband had she known that she would find herself in such a situation, and so would be exempt from yibbum entirely. The argument is developed by Dr. Westreich. Commencing with this same sugya (Baba Kamma 110b-111a), he observes an initial ambiguity: a new circumstance which did not exist at the time of the marriage is the reason for voiding the marriage, and this ruling is justified by the legal presumption, literally: “on this assumption she did not get married”). On the other hand, this is described as generating a mistaken transaction. This suggests that it may be possible to analyse the legal situation in such a way as to define a case as qiddushei ta‘ut even though it applies to an occurrence which at the time of the marriage was no more than a possibility. The ambiguity generates a difference of opinion amongst later writers: some interpret 'umdena as an expansion of qiddushei ta‘ut, while many others interpret it as an implicit condition, which is implied by the court and means that

594 The cases in which R. Feinstein suggested applying this ruling are listed by R. Jachter, http://www.tabc.org/koltorah/agauna/agaun59.8.htm (see also Jachter and Frazer 2000:44) as (1) “an impotent man” (“Even Ha’Ezer 1:79); (2) “a man who concealed that he had been institutionalized prior to the marriage” (“Even Ha’Ezer 1:80); (3) “a man who concealed that he vehemently opposed having children and later forced his wife to abort a fetus” (“Even Ha’Ezer 4:13); (4) “a man who concealed that he was a practicing homosexual prior to the marriage” (“Even Ha’Ezer 4:113); and (5) “a man who concealed that he converted to another religion” (“Even Ha’Ezer 4:83). See further ARU 2:48-56 (§4.5).

595 'Igrot Moshe, Even Ha’Ezer 4.121, the mistake relating to the status of an apostate levir. cf. §3.76 above.


597 As argued in ARU 10.

598 Section 58 [on ‘Even Ha’Ezer 157] s.v. natati libi. See ARU 6:1-2 (§2.2).

599 Discussed at ARU 10:5.

600 E.g. Maharit El-Gani; Shat Ra‘aviyah, 1032, s.v. בַּרְכַּת מְשִׁיאָה; and Me’il Tseqaqah, 2, p. 3b; as discussed by R. Shim'on Shkop, Shu‘arey Yosher, 5:18, pp. 68-70. See ARU 10:6-8.
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the couple implicitly agreed that such a future occurrence would terminate
the marriage. Tosafot, however, adopts an integrated analysis in which
he appears to accept that a woman may reject a marriage even without her
husband’s (even implicit) agreement if we conclude that, had she known
about the possibility of a particular future event (the context is a leprous
levir), she would not have got married. Indeed, the Vilna Gaon 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 (both qiddushin and nissu’in) if
the condition was breached (i.e., if she found herself bound to a leprous
levir).

3.78 A similar approach, Dr. Westreich argues, may be found in the responsa
of R. Moshe Feinstein, particularly that relating to the communist levir,
which takes the definition of an implicit condition a step forward. Not
only does ad’ata dehakhi deal with a condition which was not made
explicitly by the two spouses (but one which, we may assume, they would
have adopted had they been asked); it may also be used in relation to a
condition the need for which was actually unknown to the couple, who
were unaware of the levirate bond. It is therefore a condition implied by
the law: it is sufficient, says Rabbi Feinstein, that the couple did not want
the result (being bound to the apostate levir), while the legal construction

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See, e.g., Shut HaRosh, 34:1, discussed at ARU 10:9; Shut Binyamin Ze’ev, 71, discussed at
ARU 10:9; Shut Terumat Hodeshen 223, discussed at ARU 10:9; ET, s.v. ‘umdena (as an
assessment of the intention of the actor), 296-97. See further ARU 10:6 n.25; ARU 10:16 n.82
on Shut Maharam melRothenburg, Prague print, 564; 22b.

Combining Baba Kamma, 110b, s.v. אכילה, with Ketubbot 47b. For this analysis, see ARU
10:10-15, concluding (at 14): “umdena of ‘ada’ta’ dehachi lo kidsha nafshu according
to Tosafot is an integrated concept. When one says: the wife claims “ad’ata dehakhi” and wishes
to void the marriage, we must ask two questions: (1) Is it a mistaken transaction? (2) If it is not
a mistaken transaction, is there an implicit condition? In (1) we deal with the “doubt” or
possibility at the time of making the contract (the kiddushin): was she then aware of the chance
that such an occurrence might happen? If she were not, the transaction is void for mistake. If
she were aware of this option but nevertheless accepted the marriage, the transaction is valid.
Yet, in this latter case we must also ask question (2): was there an implicit condition? The
answer to this question depends on the kind of transaction. In a regular commercial transaction
there is no implicit condition, since the seller would never agree to cancel the transaction in a
case where, for example, his cow becomes terefhah. But in a case of a betrothed widow when
the levir is a leper, according to the hava amina on Baba Kamma 110b, there was such an
implicit agreement. In that case, therefore, we can in principle invalidate the marriage, since, in
Tosafot HaRosh’s words: וַיִּקְרָא צְרִיך לוֹ לְנָשַׁהּ.”

Bi’ur of Vilna Gaon on Even Ha’Ezer 157:4 (sub para. 13).

Targum Moshe, Even Ha’Ezer 4, 121. For the detailed discussion, see ARU 10:14-19.
of the condition and its imputation to the couple (unawareness of the obligation on the one hand; awareness but an implicit condition to cancel this obligation on the other) is the work of the poseq.

3.79 On this analysis, we have here a case where a marriage is terminated, *lema’ašeḥ*, on the basis of a form of conditional marriage.\(^6\) It is true that R. Feinstein here uses ’*umdēnɛ* regarding a future event only in order to cancel a levirate bond, not in order to release a married wife without a *gēt*. But from a theoretical point of view there is no difference between marriage and levirate: in both cases the marriage is retroactively annulled. Indeed, the practical hesitation in applying ’*umdēnɛ* to a married wife is intelligible due to the fear of *mamzerut* and jerneḥ ’*eshet ’ish*, a distinction which we argued above should not be regarded as a sufficient basis for restriction of conditions in marriage to the contingency of levirate.\(^6\)

3.80 We may note that, in a case where such arguments were not regarded as sufficient *lema’ašeḥ* to terminate the (living) marriage on the grounds of *mekāh ṭa’ut*, they were nevertheless taken as a sufficient basis for a form of *kefiyâh*. Rabbi S.-Y. Cohen, writing of a case in the Haifa District Rabbinical Court where the husband had been in psychiatric care prior to the marriage, acknowledged\(^6\) that Rav Feinstein permitted annulment on the grounds of “erroneous purchase” (*mekāh ṭa’ut*) if it was impossible to obtain a *gēt*, but continued: “However, the Rabbinical Courts in Israel have never taken such a far-reaching step as annulling a marriage; in our case as well, we must emphasise that the person in question is not considered to be completely insane, like the person described in the above *responsūm*. Nevertheless, it seems that one may use this as support for resorting to a solution of “compelling by way of forcing the options,” in a case in which it can be argued that the marriage was mistaken, and there is basis for drawing a connection between his illness and the treatment he received, and the peculiar relations between himself and his wife, and his anger and beatings.”

\(^{65}\) ARU 10:20.

\(^{66}\) §§3.34-36.

Chapter Three: Conditions

C4 Standard conditions: *tna’ei bet din*

3.81 Of course, any use of terminative conditions to provide a global solution to the problem of recalcitrance must not rely on the contingency of either explicit conditions or the subjectivity of implied conditions (unless R. Moshe Schochet’s view in §3.75 is accepted); what is required is a standard condition implied by law. But, as in the past, the case for *tna’ei bet din* gains weight from previous practice – or, indeed, from enactment (*taqananah*) of the *qahal* to which the couple belong. Thus the standard conditions of Mishnah Ketubbot 4:7-11, such as the benin dikhrin clause in the ketubbah, appear to have been derived from notarial practice now evidenced from documents of the Bar Kochba period. We have also noted that the thesis of the teachers of Me’iri’s teachers, that the geonic decree relating to *kefiyah* in cases of *me’is ‘alay* was based on Palestinian conditions, is supported by the evidence of Ra’avya, that he had seen ketubbah with clauses of that kind (§3.10, above). Of course, it would take a *taqannah* to elevate such conditions to the status of *tena’ei bet din*, and here greater problems of authority arise.

D Conditions proposed by modern posqim

3.82 The French and Constantinople proposals (§§3.22-24, above), and those of Rabbis Uzziel and Henkin, were not the only proposals for conditional marriage made in modern times. The following is a list of the proposals, in chronological order, for terminative (in principle, self-executing) conditions which we have encountered, reflecting some significant differences in the roles accorded the husband and the *bet din*:

Cf. R. Henkin, §3.45, above.

In discussing a proposed *taqananat haqahal* which would render void any marriage not conducted with the knowledge and in the presence of the communal officials and a *minyan*, Rivash (Resp. 399; see Elon 1994:II.856-59) argues: “Under the law of the Torah, the townspeople may adopt enactments, regulations, and agreements, and may penalize violators ... Since the townspeople agree on them, it is as if each one of them took them upon himself and became obligated to carry them out.”


R. Abel at ARU 18:79-91 provides a list of 12 “Posqim who accepted the practical possibility of conditional marriage as a solution for the tragedy of ‘igyun’, but not all appear to have made substantive proposals. Thus the list commences with the French (R. Hazzan) and Constantinople proposals (nos.1 and 2) and the support the latter received from R. Eliyahu Ibn Gigi of Algiers (no.3) and includes R. Moshe Schochet (§3.75, above) who proposed a debate on conditional marriage (no. 8), and R. David HaKohen Sakali (of Oran, Algeria), *Responsa Qiryat Hanah David* II 155-58 (1936), as per Freiman 1964:393 para. 13, who advocated conditional marriage basing himself on the condition of Mahari Bruna (no.9), and concludes with R. Berkovits and the support he received from R. Weinberg.
1887 R. Eliyahu Hazzan, Ta’alumot Lev III.49, on which the French Rabbis relied (§3.22, above);
1924 The Constantinople Bet Din, in Malberet Qiddushin ‘al Tsnaï (§3.23, above) and the probably related Ma’alot Lishtomo by R. Shlomo HaCohen [Itzban?] of Morocco (§3.24, above)
1924 R. David Pipano, Responsa Nose’ Ha’Efod, no. 34 ($3.83, below);
1926 R. Yosef Eliyahu Henkin, Perushay Ibrah 5:25 ($§3.44-47, 3.67, above);
1926/27 R. Zvi Makovsky in his paper entitled Mipney Tiququn Ha’Olom ($§3.84, below), together with a similar proposal the same year from R. Shemuel Avigdor Abramsohn;*

In addition, we may add the following proposals for hafqa’ah:
1930/31 R. Ya’aqv Moshe Toledano, Responsa Yam HaGadol (Cairo 1931) no. 74 ($§3.85, below);
1937 R. Menahem HaKohen Risikoff, Responsa Sha’arey Shamayim, ‘Even Ha’Ezer no. 42 ($§3.86, below).

We may note, in this context, that the responsa in ‘Eyn Tsnaï BeNissu’in were written in 1907-08, but not publicly published until 1930.†

3.83 Just before R. Henkin published his proposal,‡ R. David Pipano proposed the following addition to the ketubbah:

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’even, 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.

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*Sefer Torey Zahav, New York 5687, II pp. 8-17 as per Freimann 1964:392-93, para. 11.
†For a detailed account of the history, see ARU 4:5-10.
‡Responsa Nose’ Ha’Efod, responsion 34 was written at the end of ‘Adar Rishon 5684 (1924) but published a little later, at the end of the book ‘Aneyn Ha’Efod II, Sofia 5688 (1927/8); see Freimann 1964:391. See further ARU 13:12-15 ($§60-66), ARU 18:79-85.
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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 him [sic: read “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.’

The groom’s declaration under the ḥuppah would be:

With reference to all the conditions which are written in the ketubbah – [if] they are fulfilled, behold you are betrothed to me with this ring according to the Law of Moses and Israel and if the aforementioned conditions are not fulfilled, or even one of them or even a part of one of them, then the qiddushin shall be cancelled and shall not take effect at all and you will not need a divorce from me nor [will you need] ḥalitsah and the wedding ring will be a [mere] gift and all the acts of intercourse that I commit with you shall be on this understanding (i.e. on the understanding that they remain subject to the conditions).

Here termination occurs on fulfilment of one of a number of conditions involving actions (or omissions) of the husband. This condition is amongst the most specific in dealing with the situation of ‘aggur, in that the marriage is terminated if “there be a quarrel between us and she sues me to judgment before a righteous bet din and the bet din make me liable

Followed by provisions for yibbum/ḥalitsah and financial provisions: “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 forfend, the betrothal shall not be effective and she will not require yibbum or ḥalitsah. Also, this marriage is on the understanding that I will be healthy and strong. If, however, an impure situation [illness] arises 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.”

On his reasons for not incorporating the conditions by reference in the oral declaration, see n.628, below.
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.” The phrase “liable in any way” may well include failure to follow even a recommendation (hamlatsah) of the bet din to issue a get, if not a mitsvah. Once the husband shows his unwillingness/disagreement, the role of the bet din is only declaratory that these factual conditions have been fulfilled. Though the termination is generated by specifically stated acts of recalcitrance by the husband (which a bet din is called upon merely to confirm), there is no specification here of the grounds for divorce, beyond the fact that there has been a marital quarrel.

3.84 In 5687 (1926/7), R. Zvi Makovsky published a paper titled *Mipney Tiqun Ha’Olam* 617 in which he proposed conditional marriage not as a communal enactment but only for specific cases where it is clear from the start that the woman was likely to become an ‘agonah because of the obvious irreligiosity of the husband (or levir). Perhaps this was in reaction to the wider scope of R. Henkin’s proposal, and the need in it for a taqannah. It also raises the question of the “target” community (although problems of *tiggun are far from the monopoly of the irreligious.

3.85 In 5691 (1930/1), R. Ya’aqov Moshe Toledano proposed 618 that a condition be made at every marriage making it dependent on the continuing agreement of the local bet din, to ensure that if it sees that he has not acted fairly with her [married her kedin vekashurah] it may retroactively annul the marriage. This clearly gives the bet din the widest discretion, in that it provides no specification of either the grounds for divorce or the behaviour of the husband which triggers the condition (other than that he acts “unfairly”). The groom states that he is marrying in accordance with the will of the contemporary local rabbinate, thus engineering a modern day (but here explicit) equivalent of the talmudic ’ada’ata derabbanan megaddesh; the criterion of the husband acting “unfairly” (lo keshurah) is very similar to the talmudic lo kehogen. The condition should be repeated at the seclusion and should be accompanied by an oath. This is in fact a condition for retrospective annulment 619

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617 Appended to the collection *Sha’arey Torah*, Warsaw, Year 17, ‘Iyyar 5687 as per Freimann 1964:392, para. 10.
618 *Responsa Yam HaGadol* (Cairo 1931) no. 74. See also Freimann 1964:391, para. 8. At the time, R. Toledano was Av Bet Din in Cairo. He ultimately became Sepharadi Chief Rabbi of Tel Aviv-Jaffa and Minister of Religious Affairs. See further ARU 18:55-56.
619 See further ARU 18:55-56, noting that the wording of this *responsa* makes it clear that the intention is not really conditional marriage but rabbinic annulment.
performed by a constitutive act of the *bet din*, the role of the condition being primarily to provide spousal authorisation to the *bet din*.

3.86 Similarly, R. Menahem HaKohen Risikoff proposed a condition making the marriage dependent on the continuing acquiescence of a *Great Bet Din* in Jerusalem, the groom declaring at the end of his betrothal formula “*kedat Moshe veYisrael ukhdat Bet Din HaGadol biYerushalayim*”, thus empowering that *Bet Din* to annul the marriage retroactively in cases of otherwise irresolvable ‘*igger*’.

E Some Drafting issues

3.87 The condition must be double, stating both the positive results of fulfilment and the negative results of lack of fulfilment, the former preceding the latter and the condition preceding the result, as in the example of Rashba’s “if I divorce you within five years, we are married; if I do not divorce you within five years, we are not married” (§3.72, above), which conforms to drafting requirements set down in the context of the debate on the drafting of Mahari Bruna’s condition. This point was debated by RR. Zevin and Uzziel. R. Zevin noted that R. Uzziel’s proposed condition did not comply with these formal requirements. R. Uzziel replied that this was no problem because the basis of his proposal was the explanation of the Rishonim that *kol hameqaddesh ada’ta*’ derabanan meqaddesh functions as an extension of ‘*al menat sheyirtseh ‘abba*’. Just as *kol hameqaddesh* does not require *tnai kafel*, etc., so too in the case of ‘*al menat shelo yimtbeh ‘abba*’. The condition is no more than “a revelation of intent”, and therefore a double condition is not required. But nothing is lost here by complying with the stricter

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620 Responsa Shul’aray Shamayim, New York 5697, ’Even Ha’Ezer no. 42, as per Freimann 1964:394. See also ARU 18:56.
621 See further ARU 19:1.
622 ARU 12:29 (Section C (ii) §LXVIII and n.140).
623 Cf. Noda’ BiYehudah I ’Even Ha’Ezer 56 s.v. ‘Venimtsa’. This, however, is problematic. In the case of conditions imposed by the Sages on all marriages one can say that, in the absence of evidence to the contrary, *kedat Moshe veYisrael* is sufficient (and even that addition to the marriage formula may not be necessary) to make the marriage conditional upon the Sages’ wishes. However, it does not follow, even in the case of ‘*al menat sheyirtseh (ot shelo yimtbeh) ‘abba*’, that the condition will operate on the basis of ‘*umdena*’giluy da’at. There is disagreement amongst the Rishonim as to whether an ‘*umdena* requiring *giluy da’at* can ever operate in the area of *gittin* and *qiddushin*. The Rema rules (’Even Ha’Ezer 42:1) that even an ‘*umdena mukhlatat* (which does not require *giluy da’at*) does not operate as regards the execution of *qiddushin*. The ’Arukh HaShul’tan (’Even Ha’Ezer 42:8,9) says that the same applies to the delivery of the get. The Vilna Gaon (Shul’tan ’Arukh ’Even Ha’Ezer 42:4) says
understanding of the formal requirements.

The full conditions are stated in the *ketubbah* (and thus not necessarily in public\(^4\)), but there are different views as to the extent to which they must be declared orally under the *huppah*. It is not unknown for documents to include fictitious recitals as to the oral speech acts which (in theory) attest. This may, indeed, be regarded by some as desirable, for aesthetic reasons, and is contemplated by R. Henkin,\(^5\) but only when the condition achieves the status of a *tnai bet din*, which would require a *taqqanah* (§6.53; see also §5.57 below). It is commonly suggested that the conditions be incorporated by reference in the oral declaration (“according to the conditions stated in the *ketubbah*”, or according to the conditions authorised by a particular authority\(^6\)), but this is rejected by R. Pipano, for whom the full condition is best uttered orally under the *huppah* in the hearing of witnesses.\(^7\) For those who insist on the latter,

\[\text{that this is a *homer* due to the gravity of matters of marriage and divorce but the *Arokh HaShulhan* (ibid., 42.10.11) argues (though in the end he is uncertain: ibid., 42.12.13) that it may well be purely halakhic because, unlike monetary matters, both the delivery of the *qiddushin* and the delivery of the *get* are ineffectual without two witnesses. This is because the witnesses to marriage and divorce are intrinsic to the legal act and without them no marriage or divorce will have taken place whereas those witnessing monetary dealings are required only for proof that the transaction did indeed take place but the transaction itself is fully valid without them. Therefore, as an *umdena* cannot be seen or heard by the witnesses it cannot have any effect on the marriage or divorce. Only an explicit condition could do this.} \]

\[\text{[According to this, an *umdena mukhatat* could still operate in cases of divorce at a stage preliminary to the delivery of the *get* (for example when the husband was dangerously ill and told witnesses to write a *get* for his wife but did not add that they should deliver it to her, where we apply the *umdena* that he did mean that the *get* should be given to her). This must be so according to all opinions because such *umdenot* in the case of *gotrin* are accepted in the Halakha without question.]} \]

In consideration of all this, it would surely have been better to construct an explicit double condition with ‘on and’im lo’.

\[\text{On the *ma'asher* regarding use of *al menat* here, see ARU 12.29 (§LXVIII), ARU 19.1.}\]

\[\text{Thus, R. Zvi Makovsky in 5687 (1926/7), in his paper entitled *Miqnei Yiqqun Ha’Olam*, appended to the collection *Sha'arey Torah*, Warsaw, Year 17, *byaar* 5687 as per Freimann 1964:392 para.10, suggests that the condition be made in the presence of the rabbi also a short while before the seclusion. Cf. *Responsa Yehaveh Da’at* (Jerusalem, 5695), sections 1-17 as per Freimann, ibid.}\]

\[\text{Perushei *Ivra* 5:24.}\]

\[\text{Thus R. Rokoff suggested *harey at* ... *kedat Moshe* *we*Israel *u*hadat Bet Din *HaGadol* *bi*Yerushalayim: see §3.86, above. And R. Henkin’s proposal would add to the formula “and according to the conditions of the enactment of the [Jerusalem] *Bet Din* [for Marriage]”: see n.497, above.}\]

\[\text{He comments that he could have simplified this wording to “Behold you are betrothed to me with this ring according to the Law of Moses and Israel provided that all the conditions written in the *qetubbah* are fulfilled (הָעָרָה לְיָיֵהוּ מֵאֵלֶּהָ הָעָרָה הָעָרָה מֵאֵלֶּהָ) but this would have lead him into areas of *ma'asher* *hafiqqin* so he preferred to keep to the straight and narrow. This, he maintains, is in accordance with the Ge’onim and many Rishonim, though Rosh,}\]
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the formula may be stated quietly, so that only the bride and the two witnesses can hear. Again, on such purely formal matters, nothing is lost by following the stricter view.

F

The halakhic status of conditions

3.89 As regards conditions which accord a role to the bet din (as opposed to the French conditions against which 'Eyn Tnai BeNissu'in was directed), we may conclude that acceptable, properly drafted conditions are effective ex post facto (bedi'avad), independent of any other solution. Against the lone view of the Rogachover Gaon, the major codes all agree that conditional nissu'in is effective.628 Indeed, the acceptability of such conditional marriage according to most posqim seems to have been recognised even within 'Eyn Tnai BeNissu'in itself.629 R. Kook630 described the effectiveness of conditional marriage as ‘obvious’ (דיון) and it is reported that Rabbi Feinstein631 found no halakhic fault in Berkovits’s arguments in its favour. This is also apparent from the number of posqim who have proposed global conditional marriage in practice (§3.82, above).

3.90 When a marriage is subject to a terminative condition, there is no (factual) certainty that that condition will ever be fulfilled; moreover, the Rambam considers any doubtful biblical prohibition as only rabbinically proscribed, so that to enter into such a matrimonial partnership would be, even according to the Rambam (who considers pilagshut, which would in his view be the result of retrospective annulment, as biblically prohibited), only a rabbinical prohibition.632 Hence, we may argue, even if the Rishonim were evenly split on the question of the permissibility of pilagshut for a layman, we would be dealing, in the case of conditional

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R. Hanan’el, Ri, R. Tam and Ran disagree. R. Abel notes that although in a case like this, where the ketubah records that the condition was made “in accordance with the condition of beney Gad and beney Reuven”, almost all agree that the actual wording spoken need not repeat the condition nor need it place the condition first and the marriage statement second (the mere written acknowledgement of the Gadite/Reubenite condition being enough) R. Pipano did not choose this path because some posqim (Maharam Padua and Ḥelqat Meḥorer) still disagree. See nn.428-430 in §3.19, above.

628 See, for example, R. Danishevsky (n.546, above). See further n.431 above.

629 See §3.35 and n.476, above.

630 See n.433, above.

631 See further ARU 5:27 (§47.21, number 4) on Responsa Bet Naflali, no. 45, part 1, s.v. Uve’emet lo’ and s.v. Wa’afla. This particular responsa was written by R. Yosef David Sinzheim, author of Yad David and head of Napoleon’s “Sanhedrin” in Paris.
marriage, with a doubt (the 50-50 split of the posqim concerning definite pilagshut) in relation to a rabbinic prohibition (the possible biblical prohibition of conditional marriage that might prove to be pilagshut) and safeg derabbanan lequla!’ How much more so is it possible to rule leniently considering that a majority of the posqim permit pilagshut. In this context (a conditional marriage not authorised by a general taqqañah), we may further argue that in she’at hadebaq, such a condition may be accepted lekhattullah.

3.91 Even if issues of authority impede adoption of terminative conditions as an independent mode of marriage termination (by act of the parties, though without a get), the role of such conditions nevertheless fortifies the authority to implement another mode of marriage termination: annulment by act of the court, also – in principle 635 with a get. That conditions may fortify remedies which otherwise may be regarded as halakhically problematic is shown by the use made of R. Yoseh’s condition by the teachers of the teachers of Me’iri in support of the kefiyeh of the Ge’onim (§§3.9-14, above). As regards haﬁqa’ah, there is an even stronger conceptual link: the view that annulment itself relies upon the theory of kol hameqaddeš, i.e. upon conditions imposed by rabbinic (or communal) authority.636 Indeed, the medieval taqqañot imposing additional requirements on qiddušin, on pain of haﬁqa’ah should those requirements not be fulfilled,637 sometimes explicitly evoke a consensual basis: the people are by such taqqañot, in effect, adopting new standard

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634 See §§2.39-41, 45, above, esp. at n.319. We may note, however, that R. Broyde writes that his proposal (incorporating conditional marriage as one element in his “tripartite agreement”) “would require acknowledgement on the part of significant halakhic authorities that even if it is not ideal (lekhatekilel), it is a halakhically satisfactory after-the-fact (bedi’ava) response to a situation”, and this despite the fact that it is premised on a “communal decree” (taqqañat hatsiḥur) of the particular community to which the couple belong (“...We both belong to a community where the majority of the great rabbis and the batey din of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me”).

635 On the question of whether annulment needs to be accompanied by a get pasul, see §§5.12, 51-54, below.

636 For Rishonim who explicitly base haﬁqa’at qiddušin on a condition, see Riskin 2002:15, esp. Maharam of Rothenburg, in Mordekhai, Qiddušin 3:522: “At the time of betrothal he did nothing wrong, and we judge him according to that time, and say that he betrothed her on condition that if he later violates a rabbinic regulation ... his betrothal will not be valid.” See further ARU 2:65-66 n.293 for the argument that the view of the Mordekhai, when analysed in its entirety, may serve as a precedent for granting communities the power to annul marriages where there are irregularities in the delivery of the get or no get is possible.

637 ARU 2:41-47 (§4.3).
conditions (tena‘in) in their own future marriages. The history itself indicates that any terms so imposed, and any powers assumed in order to enforce such terms (such as the power of confiscation of the kesef), should be made explicit in the taqkanah itself.

3.92 The history of the relationship between conditions in individual marriage contracts and standard conditions in marriage also indicates a strategy leading to a global solution. The argument of the teachers of the teachers of Me‘iri was that the Palestinian condition (of R. Yosef) was practiced not only in Eretz Israel, but was also known and used in Babylonia. Thus, the divorce clause was at first merely a matter of practice, albeit widespread. Then the decree of the Ge‘onim made it an obligatory norm, even when it was not written, thus authorising them (on the view of these teachers) to compel a divorce in all such cases. Recent papyrological discoveries indicate a similar background to the standard conditions of Mishnah Ketubbot 4:7-11.

G Strategic Issues

3.93 Proposals in modern times incorporate two distinct functions for conditions in the marriage contract. Not only may they be “substantive”, stating the circumstances in which the marriage will terminate despite the husband’s recalcitrance; they are also sometimes given the function of what we have termed “validity conditions”, stating that the marriage shall never have taken place if the halakhic validity of the substantive conditions is not accepted. We noted above (§3.74) R. Henkin’s use of this strategy.

638 Rivash, Resp. 399: “Under the law of the Torah, the townspeople may adopt enactments, regulations, and agreements, and may penalize violators ... Since the townspeople agree on them, it is as if each one of them took them upon himself and became obligated to carry them out.” See ARU 2:45 (D).

639 As in Rivash, Resp. 399. See Elon 1994:II.850-56, on annulment of marriage on the strength of an explicit enactment. On the need for explicit mention in the taqkanah of the power of expropriation (in order to effect the annulment), see Rashba, Resp. 1, 551 (at ARU 2:44 n.195); Rivash, Resp. 399 (§H) (at ARU 2:45). Though taqkanot complying with these conditions, and explicitly empowering the court to annul on the basis of heker be‘ din hekher, were increasingly discouraged (e.g. by R. Karo, Bet Yosef to Tur, ‘Even Ha‘Ezer ch. 28 (end); Rema to Shulhan Arukh ‘Even Ha‘Ezer 28:21; see Elon 1994:II.870f.; Riskin 2002:24-26), Elon finds evidence of their continuing use; see II.872-74 on 16th-17th cent. Italy and II.874-78 on R. Isaac Abulafia, Resp. Pnei Yitskh, ‘Even Ha‘Ezer no.16 (p.94d) in the 19th cent.

640 See further ARU 15:14-15.

641 See n.610, above.
3.94 R. Broide includes in his proposal two distinct conditions, one substantive, the other relating to validity. The substantive condition is:

But if I am absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (kiddushin) and our marriage (nisu’in) will have been null and void. Our conduct should be like unmarried people sharing a residence, and the blessings recited a nullity. The ring I gave you should be a gift. That relating to validity reads:

Furthermore, should this agreement be deemed ineffective as a matter of halakhah (Jewish law) at any time, we would not have married at all.

The latter, we may note, relates to the halakhic validity not only of the substantive condition but of all the elements of the tripartite agreement. This may well be helpful if it works. There is, however, a danger that it may be regarded as a condition contrary to the Torah which results, according to Tosefta Qiddushin 3:7-8, in the invalidity of the condition but the affirmation of the transaction to which it was attached ($3.6, above). Moreover, communities which reject the substantive condition are very likely also to reject the validity condition too.

3.95 R. Broide’s substantive condition also raises strategic issues. The marriage terminates on fifteen months’ continuous absence “for whatever reason” (on the grounds that “15 months is so far longer than the norm for marital absence that its violation would indicate divorce is proper”). In his book, R. Broide describes this model of marriage as “Marital Abode as the Norm”, and views it as one of five different models of marriage found in the history of the halakhah, into which it (still) remains possible for various communities to opt:

Each and every prospective couple must choose the model of marriage

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642 See Broide 2010:12.
643 Citing Hatam Sofer, ’Even Ha’Ezer 110 and 111.
644 Citing Noda BiYehudah, ’Even Ha’Ezer 56.
645 See Broide 2010:14.
646 Broide 2010:12 n.39. R. Broide includes in his tripartite agreement a commitment by the husband not to absent himself from the marital home for any (continuous) period of fifteen months and the wife accepts “subject to the condition that we are both in residence together in our marital home at least once every fifteen months”. This same fifteen month period is included in what, in effect, is R. Broide’s definition of recalcitrance.
648 See n.92 above, for the support R. Broide derives from Iggerot Moshe, Yoreh De’ah 4:15, and for the (closer) view of R. Hayyim Palaggi (19th cent. Izmir), Resp. Haskillyim VeHashalom, vol.2, no.112.
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within which they wish to live together. They codify their choice through a prenuptial agreement regarding a forum for dispute resolution, or through a set of halachic norms underlining their marriage or through both.

Indeed, the most recent text of his tripartite agreement stresses the fact that the particular community to which the couple belong endorses such arrangements:

Furthermore I recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a Get within fifteen months of her requesting such a bill of divorce. I recognize that should I decline to give such a Get for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a Get given within fifteen months. We both belong to a community where the majority of the great rabbis and the batey din of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me.

The problem with this approach (and, arguably, with any approach which specifies the grounds of divorce within the condition) is that it is limited to the particular community which accepts those grounds, and thus fails the test of a “global solution” insofar as it impedes the halakhic permissibility of intermarriage between different communities (§1.7, above). A clause which refers only to recalcitrance may be preferable, since although different communities may continue to apply different criteria for divorce, those differences will not be apparent from the face of the ketubbah, thus reducing the grounds for refusing remarriage to a woman (who may have moved across congregational boundaries) on the grounds that she is really still married. Of course, R. Brody may seek to rely, in that situation, on the validity condition (§3.94, above).

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630 See Brody 2010:14.

631 It follows from this that “irretrievable breakdown” is ultimately in the hands of the wife: if she separates and immediately requests a get she is entitled to one fifteen months later. No doubt a bet din would treat the fifteen months as the window available for attempts at shalom bayit.

632 Citing Maharam Alshakar 48.

633 Brody concedes that: “one could critique this by noting that such a community does not exist geographically” (2010:8).

634 See further §4.89, below.
Chapter Four

Coercion

A. Introduction

4.1 The dogmatic history of kefiyah has played a central place in discussion of the problem of ‘iggun, particularly where the wife claims that she cannot continue with a marital relationship with her husband on the grounds of “disgust” (me’is ‘alay). We here summarise the issues which arise in the classical mahloqet between the Ge’onim and Rabbenu Tam (§4.4), before reviewing the issue in the light of the text of the vital talmudic sugya (section B: §§4.5-9) and its interpretations by later posqim (section C: §§4.10-16). We then examine the Geonic traditions, asking what precisely they did and on the basis of what authority (section D: §§4.17-29), before reviewing the views of the Rishonim (section E: §§4.30-55) and ‘Aharonim (section F: §§4.55-72). We conclude this chapter (section G: §§4.73-94) with an overview of the issues of authority which arise in this area, in the light of both the history of the matter and the underlying policy and conceptual issues relating to the grounds for divorce and the nature of the husband’s will required for divorce. An Appendix summarises an important Tosafot which discusses Rabbenu Tam’s arguments.

4.2 It may be suggested that this whole issue is irrelevant, given the object of our enquiry, namely the search for a “global” solution, one which “ideally has the capacity to prevent the problem from arising at all, or else will resolve it in all cases” (§1.6, above). There is no guarantee that any measures of kefiyah (traditionally conceived) will resolve the problem “in all cases”: Nevertheless, our investigation serves three purposes which may contribute towards a “global” solution: first, the very concept of moredet me’is ‘alay defines the scope and limits of one of the basic underlying policy issues, that of the grounds available to a wife in seeking a divorce without the consent of her husband; second, the range of measures comprehended within kefiyah merits further study,” in case a

655 See further ARU 8:12-13 (§3.1.1-2). On the interpretation of Ketubbot 86b, Hullin 132b: “We beat him [if necessary] up to [the point] that his soul departs”, see ARU 6:16-17 (§7.7).

656 On the historical relationship between these issues, see Hadari at ARU 17:160-62: “... Whilst there are Rishonim who still view the husband as a free man in the classical tradition and thus
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form may prove available which transcends the traditional limitations; third, even if coercion cannot provide a global remedy on its own (for both practical and halakhic reasons), it may contribute to a global solution in combination with other measures.

4.3 We also have to ask a basic conceptual question: what conception of freedom of the husband’s will is to be assumed as underlying the issue of (permissible and impermissible) *kefiyah*? Rambam’s classical, and oft-quoted, explanation of "[...]

7 should immediately put us on our guard against adopting, without further thought, western secular notions of individual autonomy." Rather, the true will envisaged in the classical halakhic sources (at least up to the time of the Talmud, many of the Rishonim and indeed many later authorities preceding the *Haskalah*) is that of a faithful member of the community who has internalised Torah values, including, we would argue, those discussed above (§§1.23-25) in terms of “abuse of rights”. If his behaviour shows that he has not internalised such values, coercion is not a violation of his will, but rather a form of education. It is only when he has internalised such values, including the obligation to follow the guidance of a *bet din*, that his

believe that his coerced *יָנוּר יָנוּר* must be indicative of a true internal will (I analysed Rambam, Rashbam and Ramban), there are also those who are less concerned to preserve his autonomy, who, we might say, view his coerced consent as more similar to the coerced evidence of the slave – produced by the act of will of the *bet din*, not that of the husband. It is no coincidence that this change is roughly contemporaneous with the tightening of the grounds for *kefiyah*: so long as the action of the (coerced) husband continues to be viewed as his autonomous action, one may find more extensive grounds for coercion to be legitimate; when the husband (who we now recognise does not necessarily have the Torah education or physical and spiritual resilience that might render him a truly “free” man in the classical sense) is viewed as having had no choice about assenting to the *get*, force must be kept at an absolute minimum [...].

7 Hilkhot Gerushin 2:20: "...in the case of one whose evil inclination drives him to avoid doing a *mitzvah* or to do a sin, and was beaten until he did the thing that he was obligated to do or to leave the thing that he was forbidden to do, this [later behaviour] is not compelled from him; rather [formerly] he compelled himself out of his bad judgement (*da'ato hasakah*)." See further ARU 17:107-111; ARU 18:69-70.

See however Hadari’s discussion of Antiphon and Aristotle at ARU 17:156-59. In her discussion at ARU 17:139-41, Hadari stresses this above internalisation of substantive values, so as to explain the partial validity or effectiveness of such coerced consent even when the *bet din* has mistakenly coerced a *get*: "... because it was Jews who coerced him he did decide and did divorce ... The *bet din* in this analysis represents to the husband either Torah or the community to which he wishes to continue to belong ... He does not ever have to want to do the action (the giving of the *get*) in and of itself; he does not have to be persuaded that giving the *get* is the right, good and best thing for him to do; he simply has to want (or at least be assumed to want) to be a good Jew" (ARU 17:140-41). She notes, however, that this reading does not satisfactorily explain the Rambam’s description of what happens when gentiles coerce correctly (Hilkhot Gerushin 2:20 at ARU 17:107-08), where the Rambam does not focus on the husband’s desire to conform with the local community but rather on his desire to divorce his wife when such is the right thing to do.
willingness to resist coercion may be regarded as a true expression of his
will which, if wrongly overridden, will risk producing a get me’useh. 640

4.4 In this context, it becomes relevant to revisit the history of the matter. The
halakhic objections to the use of coercion as a solution to the problem of
recalcitrance are often viewed in terms of Rabbenu Tam’s rejection641 of
the measures of kefiyah taken by the Ge’onim against the husband of a
moredet me’is ‘alay. These objections may be summarised as follows:

(a) There is no explicit evidence for the use of coercion against
the husband of a moredet claiming me’is ‘alay in the Talmud.
(b) The Ge’onim practiced the traditional form of kefiyah
(physical coercion) on the basis of an emergency situation.
(c) Rabbenu Tam explicitly denied that coercion was
contemplated by the Talmud in such cases.
(d) Although the Ge’onim appear to have authorised coercion in
such cases, they either lacked authority to do so (Rabbenu Tam), or, even if they did possess authority, we have no
comparable authority today.
(e) While Rambam authorised coercion in such cases on grounds
independent of the Ge’onim (logical inference from the
Talmud),642 his view was not followed other than by the
Yemenite community. 643
(f) The issue cannot be separated from that of the grounds for
divorce, as is reflected in the traditional rabbinic “moral fear”
(expressed already in the Mishnah) that accepted grounds for
divorce may be misused by women who have an “ulterior
motive”: namely, that they have “cast their eyes on another
man”.

B. The Text of the Talmud

4.5 The principle of coercion was accepted already in the time of the Mishnah
in some cases where the law recognised that the woman had a right to

640 In all cases except mumarim it is generally agreed that halakhically condoned coercion by
authority of a bet din produces a valid get. This would certainly be the case where the husband
is one ‘who has internalised Torah values’. Only in the case of a mumar – who has externalised
everything Jewish – will the bet din’s coercion (possibly) produce a get me’useh according to
the Rambam. On this distinction, see further ARU 18:69–70.
641 See Sefer Hayashar LeRabbenu Tam, Ikvek haTeshuvot, 24.
642 Hilkhot ‘Ishut 14:8; see further ARU 2:32–33 (§3.5.4).
643 On the latter, see Arusi 1981–83.
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divorce: broadly, cases of “major” physical defect and malodorous occupations inhibiting conjugal relations; indeed, Mishnah Ketubbot 7:9 provides a list of cases where the husband is to be coerced: נדה ופשע נשים וגדושה. Later opinion is divided as to whether this list is now closed.

4.6

The Mishnaic institution of coercion, however, is of limited value to the ḥegal: it applies to a list of situations where the Mishnah itself recognises that the wife has a right to divorce. While the tannaitic sources already contemplate financial sanctions (in respect of the ketubbah)

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664: The bet din is not, however, regarded as having the power to coerce in every case where the husband is obligated to give a get. See Breitowitz 1993:42, on the distinction between yotzei and kofer. Cf. Zweibel 1995:154, maintaining that it is only in extraordinary circumstances, as discussed in Shulḥan Arukh, Even HaʾEzer 154, that physical force or some other form of duress may be used.


666: On expansion of the list in post-talmudic times, see Y. Sinai, “Coercion of a Get as a Solution for the Problem of Ḥegal”, in The Manchester Conference Volume, ed. L. Moscovitz (Liverpool: Deborah Charles Publications, 2010; Jewish Law Association Studies XX), 246-261, at 248-49; for the view that the categories of permissible coercion are now closed, see M. Chigier, “Rumination on the Ḥegal Problem”, The Jewish Law Annual 4 (1981), 208-225, at 213, reprinted in Women in Chains. A Sourcebook on the Ḥegal, ed. J.N. Porter (Northvale, N.J. and London: Jason Aronson Inc., 1995), 73-92, at 77, on Shulḥan Arukh, Even HaʾEzer 154 and earlier sources. See further ARU 2:20 n.84. A different view is taken by D. Villa, “Case Study Number Two”, Jewish Law Watch (Jerusalem: Schechter Institute of Jewish Studies, 2000), who, while acknowledging that the Ḥitam Sofer (Even HaʾEzer, no. 116) wrote that a divorce can be compelled only when “it is clear to the one divorcing that the compelling is valid according to all”, cites a response to this by Rabbi S-Y Cohen, “Ḥefiat haged” (1990), which quotes, inter alia, the Ḥazon Ish, Even Haʾezer 69, 23 (“The Ḥitam Sofer’s ruling cannot be upheld...”) and R. Isaac Herzog (Responsa Heikhal Yitsḥak, Even Haʾezer, part 1, no.1). But the Ḥazon Ish does not refer to that ruling of the Ḥitam Sofer, with which he agrees: see ARU 6:9-10 (§6.1). In fact, the Ḥitam Sofer (Ḥitam Sofer’s grandson) observed (Resp. 59; see further ARU 18:71 n.270) that his grandfather spoke only of equally balanced, irresolvable, debate (like Rosh v. Mordkhai) and maintained that in such cases coercion would produce a get that would be definitely invalid. However, in cases where there is a clear majority (in quantity and quality) in favour of coercion Ḥitam Sofer says that Ḥitam Sofer would agree that coercion is permitted and would produce a definitely valid get. For other Acharonim supporting the use of coercion, see Riskin, 1989:139; Riskin 2002:6f., citing inter alia R. Ḥayyim Palaggi (19th cent. Izmir), Resp. Ḥayyim Veʾhashalom, vol.2, no.112. See also §§4.55, 62, below, the latter for a modern expansion of the list by R. Feinstein.
Against the moredet (Mishnah Ketubbot 5:7; Tosefta Ketubbot 5:7), it is
only the Gemara which considers the possibility of coercion against
the husband of the moredet me is ‘alay. This was to become a major
issue between the Ge’onim and the Rishonim. Its importance for the ‘agunah
resides in the fact that any wife refused a get by her husband might well
(and sincerely) declare herself a moredet, to whom her husband is
“repulsive” (me’is ‘alay). The issues which then arise are the following:
(a) is such a wife entitled to a divorce? (b) is she entitled to a coerced
divorce? (c) what form might the coercion take? (d) what if the husband
resists the coercion?

4.7 In Ketubbot 63b, we encounter a dispute between two Amoraim regarding
both the definition and the treatment of the moredet. The definitional
problem need not here concern us. What is important is the substance.
The essential issue is as follows:

... if she says, however, “He is repulsive to me (מַאִס הָעָלָי),” [Amemar said]
she is not forced (וְלֹא שָׁלָם). Mar Zutra said: She is forced (וְלֹא שָׁלָם).

According to this, the traditional text, the issue between Amemar and Mar
Zutra is whether the wife is to be compelled back (into marital
compliance). Mar Zutra takes the view that she is; Amemar takes the view
that she is not. Are we to take Amemar to imply that she is entitled to a
divorce, even a coerced divorce? The text is not explicit. However,
recent work towards a critical edition of the Talmud text has revealed a

667 In context, this must refer to refusing sexual relations, though the Talmud discusses whether
the meridah refers to sexual relationships (แสนทรรศแบบแผน) or domestic duties ( loạtמנה).[667]
See further ARU 2:21 n.87; ARU 9:4 n.23, suggesting a move from a domestic rebellion in
Mishnah Ketubbot 5:7 to sexual rebellion in the view of Rabbotenu in Tosefta Ketubbot 5:7;
668 See sections C-E below, passim; B.S. Jackson, “Moredet: Problems of History and Authority”,
669 For a full account of the sugya, following Rashi’s interpretation, see ARU 9:8-9; the opposing
(and less systematic) interpretation, of Rabbenu Tam, is taken to be prompted by the need to
rebut Rashi’s conclusion, that the talmudic sugya already contemplates kefeah: see ARU 9:9-10.
670 Through the steady reduction of her ketubbah: the Gemara is here commenting on M. Ket. 5:7.
Amemar takes the view that the Mishnian sanctions apply only where the wife is withholding
conjugal relations “to cause him pain” (µהמיד), i.e. to put pressure on him over some dispute
between them, but without seeking a divorce, but not where she seeks a divorce because she
finds him repulsive. Mar Zutra would apply the sanctions also in the latter case. Rabbenu Tam
rejects Mar Zutra’s view and indicates that this is not the halakah: see ARU 2:32-33 n.150.
Cf. Riskin 2002:4f, noting that the halakah follows Amemar in this respect.
671 On Rashi’s interpretation of Amemar, see §4.15, below.
significant variant. MS Leningrad Firkovitch (which almost certainly comes from the Genizah MSS purchased by Firkovitch) reads:

... if she says, however, “He is repulsive to me” (א发展阶段),” [Amemar said] he is forced (בפשיטך). Mar Zutra said: She is forced (בפשיטך).

Here, Amemar takes the view that it is the husband who is coerced, which can hardly mean anything other than that he is coerced to give her a get. The final view of the Talmud on the matter, that of Rabbanan Sabora’s, is that the wife is made to wait twelve months “for a divorce (ושבעת)” during which time she receives no maintenance from her husband. This view of Rabbanan Sabora’s does not say anything explicit about coercion, but does appear to indicate that the wife who claims “He is repulsive to me” (א发展阶段),” contrary to the view of Mar Zutra, is not to be compelled back (into marital compliance) but rather is entitled to a

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672 A different variant in the text was known to some of the Rishonim: the view of Amemar is presented as בפשיטך. That would most naturally be rendered: “he is not coerced”. However, S. Friedman, “Three Studies in Babylonian Aramaic Grammar,” Tarbiz (1973-74), 64-69, has argued that בפשיטך can itself be used as the feminine preposition, in which case the variant introduces no substantive change in Amemar’s view from that in the traditional text. On this variant known to the Rishonim, see further Jackson (n.668, above), 109f.

673 The description of the Leningrad-Firkovitch MS of Ketubbot-Gittin, Preface to Masekhet Gittin (Jerusalem: Makhon HaTalmud HaYisraeli, 2000), 33, reads: “In this MS we find in the talmudic text, especially in Masekhet Ketubbot, many additions apparently made by Rabbanan Sabora’s and also the Heads of the Yeshivot which appear as “interpretations”, but there are also additions which do not appear to be “interpretations”. We have to decide into which category the present variant falls. If the former, it may be difficult to view it as providing (talmudic) support for the geonic view; rather, it may itself reflect post-talmudic innovations (such as the geonic view itself). However, the form of the variant is not here the addition of an interpretation, but rather the substitution of a different text by the deletion of the negation and the addition of a ydif to יד.


675 Friedman’s argument (n.672, above) cannot be applied to the variant in MS Leningrad Firkovitch, since to do so would eliminate any difference between the views of Amemar and Mar Zutra.

676 This is supported by Rashba, 64a, s.v. דחייה: Rashba deals with the traditional text of Amemar, and argues that its meaning cannot be coercion, since the Talmud doesn’t mention the words דחייה, but only א发展阶段. But if we assume that א发展阶段 (in which case דחייה is also included) is a different expression for א发展阶段, this reading must be interpreted as coercion of a get (but see Me’iri, 63b, s.v. דחייה, who rejects the possibility of a variant like MS Leningrad Firkovitch). For an alternative (but less likely) explanation, following Riva, 63b, s.v. א发展阶段, see ARU 9.2 n.11.

677 So Riskin, 1989:44.

678 For later interpretations, see §§4.16, 26, 31, 50, below.
4.8 The issue raised by the variant text of Amemar’s opinion may be significant for the later development of the halakhah. The Ge’onim accepted and developed the institution of compulsion against the husband of a moredet (section D, below), but their view was ultimately rejected by Rabbenu Tam. For Rabbenu Tam, the Ge’onim had no authority to go beyond the Talmud, and the Talmud referred to coercion, in the case of the moredet, only in respect of the wife, not in respect of the husband (§4.34, below). But Rabbenu Tam does not appear to have had access to this variant MS tradition.

4.9 Suppose that scholarship ultimately concludes that the variant represents the original text, so that the Talmud does (in the opinion of Amemar, which would then have to be taken into account in interpreting the final decision of Rabbanan Sabora’i) contemplate coercion of the husband? Would such an historical discovery be taken into account by the halakhah? As noted above (§2.32), views on this have differed: on the one hand, the Hazon ‘Ish was opposed to the use of new manuscript evidence for halakhic purposes (though even he does not exclude such evidence completely); on the other, the Hafets Hayyim was positive and R. Ovadyah Yosef was willing to apply in such cases here the principle of hilketa kebrita’ey. Thus, in this context, the view of the Sabora’im, Ge’onim, Rif and Rambam’s school, that a woman who declares that she can no longer abide her husband is entitled to a divorce, coerced if necessary, may be based upon an explicit ruling in the Talmud. If so, it may be argued that the opposition to Rambam’s ruling by Rabbenu Tam and many other Rishonim, who forbid the application of force in such a case and whose view was accepted as normative in the Shulhan ‘Arukh (’Even Ha’Ezer 77:2), would have been withdrawn had they been aware that Rambam’s opinion was supported by a version of the talmudic text.680

C. The Interpretation of the Talmud

4.10 The above arguments do not stand alone. They may be taken to support

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679 Nonetheless, the view that coercion was here implied is found amongst the Rishonim. Riskin, 1989:168 n.15, cites Rashi and Ritva for this view, and argues himself for such an interpretation, at 45. See also Breitowitz 1993:53f.

680 See further ARU 7:6 (§III.15), 7:24 (§V.7)
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more traditional arguments (contrary to that of Rabbenu Tam\textsuperscript{[461]}, found in the Rishonim, that *kefiyot* was already authorised by the Talmud itself in cases of *moredelet mé* is ‘alay. Particular reliance here is placed on Rashi’s interpretation” of the *sugya* in *Ketubbot* 63b.\textsuperscript{[462]} But his view on the matter does not stand alone. Recent research show that early Ashkenazi Rishonim, especially Rabbenu Gershom Me’or Hagolah, accepted the geonic tradition of *moredelet*.\textsuperscript{[463]} Rashi, who followed them in this, sought to base their tradition on the talmudic *sugya*. And Rashbam, together with some other later authorities, follows Rashi in this.\textsuperscript{[464]} Indeed, some scholars argue that the Ge’onim themselves regarded it as a talmudic law, based on the conclusion of the *sugya*: “*משנים ולתריסי הרוח שמא אנא התיר*.” This view was adopted by some Rishonim, including Rambam,\textsuperscript{[465]} who treat coercion as a Talmud-based law rather than a *taqqanat haGe’onim*.

4.11 Although Rashi has the traditional text of Amemar, he integrates into his interpretation of the *sugya* the rule that the husband must give a *get*, and appears to understand this as authorizing coercion (where necessary). In fact, although the *sugya* deals with financial aspects, Rashi mentions the existence of a *get* four times\textsuperscript{[466]} (whether requiring that it be given

\textsuperscript{[461]} Accepted by the main halakhic authorities: see E. Westreich 2002:212-218.

\textsuperscript{[462]} Ascribing this view to Rashi is accepted by many commentators, both Rishonim (*Sma*\textsuperscript{9}, Lavin 81; Ritva, 63b, s.v. *Haghot Maymoniot, Ishut*, 14: 6), and Abaronim (*Pne Yehoshua*, 63b, end of s.v *(&$$)$*), as well as by academic researchers: see E. Westreich (n.295, above) and A. Grossman, *Pious and Rebellious – Jewish Women in Medieval Europe* (Walsham: Brandeis University Press, 2004), 242.

\textsuperscript{[463]} See further ARU 9, for the detailed argument.


\textsuperscript{[465]} See also A. Grossman, *Hassidot Umordot* (Jerusalem: Merkaz Zalman Shazar, 2003), 443 n.137. Ta-Shma 2000:43 claims that Rashi normally focuses on hermeneutic rather than halakhic considerations in his commentary, but this claim is disputed by halakhic writers; see *ET*, IX.337.

\textsuperscript{[466]} See E. Westreich 2002:212; Grossman 2003:435-436.

On this view, the effect of the geonic *taqqanah* was to coerce the husband to give a *get* immediately and not only after 12 months. See Friedman, 1980:1.324-325; Y. Brody, “Kelim Hayu HaGe’onim Mehokekim?”, *Shenaton Hamishpat Hazvi* 11-12 (1984-1986), 298-300. See also Ramban, s.v *אכילה אכילה*, who ascribes the view that coercion is the Talmud’s final conclusion to some response of R. Sherira Gaon, but rejects it.

*Hilkhot Ishut*, 14:10-15.

Rashi’s commentators usually point to s.v *אכילה אכילה* as a source for coercion in his commentary (see for example Resp. Maharam, Prague Print, 946, 135a), but in fact Rashi repeats it several times: (1) 63a s.v *אכילה אכילה* (Mishnah); (2) 63b s.v *אכילה אכילה*; (3) s.v *אכילה אכילה*; (4) s.v *אכילה אכילה*. Accordingly, he views coercion as an integral part of every section of the *sugya*.
immediately, or after the mishnaic process of reduction of the ketubbah),
and this informs his entire reading of the history of attitudes to the
moredet, as reflected in the various stages which are themselves
distinguished in the tannaitic and amoraic sources.

4.12 M. Ketubbot 5:7 rules:

If a wife rebels against her husband (ר"שרהה על תפלת), her ketubbah may be
reduced by seven denarii a week. R. Judah said: Seven tropics. For how
long does he reduce it? Until the ketubbah is exhausted. Rabbi Yoseh says:
he may reduce it for ever in case she inherits property, from which he may
claim it.

The Tosefta (Ketubbot 5:7) characterises this as מתעד ראשויה, and records
that רבי יוסי changed the rule:

... (a court) should warn her (שבת ב) four (or five) consecutive weeks,
(twice a week). 690 [If she persists], even if her ketubbah is a hundred maneh,
she has lost it all.

The reform from a gradual process (which would take approximately six
months to exhaust the standard 200 denarii ketubbah) to a much
accelerated conclusion appears to correspond to a difference in the very
aim of the procedure: according to the Mishnah, it was designed to induce
the wife to end her “rebellion”; according to Rabbotenu in the Tosefta, it
functioned to bring the marital conflict to an end as quickly as possible,
even if that entailed divorce. The choice here is in the wife’s hands:
preferably she may decide to withdraw her rebellion; however, if she
insists, she is entitled to a divorce,694 but must forfeit her ketubbah. Indeed,
Rashi takes the view 695 that after losing the ketubbah the wife receives a
ger both in the mishnaic rule and in that of Rabbotenu.

690 The words “a court”, “or five” and “twice a week” are not accepted by all manuscripts of the
Tosefta, see ARU 9:4 nn.17-19.

691 In this case the husband is compelled to give a get, by physical coercion if required: see
Rambam, Ishut, 14: 8: בפתח אשתו ללא בנתה רגסה, regarding moredet ma’sa’ol.

692 As regards the Mishnah, see no.1 in n.689, above; on Rabbotenu, see no.4 in n.689, above
(which is Rashi’s explanation of Amemar, who here follows Rabbotenu: see ARU 9:§11-12
and n.62). In the view of Rabbotenu, a get is a substantive part of the rule of the moredet, as
described above. In the mishnaic process, a possible explanation for requiring a get, according
to Rashi, is on the basis of the rule (which the Bavel ascribes to R. Meir) that requires a
ketubbah to be in existence throughout the subsistence of a marriage. R. Meir in Mishnah
Ketubbot 5:1 characterises as be’ila’ znut relations between spouses where the ketubbah is
less than the standard amounts. Bava Kamma 89a interprets this as meaning: “It is prohibited
for any man to keep his wife without a ketubbah even for one hour – so that it should not be an
easy matter in his eyes to divorce her.”
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4.13 The view of Rabbotenu is also found in both the Bavli and the Yerushalmi, but with some differences. According to the Bavli (Ket. 63b):

Our Masters, however, took a second vote [and ordained] that an announcement regarding her shall be made (תבון עלייה) on four consecutive Sabbaths and that then the court shall send her [the following warning]: ‘Be it known to you that even if your ketubbah is for a hundred maneh you have forfeited it’.

The version in Yerushalmi (Ketubbot 5:7, 30b, which appears to be citing a tannaic source) is:

The later court [enacted that we] warn her (לכד ימים ארבע) four weeks (after which) she cancels her ketubbah debt and leaves ( להיכרה ממתקה).

These versions differ (inter se) in two respects: (1) the language of the Bavli is suggestive of public announcement, thus involving a process which humiliates the wife; 604 (2) it is only in the Yerushalmi that the termination of the marriage is made explicit. These differences might well be related: the Bavli appears closer, in its objective, to the Mishnah, to induce the wife to end her “rebellion”. Indeed, it might be argued that the Rabbotenu of the Tosefta still had the object of coercing the wife back into the marriage, as in the Mishnah, but by a sharper financial sanction. However, the Tosefta itself presents the view of Rabbotenu there as a “revolution” as compared to the earlier rule of the Mishnah. The version of Rabbotenu in the Yerushalmi may therefore be used to shed light on their goal and rationale in the Tosefta.

4.14 This accords with Rashi’s interpretation of the Babylonian sugya. Indeed, Rashi describes the effect of the enactment of Rabbotenu as לא ביטחה הם (we do not force her). This hardly reflects the aim of inducing the wife to end her “rebellion”. The goal of Rabbotenu, in Rashi’s view, is rather to bring a quick end to the conflict – here by accepting the wife’s demand for divorce (after trying to convince her, even by public humiliation, as in

603 See ARU 9:5-6.

604 On the replacement here of Rabbotenu by “the later bet din”, see ARU 9:4 n.17; 9:5 n.30.

605 שברתי means “writes a receipt” (shovar) for her ketubbah (see Bavli, Sotah 7a; Y.N. Epstein, Maavo Lenusah HaMishnah (Jerusalem: Magnes, 2001), 616. A parallel term in Tosefta Ketubbot 9:1 is clearer: שברתי על חומץ, acknowledging that she received her ketubbah payments, or, more accurately, cancelled her husband’s debt.

606 Warning in the Tosefta appears to be private, perhaps by messenger. On the difference between מעדין ב in the Tosefta and תבון עלייה in the Bavli, see S. Lieberman, Tosefta Ki-fiskalot (New York: Jewish Theological Seminary of America, 1967), 267; Tosafot, 63b, s.v. עלייה.
the Bavli) and “not forcing her to stay with her husband”. Indeed, Rashi thus appears to endorse the view that the marital dispute must not remain static, without any movement towards a solution, and therefore that after loss of the entire ketubbah the husband is coerced to give a get.

Hence, receiving a get is a required stage both according to Rabbotenu and according to the Mishnah, after the end of the process of losing the ketubbah. Although coercion is not explicit in Rashi’s interpretation, it appears to be required by his logic.

4.15

Turning to the Amoraic stratum in the talmudic sugya, we encounter the same tension regarding the basic objective of the halakkah. Both Amemar and Mar Zutra follow the Mishnah regarding moredet. As Rashi puts it: המדרת נפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנמשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשו הנפשוProjection error:
4.16 The final (amoraic or even saboraic\textsuperscript{706}) stratum of the talmudic sugya rules:

We also make her wait twelve months for her divorce, and during these twelve months she receives no maintenance from her husband.

Its exact meaning is a matter of great dispute between talmudic interpreters, following the basic attitude of each commentator to the interpretation of previous stages of the sugya. The Ge’onim, according to Brody, referred to this passage as a late talmudic taqkanah, which determined coercion after 12 months of meridah, whereas the Ge’onim themselves applied coercion immediately.\textsuperscript{80} Rashi does not mention coercion explicitly at this point, but rather deals with the timing of the rule of moredet.\textsuperscript{81} However, we may assume that since coercion is an integral part of his interpretation of the rest of the sugya (and thus of the Talmud’s presentation of the earlier development of the halakhah), Rashi must understand coercion of a get at this stage as well.\textsuperscript{83} In his view, the final talmudic conclusion delays coercion for 12 months in a case of moredet me’is ‘alay.\textsuperscript{84} Rashi thus appears to accept the view that coercion is implied here, a view that is shared by the Ge’onim and some other Rishonim.\textsuperscript{85}

D. The Ge’onim

4.17 When we turn to the measures introduced by the Ge’onim, we are faced by a series of questions which continue to inform discussion of the problem of the ‘agunah, even if it is no longer possible simply to revert to the positions which the Ge’onim adopted: first, the precise circumstances in which they were prepared to exercise kefiyah against the husband of a moredet (§4.19); second, the form(s) of kefiyah they were prepared to apply (§§4.20-24); third, the authority on which their measures were based (§§4.25-29).

4.18 The classical account of the matter is provided by Rav Sherira Gaon, who

\textsuperscript{706} See Friedman, 1980:323 n.37.
\textsuperscript{707} See n.687, above.
\textsuperscript{708} See Rashi, 64a, s.v. פלגי עבירה and s.v. עבירה.
\textsuperscript{80} See ARU 9:12-14.
\textsuperscript{81} Cf. E. Westreich 2002:211f., citing Rashi, Ketubbot 63b, s.v. אשת חלושה מעבר פלגי עבירה.
\textsuperscript{82} Riskin, 1989:168 n.15, also cites Ritva (see Ritva, Ketubbot 63b, s.v. אשת חלושה מעבר פלגי עבירה): “Rashi and Ritva so understand this case.” For other Rishonim who agreed with Rashi, such as Rabbeinu Gershom and Rashbam, see ARU 9:2-3, nn.3-4.
was asked about the position of “a woman [who] lived with her husband and told him, ‘Divorce me; I do not wish to live with you’.” In his teshuvah, 706 R. Sherira sets out the history of the matter:

The law originally provided that a husband is not compelled [literally, the bet din “do not oblige” (יְבֵית דִּין) him] to divorce his wife when she demands a divorce, except in those instances where the Sages specifically declared that he is compelled to divorce her.

Thus the mishnah rishonah of Ketubbot 5:7 is taken not to have entailed kefiyot even once the ketubbah was exhausted. Moreover, R. Sherira appears to take the procedure of Rabbotenu in T. Ketubbot 5:7 as not necessarily involving total loss of the ketubbah:

Afterwards, another taqganah was enacted, which provided that a public proclamation should be made concerning her on four consecutive sabbaths and that the court should inform her: “Take notice that you have even forfeited one hundred maneh of your ketubbah ...”

The next stage,” for Sherira, was full forfeiture of the ketubbah, but even this, in his view, did not involve coercion:

Finally, they enacted that public proclamation is to be made concerning her on four sabbaths and she forfeits the entire amount [of her ketubbah]; nevertheless, they did not compel the husband to grant her a divorce.

For Sherira, it was the Babylonian Talmud which introduced coercion, after the twelve month waiting period:

They then enacted that she should remain without a divorce for twelve months in the hope that she would become reconciled, and after twelve months they would compel her husband to grant her a divorce ....707

But the Ge’onim, he indicates, were willing to go further, both in relation to the wife’s right to parts of her ketubbah in such circumstances and in abolishing the waiting period:

706 Teshuvot HaGe’onim, Sha’are Tsedekh, Vol. 4, 4:15. Translation quoted here from Elon 1994:II.659; cf. Riskin, 1989:56-59, for full Hebrew text and alternative translation. See also ARU 15:8-9; G. Libson in Hecht et al. 1996:235-238 (“The taqganah of the Rebellious Wife”). Sherira does not appear to be aware of the version in the Yerushalmi (§4.13, above) which concludes: “וְהֵן אֱמָתָה יִהְיוּ בְּגֵינוֹן וְתִמְרְדוּ נִפְלָתָם מִיָּדָם וְאַל יַגְּלֵיוּ הַיָּמִים צֵדָה גֵלָלָה מְרַגְּמָה וְעַד כְּלִיל הַיָּמִים שְׁעַרְתוֹ בְּמַגְּלִיהֶם: “It is clear that R. Sherira Gaon interprets the final statement of the Talmud, “and we make her wait twelve months...,” to mean that the husband is forced to grant his wife a divorce at the end of the twelve-month period, even against his will.” See also Elon 1994:II.660 n.68, citing also Ramban, Hilkhot Ketubbah, ad loc., for Sherira’s view, but noting that according to other commentators the talmudic rule was only that the husband was legally obligated to divorce after 12 months, but no judicial compulsion was applied to enforce that obligation.
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... After the time of the Savoraim, Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands (shebnot yisrael holkhon ventilot bagoyim liyot lahen gittin be’ones mi’ba’alehen); and some husbands, as a result of force and duress, did grant a divorce that might be considered coerced and therefore not in compliance with the requirements of the law [as under the law one may not use duress except in certain specified circumstances]. When the disastrous results became apparent, it was enacted in the days of Mar Rav Rabbah b. Mar Hunai that when a moredet requests a divorce, all of the guaranteed dowry that she brought into the marriage (nikksei zon barzel) should be paid to her – and even what was destroyed and lost is to be replaced – but whatever the husband obligated himself to pay [beyond the basic ketubbah amount], he need not pay, whether or not it is readily available. Even if it is available and she seizes it, it is to be taken from her and returned to her husband; and we compel him to grant her a divorce forthwith and she receives one hundred or two hundred zuz [the basic ketubbah amount]. This has been our practice for more than three hundred years, and you should do the same.

4.19 No explicit indication is given here of the grounds on which the woman is claiming to be a moredet, but we may safely assume that if she is prepared to seek the use of force from the non-Jewish authorities (or even, as an anonymous 13th-cent. responsum indicates, to resort to either prostitution

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709 Similar language is used by R. Mesharshyha in Gitin 88b in relation to recourse to gentile courts: “According to pure Torah law, a get coerced by gentiles is valid, and the reason why they said that it was invalid was so that each and every woman should not go attaching herself to gentiles and releasing herself from her husband”. (Abarbanel: Gitin 88b). It has been suggested that the reference here may be to the use of gentile thugs, a practice attested in the responsa of Rashba: see Yom Tov Assis, “Sexual Behavior in Medieval Hispano-Jewish Society,” in Jewish History, Essays in Honour of Chimen Abramsky, ed. A. Rapoport-Albert & S.J. Zipperstein (London: Halban, 1988), 25-59, at 36, citing L. 73. On the possible background in Islamic rules regarding the status of marriages of converts and the effect of conversion on antecedent marriages, see ARU 2:26-27 (§3.4.3), ARU 8:19-20 (§3.4.1), citing al-Maliki: “… If two unbelievers become Muslim, they are confirmed in their marriage, but if only one becomes a Muslim, then this is annulment without divorce.” However, the references to apostasy in this context may refer to the halakhic tradition which maintains that apostasy annuls an earlier Jewish marriage; see Rashi, according to Maimonides Hilkhot 203 and discussion at ARU 5:28 (§21.2.1), noting that “R. Babad refers to the ‘niqpat ge’onim’ – a minority of the Babylonian Ge’onim – who maintained that an apostate is treated by Torah law as a gentile so that his marriage is void”- see also Ohel Moshe II 123, discussed at ARU 5:31-32 (§21.2.6.1.3); ARU 5:21 (§19.2.1), ARU 5:37 (§21.2.6.7.1) on Maharsham. Some later views, however, deny that conversion to Islam is apostasy. See ARU 5: 40-41 (§21.2.6.11.3), on the view of Hayyim shel Shalom II 81. E. Westreich, 2002:217, maintains that me’is ‘alay could be a plea in Islamic courts, which had a similar remedy (thus supporting the view that the threat in Geonic times was recourse to Islamic courts).
or apostasy"), this is a case of me’is ‘alay rather than ba’ena leh. This, indeed, was the view of R. Zerayyah Halevi in the Sefer HaMa’or.

4.20 What exactly is meant by R. Sherira’s “we compel him to grant her a divorce forthwith” Kofin normally refers to physical coercion: thus, the husband is coerced (beaten) into writing (or authorising the writing, and delivery) of the get. On this formulation there is no suggestion that the court itself takes over any of the required formalities. What, then, if the husband resists the coercion? Nowadays, it is assumed that this is the end of the matter. The case of the recalcitrant husband who preferred to spend 32 years of his life in an Israeli jail, and die there, rather than release his wife, is often cited.

4.21 Yet there are hints also of the use of different measures in some geonic sources. Rav Yehudai Gaon, Head of the Academy of Sura, c.760 C.E., mentions the use of a herem against the husband: “When a woman rebels against her husband and desires a divorce, we obligate [the husband] to divorce her, and if he does not do so we place him under the ban until he does it.” According to the Halakhot Gedolot (ascribed to Rav Shimon Kiara, 9th cent.): “... we grant her a bill of divorce immediately (רבי יוחנן) and do not [publicly] proclaim against her for four

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710 Quoted in Riskin, 1989:52f. See ARU 2:27 (§3.4.3).
711 Quoted in Riskin, 1989:86f. See ARU 2:27-28 (§3.4.3).
712 Cf. Mishnah Gittin 9:8 (88b): “A bill of divorce given by force (get me’aseh), if by Israelitish authority, is valid, but if by gentile authority, it is not valid. It is, however, valid if the Gentiles merely beat (isvin) the husband and say to him: ‘Do as the Israelites tell thee.’”
713 Jerusalem Post, February 22nd 1997, cited by Brody, 2001:156 n.23. R. Brody regards this as representing “the basic success of the system, not its failure” (at 51). See further ARU 2:25 n.106.
714 See Riskin, 1989:47f. Rabhenu Tam took the view that a herem is in fact more severe (and thus, in his view, objectionable) a measure than physical coercion: “If someone would wish to say that we do not force him by means of whips but by decrees and excommunication ... excommunication is more severe than stripes, and there is no coercion greater than that!” See Riskin, 1989-98 (Heb.), 102 (Engl.). See also R. Henkin’s reference to a herem of the kudmonim, that a man should not make his wife an ‘aghunah (§2.42 above).
The use of plural verbs in these sources (נוהרים, ומדברים), suggesting the possibility  that the get is here effected by an act of the court rather than the husband, becomes more explicit still in an anonymous 13th-cent. responsum, which uses the expression: “they wrote her an immediate bill of divorce” (הכתב לה תרשafa מהאלה). 4

4.22 A more explicit expression of the precise nature of the remedy granted by the Ge’onim to the moredet is found in Shut haRosh, 43:8 (p.40b):

... And they enacted that the husband should divorce his wife against his will when she says: I do not want my husband ... For they relied on this [dictum]: ‘Everyone who betroths, does so subject to the will of the Rabbis’, and they agreed to annul the marriage (ותמססת עלב אפשעה הקדימה) when a woman rebels against her husband.

We may note that the Rosh’s own teacher, the Maharam of Rothenburg, cites the responsum of R. Shemuel b. Ali (quoted in §4.21, above), which uses the plural formulation אוף נְאַיָּה לָהּ נַאַלְאֵדָה. The Rosh thus appears to have interpreted the Geonic practice not as coercion but rather as annulment (הافة’עא at qiddushin).

4.23 Doubts have been raised as to whether we may consider the view of Rosh as an historically accurate account of the geonic remedy, rather than as an anachronistic justification (in the light of the later rejection by Rabbenu Tam of the kefiyah of the Ge’onim) for an earlier halakhah. Here, we

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706 Riskin, 1989:62f. This ruling of R. Shemuel ben Ali is quoted in the responsa of Maharam of Rothenburg (the teacher of the Rosh), no.443, in Hebrew: תולהי לי מע דעל; though in the Prague edition of this responsa the ruling is quoted in the name of R. Sherira Gaon). See also Mordechai A. Friedman, Ribay Nashim beYisrael (Tel Aviv: Bialik Institute, 1986), 15 n. 44c; Goldberg and Villa 2006:274 n.570.

707 See, however, Dr. Westreich at ARU 15:9-10, noting the plural also in the talmudic formulation אוף נְאַיָּה לָהּ נַאַלְאֵדָה (see 4.10, above) and the presence of this same form (תולהי לי מע דעל) in the Halakhot Gedolot (ט”כ חט ה”), and arguing that the plural is purely stylistic. He notes also a mixture of singular and plural formulations in Shut Maharam meRothenburg (Lemberg ed., 443; Prague ed., 261), but this may reflect a desire of Maharam to acknowledge the different formulations found in the geonic sources themselves.

708 Riskin, 1989:52f.

709 See also Riskin, 1989:125 (Heb.) 126f. (Eng.), and Riskin’s own comments at 129; Breitowitz 1993:50f. n.135, 53.

710 M. Shapiro, “Gerushin Begin Me’isah”, Diné Israel II (5731), 117-153, at 140-42, notes that the Maharam, in his younger years, disallowed coercion in cases of me’is ‘alay but later reversed his position and permitted it.

711 See ARU 15:6-12, 21-23. M.S. Berger, Rabbinic Authority (New York and Oxford: Oxford University Press, 1998), 72 n.72, seeks to consign this remark to “the realm of legal theory”, noting that the Rosh, here and elsewhere, speaks in terms of coercion of the husband to give a
may note, Rosh appears to claim (unless his language is to be taken as either polemical or rhetorical) that hafaq’ah\(^{722}\) was used by the Ge’onim in practice.\(^{723}\) Yet elsewhere, Rosh reverses the argument, and shows a preference for coercion over hafaq’ah in a case clearly closer to the circumstances where hafaq’ah is discussed in the Talmud than to the moredet me’is ‘alay. In Shut haRosh, 35:2, we read:

But if it looks to you my masters who are close to this matter, that the betrothing man is not an appropriate and decent person in order to marry this girl of good descent, and that he has persuaded her by fraud and cheating, and that it is reasonable to compare [this case] to the case of Naresh (Yevamot 110a) where we learned that since it (the betrothal) was done improperly (רובא יבומ) [the Sages] annulled the betrothal – [then in the case of] this [person] as well, who acted improperly, although we would not annul the betrothal, nevertheless we should follow in this case the view of a few of our Rabbis who ruled in the law of moredet that [the bet din] should compel him to divorce her.

The case is compared to that of Naresh, in which the talmudic Sages annulled the betrothal. In principle, for Rosh, the betrothal might be annulled here as well, although no get was given. However, Rosh was not willing to apply annulment here, but rather preferred coercion. His precise reasons for this are not clear. We may note the following (complementary) possibilities:

(a) He regarded the case here discussed as less radical than the kidnapping of the betrothed girl from her former “husband” in the case of Naresh. Moreover, here there could be no suspicion of notenet eynehah be’alpher.\(^{724}\)

get. Yet the fact that he himself endorsed, on one occasion (35:2, quoted in the text below) a traditional form of coercion makes his account of the geonic practice all the more striking. R. Broyde 2001:19-20, 60-61, 160 n.3, seems to accept the view of the Rosh as historically correct, maintaining that if the husband refused to divorce his wife and coercion was not possible, the marriage could be annulled even without compelling him to give a get (“Indeed, the Ge’onim devised a mechanism to ensure that if [marriage] did end: this appears to be annulment, or coercion to divorce even in the absence of fault”; ibid., 19). Nevertheless, R. Broyde is not willing to adopt this view for practice today; see ibid., 20: “such annulments remain a dead letter in modern Jewish law”; 61: “…there are nearly insurmountable halachic objections to a return to halachic rules that have not been normative for 800 years”.

On whether, for Rosh, it needs to be accompanied by a coerced get, see ARU 15:21-22.

Indeed R. Ovadyah Yosef in Torah Shebe’al Peh (5772:101) writes that we may use this as part of the basis for annulment even today. See further ARU 18:51.

ARU 15:11 n.45. Dr. Westreich offers (at ARU 15:12) the following explanation of the relationship between the two responsa: “Thus, integrating Rosh’s two respona (35:2, which exceptionally authorises coercion, and 43:8, which explains the Geonic moredet on the basis of annulment) produces the following explanation: Moredet is partially based on annulment (specifically, in terms of the authority for it), but the procedure includes a coerced get. Since it
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(b) He uses sfeq sfeqa: one sfeq is whether the marriage is annulled like Naresh; another is whether, if not, we can rely on Rambam’s coercion for me’is ‘alay.

(c) Rosh in fact explicitly avoids the practical implementation of hafqa’ah (lema’aseh), but does not reject it in principle (lehalakhah).\(^{725}\)

4.24 On this analysis, Rosh rejects hafqa’ah except where it is clearly within the scope of the talmudic precedents, and rejects the Geonic application of kefiyyah in cases of moredet me’is ‘alay (at least without the 12-month talmudic waiting period), but grants a form of kefiyyah (apparently that of Rambam) in a case analogous to that of one of the talmudic precedents for hafqa’ah. Taking the two teshuvot together, we may conclude that Rosh does not treat hafqa’ah and kefiyyah as entirely separate remedies. His understanding that this (35:2) is a situation close to those in the Talmud where hafqa’ah is used provides support for his conclusion in favour of (the less radical) kefiyyah. This amounts to an endorsement of the view that hafqa’ah remains possible in post-talmudic times if accompanied by a coerced get.\(^{726}\)

4.25 Similar questions arise in relation to the view of the teachers of the teachers of Me’iri, that the geonic measures were based on the presence of the tna’i of R. Yoseh in the Yerushalmi in the ketubbot of the geonic period (§§3.9-15, above), and indeed the claim of Ra’avya to have examined a ketubbah that was brought from Eretz Israel and contained a divorce stipulation similar to the divorce clause in the Yerushalmi (§§3.10, 15-16, above). That view, we concluded above, may itself have been anachronistic. Even so, it illustrates again the weak dividing line between hafqa’ah and kefiyyah. For what is added by the teachers of Me’ir’s teachers is not merely a further (“voluntarist”) legitimation of a non-standard form of marriage termination; there is also a substantive element, the possibility (derived from the unusual language of the Genizah ketubbot) that we have here a form of prospective annulment (§3.70, above). That, indeed, would explain the otherwise arbitrary use by


\(^{726}\) See also ARU 15:21-22, and §5.72 below, esp. R. Yosef, cited in n.1167, below.
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the Rosh of the language of ḥafqa‘ah in relation to the kefiyyah of the Ge’onim, for kefiyyah (in its traditional sense of a coerced get) is indeed a form of prospective termination of marriage.

4.26 R. Sherira Gaon very clearly takes the Talmud itself to have enacted kefiyyah for a moredet me‘alay, and explains the geonic measures as having abolished the 12-month waiting period and as having improved the woman’s financial position (§4.18, above). That the basic principle is talmudic is affirmed also by both Rashi, Rambam and other Rishonim.

4.27 It is in relation to the abolition of the 12-month waiting period and the improvement of the woman’s financial position that R. Sherira Gaon uses the language of rabbinic taqganah (םרגנה), and explains it on “emergency” grounds, speaking of the “disastrous results” of the fact that “Jewish women attached themselves to non-Jews to obtain a divorce through the use of force against their husbands.” According to those who understand this 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. In the Sefer HaMa’or of R. Zerahyah Halevi, written between 1171 and 1186, the Geonic decree (taqganah) is attributed to the Rosh similarly claims that “there was a temporary need in their day to go beyond the words of the Torah and to build a fence and a barrier” (םרגנה הוא-lenペンתרThanOrEqualToבריה, תלמודי ההלכה למעלה), and regards it as a temporary measure. Ramban, on the other hand, maintained that “in truth they decreed for [all] generations.” Against the weight of this authority, it may appear somewhat surprising that Rabbenu Tam (if

728 See §§4.10-16, above.
729 §§4.32, 4.40, below.
730 See Tsits Eliezer 5, 26, as discussed at ARU 5.17 (§12.2.12), on the Mordekhai and Tosafot Rid. For the contrary views of Ramban and Rashba, see §4.31, below. On the wide range of opinions on this point, see E. Westreich 2002:212ff., and the summary at ARU 22:182-83 (§6.52).
731 §4.18, and see n.709, above.
733 See ARU 2:27-28 (§3.4.3).
735 Milhemot on Rif, Ketubbot 27a, quoted by Riskin, 1989:112.
indeed he had direct access to the works of the Ge’onim\(^{736}\) pays no attention at all to the argument from the days of the Talmud.\(^{737}\) It has, however, been observed that this is a general characteristic of Rabbenu Tam’s halakhic writing: he “never utilizes the argument that the conditions have changed since the days of the Talmud.”\(^{737}\)

4.28 We have observed the view attributed to the teachers of Me’iri’s teachers, that the geonic kefiyah was based on the tna’i of R. Yoseh,\(^{738}\) and thus that a preliminary agreement was regarded as able to dissolve later problems of get me’useh, even when divorce was initiated solely by the wife.\(^{739}\) The language used there clearly indicates that regular use of particular clauses in a ketubbah\(^{740}\) was regarded as capable of establishing a minhag\(^{741}\), such that the clause ultimately assumed the status of a tna’i bet din: הקנתה לשלוחים אב להדיע את המיסוך של חובה להIndexChanged, even where they no longer accept it.\(^{742}\)

4.29 The combination of forms of authority attributed to the geonic measures – talmudic interpretation, taqkanah and tna’i – might appear to provide a unique blend of institutional and voluntarist legitimation. But before concluding that this might prove a suitable model for the contemporary situation, we need to reassess the dogmatic status of such a combination in the light of the views expressed by the Rishonim and ‘Aharonim.

E. The Rishonim: kefiyah for the moredet me’is ‘alay

4.30 There are differences amongst the Rishonim on both what precisely was

736 Riskin, 1989:113, notes that the original decrees of the Ge’onim were apparently not available to Ramban, and that Rashba, too (ibid., at 118ff), mistakenly denied that the practice of the Ge’onim was based upon interpretation of the Talmud. This might appear to justify application of the discretion conferred by Rema’s qualification of hilketa kebatra’ey.

737 For the view that Rabbenu Tam “never utilizes the argument that the conditions have changed since the days of the Talmud. He rather chooses to resolve the problem by presenting new interpretations to the statements of the Talmud . . .”, see S. Albeck, “Yahaso shel Rabbenu Tam LeVa’ayot Zemano”, Zion 19 (1954), 104-41, quoted by Riskin, 1989:108; ARU 2:28 n.125. But the matter is disputed. See further Ta-Shma 2000:76-92.

738 See §3.9 above.

739 See further ARU 15:23.

740 See ARU 2:29-30 (§§3.5.2) for Rabbenu Tam, Rambam (in relation only to the financial provisions) and Rosh, and further §4.32 on the contrary attitude of Rabbenu Tam to the status of such minhagim.
the innovation introduced by the Ge’onim, and on the authority by which they did it (section E1). Different positions are attributed to Rabbenu Tam – not only on kefiyyah but also on ḥiyuv (section E2). Rambam, though not following the Ge’onim, accepted kefiyyah (section E3), and his view has survived in some communities (section E4). However, the view that Rabbenu Tam completely rejected kefiyyah (though not ḥarkaqaṭ) in the case of the moredet meʾis ‘alay is widely followed by later posqim (section E5). A mediation between these views has emerged, introducing the concept of amatlah as supporting a plea of moredet meʾis ‘alay (section E6). This latter development (in common with analysis of the different positions attributed to Rabbenu Tam) shows that the issue is not confined to “remedies”; it also entails the basic question of the permissible grounds for divorce.

E1. The Rishonim on the authority claimed by the Geʾonim

4.31 Despite the explicit statement of R. Sherira that already according to the Talmud, “after twelve months they would compel her husband to grant her a divorce”, Ramban appears to believe that it was the Geonic decree which introduced the coerced bill of divorce. Rashba also appears to deny that the practice of the Geʾonim was based upon interpretation of the Talmud: “And one should not bring a proof from the words of the Geʾonim … because they all said that they do not force him to [divorce] her according to Talmudic law [but rather according to the specific decree of the Geʾonim] as Rashi … wrote …”. Of course, a geonic understanding that “they do not force him to [divorce] her according to Talmudic law” need not mean that the Geʾonim denied that the Talmud endorsed kefiyyah (that would contradict the words of R. Sherira); it need only mean that Talmudic law did not endorse immediate coercion, and it was this – abolition of the 12-month talmudic waiting period – which the Geʾonim enacted. This is precisely the issue on which the texts of Rabbenu Tam are inconsistent.

4.32 Other sources speak of the Geonic practice in terms of minhag. Rabbenu

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541 Reflecting different interpretations of what was already authorised by the Talmud: see §§4.10-15, 26-28, above.
542 See §§1.29-35, above.
543 See §4.31, above.
544 Riskin, 1989:113, observing that the texts of the original decrees of the Geʾonim apparently were not available to Ramban.
545 Riskin, 1989:118f.
546 See §§4.33-34, below.
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Tam views this as illegitimate:

And if we have learned [the rule] that custom may overcome a law, God forbid that [this should apply in a case which involves] a ritual prohibition, [the penalty of] strangulation, [the penalty for adultery], and the [birth of] illegitimate offspring.

On the other hand, Rambam rejects the force of any such geonic custom (though he regards this as relevant only to the financial provisions of the Ge’onim) not on the grounds that it wrongly trespassed into the field of 'issura, but rather because it had not spread sufficiently:

And the Ge’onim said that in Babylonia they have other customs concerning the moredet, but these customs did not spread to the majority of the Jewish people (יוסף נויר והלאה), 19 and many and great people (רביבא, רבינא) disagree with them in the majority of places (ברוב בהרי). And [it] is proper to hold by and to judge in accordance with talmudic law [and not Geonic decrees].

Although Rambam here respects the objections of “many great scholars” (יוסף נויר והלאה) to the geonic position, we may note that he does not here adopt a criterion of consensus; rather, he looks to the “majority” (רביבא) of communities and of scholarly centres. Rashba is also concerned with the “spread” of the Geonic practice (here referring to the practice of kefiyah, described as taqguanah rather than minhag), claiming that “their decree did not spread in our countries at all (לא נפשא ארצותינו בכרות התנאים מלין).”

Rosh, moreover, accepts that such custom may retain some validity even in his own day. In one responsum he advises:

If [her husband’s] intent is to “chain” her, it is proper that you rely on your custom at this time to force him to give an immediate divorce.

This is a remarkable conclusion, given the overall view of the Rosh, who followed Rabbenu Tam and regarded the practice of the Ge’onim as a

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747 Riskin, 1989:98 (Heb.), 101 (Engl.).
748 Riskin, 1989:99, however, points to the testimony of R. Shemuel ben Ali that the Geonic decrees were normative practice throughout Babylonia during this period.
750 Klein’s translation, in the Yale Judaica Series translation.
751 Resp. 572, 573 in Bnei Brak ed., 1948, Pt.1, p.215, quoted by Riskin, 1989:114 (Heb.), 116 (Engl.). See also Elon 1994:II.664 n.84, noting that Rashba also wondered whether the Ge’onim “enacted it only for their own generation”.
752 Resp. 43:8, p.40b, Riskin, 1989:126 (Heb.), 128 (Engl.), and see further §§4.22-246, above. Rosh says that in this case the brother of the woman claiming me’is ‘alay told him that she gave reasonable bases for her rebellion. Cf. Breitowitz 1993:48 n.129, 155.
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temporary necessity. Indeed, even in a case involving a violent husband, he refuses to go beyond the cases of kefiyah found in the Talmud.

E2. Uncertainties in the Position of Rabbenu Tam

4.33 While for the most part rejecting the continuing validity of the Geonic decrees, the Rishonim were far from agreed on where this left the authoritative halakhah. The predecessors of Rabbenu Tam had largely favoured unilateral divorce for the wife who claims me’iš ‘alay, as we see from Raban, Alfasi and Rashbam. It was, however, the view of Rabbenu Tam (R. Jacob b. Meir, France, 1100-1171, the younger brother of Rashbam) which was ultimately to prevail:

And that which Rabbenu Shemuel [Rashbam] wrote – that the Ge’onim decreed that we do not delay twelve months for a divorce but rather, they

753 Elon, 1994:II.665, comments: “One may deduce from this decision that Asheri placed primary emphasis on his second reason [for rejecting the geonic enactments, namely that the circumstances of the time had changed], and he therefore permitted the enactment to be applied, when appropriate under the circumstances, in those places that had been following it.”

754 Responsa, Kelal 43:3, where the wife claimed: “...that her husband is crazy and his stupidity increases day by day so she requests that he divorce her before he becomes totally mad and she would then be an ‘agunah for ever ... he is utterly crazy and she is afraid that he might kill her in his anger because when people anger him he strikes and kills and hurls and kicks and bites ... Re’even counters that ‘You knew him beforehand and you considered and accepted. Also, he is not crazy but merely not well-vershed in worldly conduct and he will not divorce you unless you return the books or their value and then he will divorce you.’ [Reply] I do not see from their claims anything for which it would be fitting to coerce him to divorce because one cannot add to that which the Sages enumerated in Chapter HaMaddir (77) ... Therefore, she should persuade him to divorce her or she should accept him and be sustained from his properties”: see ARU 12:4/ARU 18:72, based on Bass, Gerashin.

755 For a summary, see ARU 22:183 (§6.53).


757 Rif, Ket. 26b-27a: “But nowadays, in the court of the Academy, we judge the moredeh in such a way: When she comes and says: ‘I do not want [to remain married to] this man, give me a bill of divorce,’ [he is made to] grant her a divorce immediately”, quoted by Riskin, 1989:64 (Heb.), 65 (Engl.). It is clear that Alfasi contemplates coercion (kofin) in such cases. The passage concludes: “And according to all [authorities], anyone whom we forced to divorce [his wife], either according to Talmudic law, as we learn in the mishnah, “These are those who are forced to divorce,” and similar cases [gross physical afflictions], or according to the Geonic decree, if the woman dies before she is given a bill of divorce by her husband, her husband inherits her [property] because the inheritance of the husband is not canceled without a complete divorce, and this is the law.” See also Riskin, 1989:85f.; E. Westreich 1998:128f., 2002:209f. Elon, 1994:II.664 n.84, cites the view of the Rosh that those who followed the view of the Ge’onim on compulsion did so not because they had accepted the tappanot of the Ge’onim, but rather because the enactment is recorded in Alfasi’s code.

758 See Riskin, 1989:93. Riskin comments that the “atmosphere among the early Franco-German leaders seems to have been one which was sensitive to the needs of the woman, and which therefore upheld the Gaonic decree (although there were still those who maintained that the divorce was Talmudically based).” On the early Rishonim who followed the Ge’onim, see also the secondary literature cited at ARU 9:1-2.
force him – far be it from our teacher to increase the number of mamzerim in Israel. We hold the halakhic principle that Ravina and Rav Ashi are the last authoritative halakhic decisors, and even were the Ge'onim able to decree that a woman could collect her alimony from movable property, whether it be on the basis of Talmudic law or their own reasoned judgment, that is only as far as monetary value is concerned. But as for permitting an invalid bill of divorce (نةב אילות), we have not had the power to do so from the days of Rav Ashi [nor will we] until the days of the Messiah. And this is an invalid bill of divorce. After all, we learned in the Talmud that [the Sages] did not force a divorce until twelve months, and they [the Ge'onim] advanced the forcing of the divorce before [the time which] the law [allows].

Here, we may note, Rabbenu Tam clearly accepts that coercion after 12 months was authorised by the Talmud. What he here rejects is compelling such a get within 12 months, and this he classifies as 'issura.'

In another passage of the Sefer HaYashar, however, Rabbenu Tam denies that kefiyot against the husband was authorised by the Talmud at all: the Ge'onim had no authority to go beyond the Talmud, and the Talmud

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759 Sefer Hayashar leRabbenu Tam, Resp., ed. Rosenthal, #24 (p.40), quoted by Riskin, 1989:97 (Heb.), 98f. (Engl.), Elom 1994:II.661f. On the difficulty that Rabbenu Tam’s apparent claim in this passage is consistent with the position of Rashi (his grandfather), see ARU 5:17 (§12.2.12 n.57); ARU 6:10 (§6.4). On this passage, see also Reiner 2009:306.

760 Elom 1994:II.662, claims, however, that “most halakhic authorities held that the Ge'onim did have authority to legislate even on matters of marriage and divorce, and even to adopt enactments that deviated from Talmudic law”, though adding that most of these authorities nevertheless held that the geonic enactments concerning divorce for a moredet should not be followed. Cf. II.665: “The majority view is that the legislative power of the Ge'onim was not limited to monetary matters (as Rabbenu Tam held it was), but was fully effective even with regard to marriage and divorce.” With Rabbenu Tam’s approach, contrast particularly that later expressed by Ramban (but sometimes attributed to Rashba: see further ARU 8:23 n.140): “Heaven forbid I should dispute a decree of the Ge’onim, for who am I to dispute or to change that which the Ge’onim of the Schools – my masters – were accustomed to do?” The rejection of the Geonic decrees, he argues, is because of different circumstances: “it has already been nullified because of the generation (יתוס לרבינוו הגאון).” As for the general question of authority: “I rail against those who say that it is not fitting to follow the decrees but [rather to follow] the law of the Talmud”, Hiddashei HaRashba (Jerusalem, 1963), pt.2, pp.97-98, quoted by Riskin, 1989:117 (Heb.), 119 (Engl.). See also Hiddashei HaRamban, Ketubbot 63b.

761 At ARU 6:11 (§6.6), R. Abel compares this to Rabbenu Tam’s attitude towards the decision of the Ge’onim to add to the text of the Talmud and thereby change the halakhah regarding the annulment of tamets on Pesah, citing R. Ovadyah Yosef, Yabia ‘Omer VII, ‘Orah Hayyim, 44:6, quoting Shabbosay HaLeqet (217) who writes: “…we are not to read in the Gemara bemashehu for it is not of the original Talmud that R. Ashi redacted but it is an interpretation of the Ge’onim which they added into the text. Nevertheless, even Rabbenu Tam said that one should not conduct oneself so in practice because one must not deviate from the words of the Ge’onim to the right or to the left.” He notes that one might distinguish Rabbenu Tam’s attitude here from that regarding kefiyot for a moredet on the grounds that non-annulment of tamets on Pesah is a matter of rabbinic rather than biblical law, or that he acquiesced in their
referred to coercion, in the case of the moredet, only in respect of the wife, not in respect of the husband:

And Rabbenu Tam raised another problem, that in the entire [Talmudic] discussion there is no mention of forcing the husband, only of forcing the wife ... (רבעון הרעון כא橐 דתורה ון דתורה הדתורה דתורה הדתורה הדתורה)

and similarly:

And we do not find in any [part of the laws of divorce] that the husband is forced to give a divorce without any [logical] difficulty at all [in the law’s formulation] (ולא שפ Draws דתורה הדתורה הדתורה הדתורה)

And:

How could a scholar make [such a] mistake as to say a force a husband to divorce [his wife] when she says “He is repulsive to me!”?

איך ניתן חס להסובבים הדתורה הדתורה הדתורה הדתורה הדתורה

Such an absolute rejection of kəfiyyah in the case of the moredet mē’is ‘alay is compatible with an argument found in the Sefer Hayashar based on the “moral fear” argument, that the woman notenet eynnehah be’alot.565

if the Tannaim had been concerned that a wife claiming accepted grounds for divorce might in fact be using them so as to conceal the fact that she had really “cast her eyes on another”, all the more so was the “He is repulsive to me!” (mē’is ‘alay) grounds liable to abuse (an argument which implies for Rabbenu Tam that even a sincere plea of mē’is ‘alay is not an accepted grounds for divorce), so that coercion in such cases should not be contemplated.566 In short, there is a fear here that a sinner may be rewarded.

4.35 One possible way of resolving the difficulty is by reference to Rabbenu Tam’s view that the 12-month waiting period of the Talmud did not apply to the moredet who claimed “he is repulsive to me” (mē’is ‘alay). Rather,

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563 Riskin, 1989-98 (Heb.) 101 (Engl.). R. Abel, ARU 6:10-11 (§6.6) and ARU 5:18 (§12.2.12 n.57), notes that this more radical version of Rabbenu Tam’s view accords with the report in Tosafot, Ketubbah 63b, s.v. ‘aval ‘amrah.

564 Riskin, 1989-98 (Heb.), 101 (Engl.).

565 M. Ned. 11:12. See n.58 and §1.29, above.

566 Sefer Hayashar LeRabbenu Tam, quoted by Riskin, 1989-98 (Heb.), 101 (Engl.). Yom Tov Assis 1988:35 notes this issue as reflected in the responsa of Rashba.
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Rabbenu Tam confines it to the moredet who wishes to remain in the marriage and cause her husband pain (בשענה לא לה אמתות İşte), but assuming here (with R. Riskin) his innovative interpretation of the latter situation: “I wish to remain married to him rather than forfeit my alimony, but I will cause him pain until he agrees to divorce me with alimony because indeed I do not wish to remain married to him.” But this does not satisfactorily resolve the tension between his statements regarding the geonic measures. For we would then have to understand his statement:

After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Ge’onim] advanced the forcing of the divorce before [the time which] the law [allows].

as meaning:

After all, we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months (in the case of ba’ena leh), and they [the Ge’onim] advanced the forcing of the divorce (in a case of moredet me’is ‘alay, or perhaps: in all cases) before [the time which] the law [allows].

The applicability of the final position of the Talmud (exit of a moredet from the marriage after a delay of 12 months without financial support) is indeed a matter of dispute between the Rishonim: Rashi applies it only to me’is ‘alay; others apply it to both kinds of moredet, while yet others (Rambam, ’Rashbam”) take the same view as Rabbenu Tam and apply it only to moredet ba’eynah ley. The position of Rabbenu Tam and his school appears best reconstructed as follows: the twelve month waiting period does not apply to the moredet me’is ‘alay: since (on Rabbenu Tam’s understanding) she is willing to forego the ketubbah, she may be

\[\text{References:}\]

173 See further Riskin, 1989:94-95, 103-04; ARU 2:30-31, nn.141, 143;

174 But this is not the only interpretation of Rabbenu Tam’s position. In Shiltay HaGibborim, 27a, A, Smag takes Rabbenu Tam’s view to be that for the moredet ba’ena leh the rule of Rabbotenu (4 weeks’ of announcements and warnings, without the 12 month waiting period) applies; the 12 month waiting period is for the moredet me’is ‘alay, who must wait 12 months (probably without warnings) and then lose her ketubbah. See ARU 9:13-14.

175 Riskin, 1989:107, implies that in such a case (for Rabbenu Tam), Amemar rules that we do not force her back into the marriage and that Rabbanan Saborai allow her to go free after twelve months without her ketubbah.

176 E.g. Rashba, 64a, s.v. הנBuildContext; Ritva, 64a, s.v. הנBuildContext.

177 Hilkhot Ḥisḥat 14:8-14, granting divorce without any delay in the case of me’is ‘alay, but applying Rabbotenu’s rule of four weeks of announcements and warnings (and then loss of the ketubbah), together with the 12 months of waiting for her get, to moredet ba’eynah leh. See further ARU 16:36.

178 Mentioned in Shiltay HaGibborim, 27a, B.

179 Tosafot, 63b, end of s.v. הנBuildContext.
divorced immediately (assuming the husband’s willingness). Rather, the
twelve month waiting period applies to ba’eynah ley, interpreted as the
wife who does want a divorce, but is not willing to forego the ketubbah
(and is willing to engage in meridah to obtain it). Not only is there no
kefiyah here: the husband is not allowed to divorce his wife during the 12
month waiting period, even if he wants to. The reasons for this may well
be twofold: (a) a form of punishment or deterrence for using meridah for
illegitimate reasons; (b) to give the wife an opportunity to change her
mind and forego the ketubbah (at which point the husband may then
divorce her). After the 12 month waiting period, the husband may
divorce her (without paying the ketubbah) but he still cannot be compelled to do
so.775 The logic of this position is that the discontented wife (moredet) may
seek a divorce only if she forfeits her ketubbah (and to that extent me’is
‘alay is not regarded as a fully justifiable ground for divorce), and this
forfeiture may come about either voluntarily on her part (me’is ‘alay776)
or involuntarily (ba’eynah ley777), the latter through exhaustion of the
ketubbah by the application of the mishnaic sanctions. If, then, the
moredet persists through the 12 months (without financial support), her
husband may, if he wishes, divorce her without payment of the ketubbah.
The denial of kefiyah, however, is made clear for both cases:

But if the husband does not wish to divorce his wife, not in this manner, and
not in this manner [i.e., neither with nor without alimony], we [the court]
should not force him; but let him isolate her (פוערת ומרידה) [i.e., leave her in a
status where she may not marry] forever...778

Here, Rabbenu Tam appears to use ‘iggan as the ultimate penalty: the

774 “... but [in the case of one who says:] “He is repulsive to me” there is no delay, since she is
willing to forfeit [her rights], and when the husband agrees to the divorce”: Riskin, 1989:101.
See for example Ramban, 63b, s.v. הד Goa המשבחת, in the name of Rabbeni Hanan ικανος.
Formerly [the law] was to separate them, and if the wife refused, the husband was to
force her to remain with him; but now he may even divorce her without alimony if he wishes” (Riskin, 1989:105), and later (at 105c) “... if she had forfeited [the
alimony] to him in the case of her finding him repulsive, because she thought that her husband
was preventing [the divorce] because the alimony he would owe her would be great – even so,
we force her [to remain with him] so that her forfeiture will not be valid even if he wishes to
divorce her, until an entire year passes. In this way, Jewish women will not be without dignity
and respect [hefker]. But after twelve months, if he wishes to divorce [her], he may divorce
[her], and he is exempt from paying] alimony.”

775 Riskin, 1989:105.
husband has the right to treat his wife’s disgust – with disgust.\footnote{779}

4.36 A different approach is that Rabbenu Tam changed his mind, from rejection (only) of the abolition of the 12-month delay,\footnote{780} to complete rejection of kefiyah (and some say even ḥiyav\footnote{781}) in cases of moredet me’is ‘alay. The first (permissive) view, according to which coercion may be applied in cases of me’is ‘alay (at least after the 12 month waiting period), reflects Rabbenu Tam’s earlier opinion. The second (restrictive) view is the one he held later. R. Ovadyah Yosef\footnote{782} cites Responsa Maharibal III:13 for such a change of mind:

… this custom, to coerce divorce due to the claim me’is ‘alay, was the accepted practice in the (Babylonian) academies for 400 years\footnote{783} and even Rabbenu Tam practised it at first…

R. Abel suggests that Rabbenu Tam’s change from a position of unquestioning acceptance towards the Ge’onim (accepting the account of Maharibal) may be related to differing views as to whether the period of the Ge’onim formed a superior “halakhic epoch” with whom later sages agreed not to argue: Rabbenu Tam may have at first held the same view as Ramban, who affirmed that superior status, but later adopted the view of Rambam, who denied it.

4.37 We may note that the account of Maharibal further complicates the issue, since neither of the Sefer Hayashar texts adopts a position of unquestioning acceptance towards the Ge’onim: even the “earlier” text rejects the geonic abolition of the 12-month waiting period.\footnote{784} Indeed, it

\footnote{779}{But this may not be characteristic of Rabbenu Tam’s approach as a whole. Reiner 2009:302 notes a decision upholding a get given by a man who had converted to Christianity, even though the man’s name was not properly recorded in the get. Reiner (at 313) interprets the ban on kefiyah as related to the bera‘em of Rabbenu Tam against questioning another bet din’s get, once it had been delivered. He was himself the recipient of appeals against the decisions of the Parisian Rabbis, and wanted to ensure uniformity of practice in France. Banning kefiyah was part of that strategy.}

\footnote{780}{Interestingly, the financial aspects of the taqkanat haGe’onim were not criticised in Sefer HaYashar, perhaps because Rabbenu Tam accepted the authority of the Ge’onim to legislate in that area even against the Talmud. Ironically, the Rambam did reject the geonic financial measures, possibly because he saw no reasonable justification for them; elsewhere, he clearly accepted their changes to diney mamonot where he considered them reasonable – for example, in the case of security over of movavos.}

\footnote{781}{See §4.38, below.}

\footnote{782}{Yabia ’Omer III ’Even Ha’Ezer 19:15: see ARU 6:11-12 (§6.6).}

\footnote{783}{Some sources give 300 years, some give 500 and some 600: see Yabia ’Omer III ’Even Ha’Ezer 18:6.}

\footnote{784}{The issue is sometimes debated in relation to the Christian cultural environment (hostile in principle to divorce) of Rabbenu Tam as against the Islamic environment (with its liberal...}
may well be premature to adopt this view. Israel Ta-Shma has noted that the *Sefer HaYashar* is preserved in an extremely corrupt state, and even after the great labour expended on editing it, still contains many obscure and inexplicable passages. In its present form it comprises excerpts collected in the days of the Rishonim and represents the work of many hands, including that of Rabbanu Tam himself, who repeatedly emended and improved much of it.75 Nor is this the only tension in the text.76

Serious text-critical work is clearly needed before we can arrive at conclusions. In halakhic terms, we are faced with a situation of *safeq* not dissimilar to that regarding the talmudic position itself: there, a (perhaps minority) opinion on a point of talmudic interpretation (did Amemar accept *kefiyeh* of the husband for the *moredet me’is ‘alay*) is supported by a variant reading in a recently discovered manuscript; here a minority view not following Rabbanu Tam’s outright rejection of *kefiyeh* for the *moredet me’is ‘alay*77 is supported by a passage within the *Sefer HaYashar* itself which appears to accept such *kefiyeh* provided that the original talmudic restrictions upon it are preserved. Indeed, the question may also be posed as to what direct access Rabbanu Tam had to the geonic writings78 (let alone to the variant talmudic reading).

4.38 Also disputed is the question whether Rabbanu Tam (at least once he turned against the Geonic practice) went even further than rejecting *kefiyeh* entirely, and denied that the wife had justifiable grounds for divorce in such circumstances – so that (as later sources would put it), the court should not even order (by *biyyuv*) the husband to issue a *get*. But this fits ill with Rabbanu Tam’s own willingness to apply *haraqot* in favour of a *moredet me’is ‘alay*.79 Indeed, R. Gertner points out that even if there is not a *mitsvah* to divorce, Rabbanu Tam agrees to *haraqot* for *me’is ‘alay* because although he is not in the wrong in such a case neither is she?80

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75 Ta-Shma 1973:781.
76 For another relating to the correct categorisation of the talmudic case of the daughter-in-law of R. Zevid (as ba’eynah leh or me’is ‘alay), compare the texts at Riskin, 1989:101 and 105. See also ARU 2:32 n.149.
77 See further below, §§4.45-48.
78 Cf. the question raised in relation to Ramban (albeit a few generations later): n.744, above.
79 See n.40 above, and §4.67, below.
4.39 Nevertheless, Rambam (followed in this respect by contemporary rabbinical courts\textsuperscript{769}) regards the financial sacrifice she is willing to make as a sufficient guarantee of her sincerity and of the strength of her feeling that she can no longer tolerate the marriage. Moreover, amongst those who follow Rabbenu Tam, there are influential views favouring a ḥeyyuv. Rabbenu Yonah maintains that although the husband cannot be coerced to divorce he is obligated to do so and if he refuses one may refer to him as a sinner.\textsuperscript{770} Rema in Yoreh De’ah 228:20 regards me’is ‘alay as creating a ḥeyyuv get.\textsuperscript{771} The Noda’ BiYehudah\textsuperscript{772} quotes the Rema’s “obliged to divorce” in Yoreh De’ah without raising the apparent contradiction from ‘Even Ha’Ezer, which implies that he too sees no contradiction at all. The Rema would then be following the ruling of Rabbenu Yonah, who says that in a case of me’is ‘alay although we do not coerce him we tell him that he is commanded to divorce her and if he does not do so there applies to him the saying of our sages: “If anyone transgresses rabbinic law it is permitted to call him a sinner.”\textsuperscript{773} We find this view also in Me’iri in the name of “some of the sages of the [previous] generations”\textsuperscript{774}.

E3. Rambam’s Acceptance of kefiyah\textsuperscript{775}

4.40 While Rambam, as we have seen (§4.32), also took the Geonic practice as non-normative, his view that it is proper to follow the Talmud itself led him to the opposite conclusion to that of Rabbenu Tam:

The woman who refuses her husband sexual relations – she is the one referred to as “the rebellious wife”. So we ask her why she is rebelling. If she says [she is rebelling] ‘because he is repulsive to me, and I am unwilling voluntarily to engage in sexual relationships with him,’ we force him to divorce her immediately, for she is not as a slave (אשה אธรรม) that she should be forced to have intercourse with one who is hateful to her. She must, however, leave with forfeit of all of her ketubbah ...\textsuperscript{776}

\textsuperscript{769} See ARU 16:191-92, quoting PDR 6:325-353.
\textsuperscript{770} See Yaht’a ‘Omer, ibid., 18:13; cf. Rema, Yoreh De’ah 228:20 (end). He does not mention any requirement of amalatah here.
\textsuperscript{771} See also Shakh, Yoreh De’ah 228:20, sub-para. 56. See further ARU 5:18-19 (§12.2.13).
\textsuperscript{772} Resp. Noda BiYehudah I Yoreh De’ah no. 68 s.v. Wekhol, which simply quotes Rema.
\textsuperscript{774} See ET VI, col. 422, at note 968.
\textsuperscript{775} For a summary, see ARU 22:183 (§6.54).
\textsuperscript{776} Hilhut Istat 14:8, Klein’s translation in the Yale Judaica Series; cf. Riskin, 1989:88 (Heb.), 88f (Engl.).
We may reasonably read the strong language here as a direct reply to Rabbenu Tam’s עין ליטלש (§.435, above).

4.41 Both Rambam and the Ge’onim endorse an immediate divorce, backed if necessary by coercion, for a woman claiming me’is ‘ailay. Rambam, however, was less liberal than the Ge’onim regarding the financial provisions. But there is also an important difference in their reasoning. Rambam’s ruling, as Riskin puts it, “is in no way bound up with any historical reasons of adultery, apostasy or dependence upon Gentiles, but is rather a humane consideration of the sensitivities of an unhappy wife.”

4.42 Rambam decides the Halakhah in accordance with his independent understanding of the statement of Amemar in the Talmud that [according to the traditional text] such a woman “is not to be forced [to remain married]”, and interprets this to mean that the husband must be forced to grant a divorce. Unless Rambam had access to the variant textual tradition of MS Leningrad Firkovitch, the most likely explanation of his stance is that it is based on sevarah: a free Jewish woman (pace Mar Zutra⁸⁰) cannot be forced into marital relations.

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⁷⁹⁹ ישתה ליטלש implies that the husband will not treat her (sexually). Nevertheless, in both cases she is rendered permanently his dependent.

⁸⁰⁰ In its immediate context (see Hilkh hot Ishut 14:13), his statement at Hilkh hot Ishut 14:14, quoted in §.4.32 above, appears to refer to the property arrangements. For the criterion of “spread” as applied even to talmudic gezoret, see Yad, Manrim 2:6. Riskin, 1989:91, concludes that the net effect of his cancelling the geonic decrees on the one hand, but interpreting the Talmud in terms of the position of Amemar (taken to refer to coerced divorce) on the other, was effectively to equalize the positions of husband and wife: “If the husband finds his wife repulsive he may divorce her even against her will, but must pay her the alimony provided for by the marriage contract. If she finds him repulsive, she may obtain a divorce even against his will, but receives no alimony at all.”

⁸⁰¹ Riskin, 1989:90E. Cf. Resp. Tzemah Tsedeq no. 135, cited in ARU 12:5 (§B.VII) from R. Bass. Riskin, 1989:91, noting that the incident of R. Zevid in the talmudic sugya and the subsequent Saboraic requirement of a delay of 12 months thus refers, according to Rambam, only to a wife who claims: “I wish [to remain married to] him, but [I wish] to cause him pain.” This, he writes (at 175 n.10), is contrary to the interpretation of Rashi (cf. ARU 7:19), Rabbenu Tam, and Alfasi, all of whom interpret the case of R. Zevid as dealing with a case of a woman who claims she finds her husband “repulsive”. But the text of Rabbenu Tam is not consistent on this: see n.786, above.

⁸⁰² Rabbenu Tam also rejects what he takes to be the position of Mar Zutra in the Talmud (Riskin, 1989:104E): “But if she said “He is repulsive to me” – we do not force her [to remain married]. That is to say: if she said, “I do not desire him, neither him nor his alimony; rather, I forfeit everything to him,” this is not considered a forfeiture in error, and we do not force her to remain [in the marriage in the hope that] she will change her mind. If the husband wishes to divorce her without alimony he may divorce her, and he has no alimony obligation, for she has
This reasoning, however, did not command universal appeal. Rosh asked:

... what kind of reason has he given for coercing the man to divorce [his wife] and to permit a married woman [to someone else]? [Rather,] let her not have sexual relations with [her husband] and let her remain chained all of her days,304 for, after all, she is not commanded to be fruitful and multiply! Because she followed the dictates of her heart, [and] cast her eyes upon another and desired him more than the husband of her youth, do we then fulfill her lust and force the man who loves the wife of his youth to divorce her? Heaven forbid that any judge should judge thus!305

Rashba, moreover, remarked: “This too is a marvel (אקו) in our eyes, because of the proofs we have written [disproving this], and all who came after him disagreed with him.”306

Some have argued for a correlation between the basic differences between Rambam and Rabbenu Tam and the external religio-legal environment.307 The Ge’onim had been concerned that women might be tempted either to seek the assistance of Islamic courts or perhaps even to convert to Islam in order to free themselves from their husbands.308 Such considerations were foreign to Rabbenu Tam, living in a Christian environment where the moredei had no possibility of seeking gentle help in order to obtain a divorce, and where, indeed, there was external moral pressure to restrict divorce itself – a factor, as Ze’ev Falk argued many years ago, in the adoption by Rabbenu Gershom of the requirement that (absent specific cause) divorce required the consent of the wife, and could no longer be effected by the husband almost unilaterally.309 The fact that the herem of Rabbenu Gershon was accepted in Ashkenaz but not Sephard may well also have been a factor in accentuating the divide over the moredei. For coercion where the wife claimed me’es ‘alay went some way towards

 forfeited [it] to him; it is a complete forfeiture. Mar Zutra says: we force her; that is, we require her to remain, and perhaps she will change her mind, as with the case of “I desire him and I am causing him pain,” for it is one case, and they are both considered rebellious [wives]; for since she forfeits on account of rebellion, it is not a complete forfeit, and if the husband wishes to divorce her, he gives her alimony. However, this is not [the law]; rather, as we explained before, [the woman who says] “He is repulsive to me” is not a rebellious wife.”

304 Cf. דעה ועליה in the passage from Rabbenu Tam quoted in §4.35, above.
305 Rosh, Resp. 43:8, quoted by Riskin, 1989:125f. (Heb.), 127f. (Engl.).
308 See n.709, above.
balancing the rights of husband and wife, by giving the wife a unilateral right of divorce from her husband, corresponding to the unilateral right which he had to divorce her. In Ashkenaz, however, after the herem of Rabbenu Gershom, the husband no longer had such a unilateral right;810 in the absence of “statutory” cause, divorce had (in principle) to be by consent. Why, then, should the wife have a unilateral right to coerce the husband into giving her a get?

E4. Survival of Rambam’s View811

Recent research, moreover, casts some doubt over the dominance of Rabbenu Tam’s view, either in his own generation or later.812 In geographical terms, we may note evidence that the geonic practice appears to have spread by the time of Rabbenu Tam (and on his own account) as far as Paris.813 And in Tosafot Ketabbot 63b, s.v. Aval, we find a systematic reply to almost every argument against those who apply coercion in cases of moredet me’is ‘alay – except the argument that we do not find any mention of coercion in the text of the Talmud itself.814 And if the variant reading of Amemar’s view had been available to the Tosafists, that too might have admitted of a reply (see Appendix B, below).

810 The extent to which this equality in principle was compromised by (a) the capacity to constitute the court as agent to receive a get on the wife’s behalf, and (b) the heter me’ah rabbanim, are beyond the scope of this paper. See also §2.42 above, on the status of a get given in breach of the herem of Rabbenu Gershom.

811 For a summary, see ARU 22:183-84 (§6.55-57).

812 Riskin, 1989:108, 176 n.25, in relation to Rabbenu Tam’s denial of “authority to legislate other solutions beyond the Amoraic period of Ravina and R. Ashi”, in the context of the moredet. See further, for the Atraonim, n.863, below.

813 Sefer Hasidim, per Riskin, 1989:99 (Heb.), 101f. (Engl.): “And regarding that which our Rabbis of Paris wrote: We hereby agree to whatever you will do to force [this] man – with whatever means of coercion lie at your disposal – until he says “I wish [to grant this divorce]” – this too is not proper in my eyes (perhaps it is an error on my part), for we do not find that we force him to divorce [his wife], as R. Ḥananel decided [as quoted] above, and since he states at the end of [his commentary to] Gittin: [As to the case of an] Israelite’s coerced divorce, [if it is arranged] according to law, it is valid; if not according to law, it is invalid and [prevents the woman’s] future offspring by another husband from marrying native-born Jews.” But R. Yosef in Yabia ’Omer III ’Even Ha’Ezer 18:8 quotes R. Ḥananel as apparently accepting kafiyah. See further Reiner 2009:301-02.

814 On the argument of R. Herzog, Responsa Hekhal Yitsḥaq, ’Even Ha’Ezer I 2:3, from Rambam’s commentary to the Mishnah (not known to the Tosafists) that the mishnaic cases of kafiyah all involve payment of the kanubah, unlike coercion in me’is ‘alay, see Goldberg and Villa 2006:286-87; ARU 6:12 §§6-8.
Even so, the view of Rambam was not lost. On their arrival in Algiers following the edicts of 1391, Rivash\footnote{Sinai 2010:250 cites the custom of Talmes (capital of Algiers) as attested by Resp. Rivash (end of §104).} and Rashbetz (who followed Rabbenu Tam) encountered various communities which had persevered with Rambam’s ruling.\footnote{See E. Westreich 2007:304-05.} Rashba had allowed members of these communities to act according to their customs, despite his personal opinion that followed Rabbenu Tam.\footnote{See E. Westreich 2002:214-215.} At the beginning of the 14th century Rosh had found it necessary sharply to attack (but without immediate success) the sages of Cordoba, who still followed Rambam in applying coercion in cases of me’is ‘alay.\footnote{See E. Westreich 2007:305.} In a responsum by Ran in the second half of the 14th century we hear of a local community in Spain which enacted an ordinance whereby all rulings should conform to the Rambam, including those involving rebellious women.\footnote{See E. Westreich 2002:216.} In a responsum (II:8) concerning a case where a woman’s life was made a misery by a cantankerous and miserly husband (who would quarrel with her endlessly and starve her), Rashbetz ruled that the husband could be compelled to divorce, condemning the husband’s behaviour in no uncertain terms,\footnote{“... it is proper for the bet din to rebuke him and to apply to him this [biblical] verse: “Have you murdered and also taken possession?” (I Kings 21:19), for this [marriage situation] is worse than death, for he is ‘like a lion that treads and eats’ (Ta’aniy 8a) ...”. See further ARU 12:5, quoting Bass, Gerushin.} and addressing those who denied the present generation the authority to coerce with, \textit{inter alia},\footnote{He argues that this may be derived by \textit{qul wahtomer} from the \textit{ba‘al polyns} in the Mishnah (\textit{Ketubbot} 77a) especially as we find a \textit{qul wahtomer} similar to this in the \textit{Yerushalmi} (\textit{Ketubbot} 5:7). He also cites \textit{Responsa Rashba} I 693 in support.} the words “It is possible that they did not say that about cases [involving] great suffering like this and how very much more so if he starves her. If she had been their [daughter] they would not have spoken so.”\footnote{See further ARU 12.5 (§VIII); ARU 18:74, both quoting the account of Bass, Gerushin.} Indeed, “the dayan who forces her to return to her husband when she rebels, like the law of the Arabs, is to be excommunicated...”\footnote{For even those who say we cannot coerce the husband to divorce his wife who claims me’is ‘alay agree that we cannot coerce her into compliance. See \textit{Ketubbot} 63b for the dispute of Amemar and Mat Zutta. The halakhah follows Amemar: see \textit{Ezra Ha’Ezer} 77:2, 3.} Two generations later, Tashbetz’s grandson still found it necessary to attack the local traditions in Algeria that followed the position of the Rambam.\footnote{See Westreich 2002:217.} Professor Westreich concludes that there was a real basis in the Castilian tradition for the creation of a law that coerced the husband to
divorce his wife without relying upon a specific talmudic ground.\footnote{See Westreich 2007:306.} He adds that in the case of yibbum, there was a willingness to continue using me’is ‘alay as an additional reason (snif), appended to another.\footnote{See Westreich 2007:306, cf. at 319-20, citing Resp. Maharik, ch.102 and Maran himself: Resp. Beit Yosef, Hilchos Yibbum vehalitsah, ch.2.} Even Rema in ‘Even Ha’Ezer 77:3 refers without criticism to places that practise coercion for me’is ‘alay.\footnote{See ARU 5:18-19 (§12.2.13).}

4.47 R. Avraham Ibn Tawwa’ah (Rashbets’s grandson) argues,\footnote{Haht haMeshehlass, HaTur HaSheleishi no.35, p. 11b col.1, s.v. umikol maqom.} on the basis of responsa of Rashbets,\footnote{1-4, II:69 & 180. See further ARU 6:11-12 (§6.7 and n.39). For evidence in Tashbetz of a community in Spain at the end of the 14th century which still enacted an ordinance in the spirit of Rambam, see Westreich 2007:216.} that the latter in practice agrees entirely with the ruling of the Rosh (Resp. 43:6) that if any bet din – even in a place where it is not the custom to follow the Rambam regarding coerced divorce in the case of the moredet – relied on the Rambam and coerced a get in a case of me’is ‘alay, though the bet din acted incorrectly, the woman may, on the basis of that get, remarry (lekhvatullah, but on the basis of a get which is valid bedi’avad). In fact, there is a difference between Rosh and Rashbets. The Rosh says that he would, bedi’avad, accept a coerced get in a case of me’is ‘alay. This clearly means that he would allow the divorcee to remarry lekhvatullah. Rashbets, however, is stricter in that he does not permit her remarriage lekhvatullah\footnote{That he is disagreeing with the Rosh rather than interpreting him is made clear by R. Avraham Ibn Tawwa’ah in Haht haMeshehlass (printed at the end of Respansa Tashbets), HaTur haSheleishi no. 35, p. 11b col. 2, lines 42-44, photostat of ed. Lemberg 1891, Tel Aviv, n.d. Goldberg and Villa, 2006:284, quote Tashbets II 256: “However, this [rejection of the ruling of the Rambam] is only ab initio but if it occurred [that a get was coerced in a case of me’is ‘alay] in any of the places that conduct themselves according to his [the Rambam’s] works zal, the Rosh zal has written that we do not reverse the situation. I say that applies if she has already remarried i.e. she need not leave but it is difficult to permit her to remarry ab initio. It seems correct to me to argue for a legal ruling that [in a case of me’is ‘alay where the get has been obtained through coercion] the ruling is the same for all places: she shall not be allowed to remarry but if she has already remarried she need not leave [the marriage].” See further ARU 6:11 (§6.7).} but is only willing to say that if she has already remarried she may remain with her new husband.\footnote{Goldberg and Villa, 2006:284, quote Tashbets II 256: “However, this [rejection of the ruling of the Rambam] is only ab initio but if it occurred [that a get was coerced in a case of me’is ‘alay] in any of the places that conduct themselves according to his [the Rambam’s] works zal, the Rosh zal has written that we do not reverse the situation. I say that applies if she has already remarried i.e. she need not leave but it is difficult to permit her to remarry ab initio. It seems correct to me to argue for a legal ruling that [in a case of me’is ‘alay where the get has been obtained through coercion] the ruling is the same for all places: she shall not be allowed to remarry but if she has already remarried she need not leave [the marriage].” See further ARU 6:11 (§6.7).}
rulings with lenient ones and even in cases of gittin and qiddushin. On this basis R. Abel has argued that had R. Karo seen Tashbets I:69 and II:180 and the arguments of Ibn Tawwa‘ah, he would have accepted the position of the Rosh – and the final position of Rashbets – as being that, though a get must not be coerced in cases of me’is ‘alay, if it was coerced the woman may remarry. In effect, a get me’useh is thus rendered valid bedi’avad.

4.49 This argument has a further possible consequence. Since in times of urgency (she’at hadehaq) we may act lekhatḥillah in a manner which, in normal circumstances, is considered legal only bedi’avad, it follows that if the contemporary problem of ‘iggun constitutes a she’at hadehaq (which seems highly likely: §2.38), we may nowadays permit coercion of a get in accordance with the Rambam even lekhatḥillah.

E5. Dominance of Rabbenu Tam’ Interpretation

4.50 However, Rabbenu Tam’s rejection of both the Geonic position and Rashi’s interpretation of the talmudic sugya ultimately prevailed. Indeed, Rabbenu Tam and his followers denied that the conclusion of the sugya was to be interpreted as coercion (if indeed it referred to the moredet me’is ‘alay at all: §4.35, above).

E6. Grounds for Divorce amongst the Rishonim

4.51 As noted elsewhere, there is a wide range of situations where a claim of me’is ‘alay may be made, including both faults and defects which are

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832 Resp. Yadia ‘Omer, X. Hoshen Mishpat 1, s.v. Teshuvah.
833 See further ARU 6:12 (§6.7).
834 In fact, in Bet Yosef, ‘Even Ha’Ezer 79 s.v. Umah shekatav wekhen ha’, at the end, R. Yosef Karo cites the ruling of Rashbets, II 256, quoted in n.831 above (but in the name of Rashbash, the son of Rashbets – the second and third volumes of Tashbets were not seen by R. Karo). Thus R. Karo’s ruling would be that in a case of me’is ‘alay [where the get has been obtained through coercion], the woman should not be allowed to remarly but if she has already remarried she need not leave [the marriage]. However, in Darkey Moshe there the Rema opines that she should not even be allowed to remain in the marriage.
835 See further ARU 5:17-19 (§§12.2.12-14); ARU 6:10-12 (§§6.4, 6.6, 6.7, 6.8); ARU 7:5-6 (§III.15); ARU 7:23 (§V.7); ARU 8:22-24 (§3.5); ARU 9:9-14; ARU:15 ss.3a, 4, 5.
836 Already in the late 12th century Sefer HaMa’or, R. Zeraḥya HaLevi from Provence had ruled against application of the geonic measures: see §4.27, above. See later Shulḥan Arukh, ‘Even Ha’Ezer 77.2, Biqqaṭ Meḥinaqeq 5, Bet Shemuel 7.
837 §§1.31 above, 4.86 below.
recognised as independent grounds for divorce and (mere, but genuine) “disgust”. In the past, there has been a fear that the plea may conceal a preference for a new partner (notenot eynehah beater); today, there is equally a fear that the plea may be used as a formality concealing a request for “no fault divorce”, even where the circumstances do not amount to “irretrievable breakdown”. Such concerns with the basic grounds for divorce are already apparent in the literature of the Rishonim, in particular in the conflict between Rabbenu Tam and Rambam, most notably between Rabbenu Tam’s willingness to penalise a moredet me’is ‘alay with שננות חילולא (§4.35, above) and Rambam’s unwillingness to have her treated as חילולא (§4.40, above). It is also evident in Rabbenu Tam’s own apparent ambivalence as to whether a moredet me’is ‘alay should be punished or given the benefit of the harḥaqot.

4.52 It is this conflict which appears to have generated a demand for amatlah in cases of me’is ‘alay, at least where kefiyah is sought. This is not found amongst the Ge’onim and early Rishonim (who accepted coercion for the moredet, including the Rif, Rabbenu Gershom, Rashi, Rambam, and Rashbam, all of whom rule that the mere claim

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838 See, for example, the decision of the Haifa Rabbinical Court permitting coercion (albeit not by physical means) provided that the wife’s plea of me’is ‘alay is supported by amatlah (in the case at hand, domestic violence), described by Rabbi S.-Y. Cohen 2002:331-348, esp. at 343f. It appears that the degree of domestic violence here was not regarded on its own as sufficient for kefiyah.

839 For a summary, see ARU 22:185 (§6.60). On the nature of amatlah as rebutting presumptions or inferences raised by previous acts or conduct, see Tosafot Ket. 22b, where the woman is believed if she gives amatlah when “she retracts her words [of temei’ah ani] and says I’m clean”. Cf. PDR 9/74-93, discussed at ARU 16:191. See also ARU 16:184-85.

840 On amatlah in the context of a woman confessing to adultery (temei’ah ani), see Encyclopedia Talmudica, volume 2, p. 53, column 1, quoted at ARU 16:189.

841 Rema, Yoreh De’ah 228:20, appears to accept amatlah as the basis for a ḥiyuv in me’is ‘alay: see ARU 5:18 (§12.2.13). The question discussed by Rema is that of a couple who had sworn to marry each other and she requests annulment of her oath (ḥatarah) on the basis that she has discovered faults in him to the extent that he has become repulsive to her. If she produces good evidence of his unacceptable nature (amatlah), the bet din may annul her oath even without informing him. Rema concludes that even if she were married to him and says that she cannot stand him, he is obliged to divorce her; how much more so may she be released from an oath to marry him.

842 See sources discussed in §§4.17-29, above.

843 See sources cited in §4.33, above.

844 As shown by the fact that he does not criticise Rambam in his hasagot – an accepted argument amongst the posqim.

845 For the texts, see E. Westreich 2002:212; Grossman 2004:242.

846 ARU 9, esp. pp.1-3.


of me’is ‘alay is sufficient to generate kefiyah. Against this, Rabbenu Tam appears to make amatlah a condition for application of the harḥaqot and holds that no kefiyah is justified even where there is an amatlah mevurert. We also encounter amatlah in Tosafot and Maharam.

4.53 Amatlah mevurert is sometimes taken as a higher standard than (plain) amatlah and appears to be used primarily in cases of me’is ‘alay. Rav S.-Y. Cohen notes that where there is amatlah mevurert, more posqim agree that we may coerce the get, and it appears also in Shulḥan Arukh, Even Ha’Ezer 77:3. Amatlah mevurert is not well defined in halakhic sources, thus leaving it up to the discretion of batey din whether they accept the evidence a woman presents to them or not. However, Tur Even Ha’Ezer 77 quotes Maharam Rothenburg for the view that a moredeṭ me’is ‘alay would either have to give proof showing why he was not acceptable to her (apparently, the “subjective” ground), or bring proof that he had strayed or had a disease. Another objective ground for amatlah mevurert is found in Maharam Alshich 11, who discusses the case of a yevamah who falls to a young yabam, and writes that when she claims “he is young and ignorant and he cannot support me, yet he does

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849 See, inter alia, R. Avraham Ibn Tawwa’a in Tashbetz IV (Hot HaMeshuggallash) HaTur HaShelishi number 35, s.v. HaDa’at HaSheni and s.v. HaDa’at HaRevi’i. See R. Gertner 5758:118:1 = p. 478.

850 R. Avraham Ibn Tawwa’a (n.849, above) attributes this position also to Ramban, Rashba, Rosh and Ran. See, however, §4.53, below.

852 Though not directly in the context of me’is ‘alay: the nearest case is Tosafot on Ket. 64a (rejection of the brother-in-law by a yevamah); see also Tos. Yeb. 39b, Yeb. 118a, Gitt. 99a and n.839 above (on withdrawal of a plea of temei’ah ani). Tosafot Ketubbot, 63b, s.v. Avil (see Appendix B, below), responds to Rabbenu Tam (who sought to prove from Gittin 49b that we do not coerce in cases of me’is ‘alay) with the view that a wife may claim me’is ‘alay if there are raglayim ladavar. On the relationship between raglayim ladavar and amatlah in the context of a woman confessing to adultery (temei’ah ani), see Encyclopedia Talmud, volume 2, p. 53, column 1, quoted at ARU 16:189.

853 See R. Avraham Ibn Tawwa’a (n.849, above). Cf. R. Ovadyah Yosef, Yabia ‘Omer III ‘Even Ha’Ezer 18:2 and 18:3 (end), though R. Yosef has not yet said that we may rely on that alone (except for Yemenites). On Maharam’s attitudes, see n.720, above.


855 See Rabbi S.-Y. Cohen 1990:197-198 (citing inter alia Tashbetz, Siman 8, where the different levels of amatlah are discussed). R. Cohen mentions also Yabia ‘Omer, 3, ‘Even Ha’Ezer 18, arguing that where the amatlah is “visible” (gelayah) and “publicized” (me’lirmel), the husband is coerced to give a get.

856 See §4.64 below, and ARU 16:206.

857 We are informed by a leading dayan that even amatlah mevurert does not require objective evidence (e.g. abuse etc.), but only evidence that the repulsion is real, and not an excuse for any other motive (including financial).

858 ARU 16:192-93.
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not want to perform ḥalitshah” that is considered a great amatlah and he should be forced to perform ḥalitshah.

F. The ’Aḥaronim: kefiyah for the moredet me’ is ‘alay

4.54 Issues relating to kefiyah continue to be discussed by the ’Aḥaronim, and in the decisions of rabbinical courts in Israel. In this section we review their analyses of issues of authority (F1), the criteria for divorce implicit in their approaches (F2), and the different forms of coercion which they consider (F3).

F1 Authority for kefiyah in the ’Aḥaronim

4.55 It is commonly argued that most posqim do not allow kefiyah in cases of meas “’alay.” Indeed, R. Shemuel Amar of Morocco (d. 5649/1889) ruled659 (against a number of the Rabbis and Sages of Fez) that a get cannot be coerced even in a case where the husband had attempted to murder his wife, on the grounds that the talmudic list of circumstances justifying kefiyah is closed. Indeed, R. Shemuel directs his readers to an earlier (unnamed) poseq who wrote that even if he pursues her with a knife in order to stab her, we cannot even say that he is obliged to divorce her.” R. Bass also cites R. Shabbetai Katz, the Shakh, who writes in Gevurat ’Anashim: “In any case where there is a possibility to explain a halakhic source leniently or stringently one must adopt the strict interpretation which would exclude compelled divorce so as to avoid the danger of a coerced get which would make the woman’s children from another man who is not her husband into mamzerim.”662 However, this is far from a universal view. Dr. Yuval Sinai has recently cited responsa of the ’Aḥaronim permitting coercion written after the dissemination of the Shulḥan Arukh,663 despite the rejection there of Rambam’s position.664

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659 R. David Bass, Gerushin.
662 ARU 12:4 (§4V)/ARU 18:73. See, however, the argument against such automatic endorsement of ḥalitshah in §§2.5-9, above.
663 Sinai 2010. See n.666 above, at 253-255, citing, inter alia, the following sources: Maharitaz (16th century Sefat), Shulḥan Arukh, ’Even Ha’Ezer 72:2, who writes that he heard that his teacher, R. Moshe Besodia, had ruled according to the Rambam on the issue of me’ is ‘alay “in these places, which are the Rambam’s regions”, and that other contemporaneous halakhic authorities had concurred with the ruling; R. Mosad Alfasi (Matba’a Dhéleva, pt.1, ’Even
4.56 Of particular interest in this context is the manner in which the Ḥatam Sofer addresses Rambam’s rationale for *kefiyot,* in a case where the husband had become epileptic. Here, the Ḥatam Sofer argued, there was a dispute amongst the *posqim* as to whether coercion could be applied, the Rosh saying that it could and the Mordekhai that it could not. The Ḥatam Sofer then reasoned:

Even if it is clear in Heaven that the *halakha* is like the Rosh, since there is the opposing opinion of the Mordekhai, and we do not have anyone who can decide between them, if one forced him to divorce she is still a definitely married woman in Biblical Law and not a questionable one. The reason I say this is that a coerced *get*, even when it is enforced according to the Law, and he says ‘I agree’, the *get* is nevertheless only fit for the reason that the sages gave... it is presumably agreeable to him to fulfill the words of the Sages who said one should compel him to divorce as the Rambam beautifully explained... [but] this is only when it is clear to the husband that the coercion is in accordance with the Law according to every authority [for] if so it is a *mitzvah* [in his situation] to heed the words of the Sages. However, in this case the husband will say ‘who says it is a *mitzvah* to heed the words of the Rosh?’ Perhaps it is a *mitzvah* to heed the words of the Mordekhai! So if his statement ‘I agree’ was coerced and did not issue from his heart there does not seem to be even a potential position to coerce a divorce.

We may note that such an argument would exclude the application of Rambam’s reasoning in any case where there is a *mabroket posqim.* Moreover, the natural meaning of Rambam is surely not that a person may assert his own halakhic opinion in the face of the *bet din,* but rather that...

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*Ha’Ezer,* 154; *Darkhei No’am* (17th century, Egypt), ‘Even Ha’Ezer, 15, who wrote in the name of Maharikash and Rida’i that “Egypt and the surrounding areas and in Yemen and the West are regions of Rambam. [i.e. they adhere to his ruling]”; R. Barukh Kelei, *Resp. Mekor Barukh* (16th century, Saloniki), s.17, who wrote that if the halakhic authorities of a city deem that the woman’s claims are well grounded and that his intention is to “chain her” and the custom is to coerce in cases of *ma’is* ‘ulay, it is appropriate for them to rely on their custom [Cf. Rosh, *Resp.* 43:8, quoted in §1.23, above]. Echoes of these rulings, Dr. Sain notes, are even found in the 19th century in the Land of Israel: *Resp. Ma’aseh Ish,* ‘Even Ha’Ezer, 11.

*Shulḥan Arukh, Ha’Ezer,* 72.2.


ARU 12:4-5 (§VI); ARU 18:73.

But the Mordekhai at least acknowledges the opinions favouring coercion: see §4.58, below (as cited by R. Waldenbreg).

Because according to the Mordekhai he was right.

Literally, ‘I would have said’ (haval ‘amenah’).

Hadari, ARU 17:141, does take this to be the implication, though noting that there are numerous problems with this reading. She notes that the *mitzvah* *lishmo’a* b’dive *tikhamim* is here transformed from a commandment to obey the *bet din* by dint of the fact that they are the representatives of the Jewish, Torah-observant community into a commandment basically to obey the *halakha.*
his true intention (disciplined if necessary by a measure of kefiyah\(^{871}\)) is precisely to follow the instructions of the bet din. R. Shear-Yashuv Cohen notes that though the Ḥatam Sofer maintains that coercion may be used only when it is unanimously agreed, later ‘Aharonim did not accept this in practice,\(^{872}\) and that even opponents of kefiyah, such as Rabbi S.Z. Auerbach, agreed that it may be used in cases of emergency. We may add that although the Ḥatam Sofer maintains that coercion may be used only when it is unanimously agreed, his grandson in Resp. Ḥatan Sofer (no.59) limits this stringency to cases of equally balanced division of opinion, such as a conflict between the Rosh and the Mordekhai, where it is not possible to reach a clear halakhic ruling.\(^{873}\) Where, however, there is a clear majority (rov minyan and rov binyan) favouring coercion, we may apply it in spite of the minority view, for even the minority must accept the ruling of the majority.\(^{874}\)

4.57 Modern support for kefiyah does not rest only on such factors. Rabbi Yitshaq Herzog\(^{875}\) cites manuscript responsa (nos. 17 and 47) of Rabbenu Yeshayah of Trani (end of the 13\(^{9}\) cent.), in which the latter rules in accordance with the Ge’onim regarding coercion of the divorce of a moredey, and in which he argues that the yeshivot of the Ge’onim are the replacement of the Great Sanhedrin, so that we must apply to their enactments the maxim mitsvah lishmo’a divrei haḵhamim. Hence, R. Herzog argues, any get coerced in accordance with their enactment is valid. He observes that those who forbid coerced divorce for a moredey do not refer to this ruling of Rabbenu Yeshayah, which indicates that they did not know of it; it is therefore possible that had they become aware of it many of them would have withdrawn their ruling. Indeed, he writes:\(^{876}\)

“Rabbenu Yeshayah, as is well known, is a great pillar of the Halakḥah of the stature of Rambam and Tosafot.” Here again we have new manuscript evidence which falls within Rema’s qualification of hilketa kebatra’ey.\(^{877}\)

\(^{871}\) ARU 17:108-10, 140.

\(^{872}\) 1990:200-201, citing R. Spector, R. Herzog and Ḥazon Ish.

\(^{873}\) As in the case of the nikḥpeh, where the Rosh says kofin and the Mordekhai says ’eyn kofin and we do not have any authority great enough to decide between them. We may note that in cases like nikḥpeh few if any would allow coercion. The biddash of Ḥatam Sofer is thus not the prohibition of the coercion; his biddash is that whereas others may regard the get coerced under such circumstances as only safeg batel (because maybe the halakḥah follows Rosh) Ḥatam Sofer argues that it is definitely batel (because there is no possible presumption of inner acquiescence).

\(^{874}\) Whether by biblical or rabbinic decree: see ARU 7:1 (§§1.2 and L.3).

\(^{875}\) Resp. Heikhal Yitshaq, ‘Even Ha’Ezer, part 1, no.2. See ARU 6:10 (§6.5).

\(^{876}\) Later in the responsum, s.v. WeRabbenu Yeshayah.

\(^{877}\) Cf. §§2.32, 4-9, above.
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and may argue that had Maran been aware of this, he might have adopted a different ruling in the Shulḥan Arukh, so that the position of those 'Aḥaronim who follow Rambam would be further strengthened.

4.58 In Tsits Eliezer 4.21, Dayan Waldenberg asserts that dayanim are obliged to risk their souls to save the wives trapped in marriages they cannot bear, and rules at the end that a case of meʾ is ‘alai with amatlah mevureret can be subjected to coercion by means of bererah: the wife is free to live apart from him and he is obliged to support her until he chooses to divorce. R. Waldenberg calls for this to be made law in all batey din in Israel. In a letter to R. Elyashiv published in Tsits Eliezer 5.26, he defends this call for the re-introduction of coercion in cases of meʾ is ‘alay. He points out that the Mordekhai records that a number of the Geʾonim and Rabbenu Hananʾel maintain, like the Rambam and Rashbam, that in a case of meʾis ‘alay we coerce him to divorce her according to the law of the Talmud. So maintains Tosefot Rid in the name of Rav Sherira Gaʾon – that according to the law of the Talmud after 12 months we force the husband to divorce her, the enactment of the Saboraʾim [referring here to the initial enactment of the Geʾonim] being that where coercion is required it is applied immediately. A careful examination of the wording of the Tosefot Rid there makes it clear, Dayan Waldenberg maintains, that he, too, agrees to this.

4.59 Dayan Waldenberg also cites later authorities. At (7) he points to the Rema in ‘Even HaʾEzer 77:3 where reference is made to places where the custom is to coerce in cases of meʾ is ‘alay, which proves that Rema has not excluded this opinion from the Halakah. He also notes that for Rema, even where there is no such custom, the husband in cases of meʾ is ‘alay is obliged (thus, by a ḥiyuv) to divorce, – an opinion apparently endorsed by the Shakh there and in Nodaʾ BiYehuda. Dayan Waldenberg concludes:

Therefore, according to the poverty of my understanding, the words of Maharaʾ Tawwaaʾah in Ḥat HaMeshulash may be relied on. He writes that even according to the opinion that one must not coerce, if the hour requires compulsion, let them coerce, for a judge must be guided by the circumstances confronting him – so long as the judgeʾs intention is for the sake of Heaven and he investigates the matter as is proper.

As mentioned in my book there, I proposed that the final decision in

878 End of (6), s.v. weʾatʾereʾnu.
879 See §4.39 and ARU 5:17-18 (§§12.2.12) for the citations. See also Riskin 2002:6-7.
this matter should be through a general agreement of all the rabbinic courts
in the land so that we should not find ourselves divided into splinter groups
in so fundamental an area of the Halakhah.

4.60 It has recently been claimed that “Rabbi Ovadyah Yosef is prepared to
rule in favour of get-coercion when the wife claims me’is ‘alay.’” The
passage quoted, however, while perfectly accurate, is misleading in that it
does not represent R. Yosef’s own final ruling. He is building up the
argument for coercion but ultimately uses it, in this particular case, only
as part of the solution, which amounts to a combination of many doubts.
R. Yosef has not as yet said that coercion may be applied in a case of
me’is ‘alay where there is no other argument for leniency. Furthermore,
this particular responsum (which fills numbers 18, 19 and 20) deals with a
Yemenite couple and, as R. Yosef reminds us, in Yemen the Rambam’s
rulings were accepted as the final Halakhah. Even so, R. Yosef points to
many other reasons to employ coercion in this case. It may well be,
however, that he would find a way of employing coercion should a
situation of me’is ‘alay arise where no other reason for leniency was
present even if the case involved Ashkenazim or Sefaradim (rather than
Yemenites), as indeed Rav Herzog (§4.57, above) and Dayan Waldenberg
(§§4.58-59, above) do.

F2 Grounds for Divorce in the ‘Aṭaronim

4.61 The sources on kefiyah in cases of moredet me’is ‘alay cast important
light on the limits of the grounds for divorce – and the (less discussed, but
equally important) grounds for the husband’s refusal. In this latter
context, attention may be drawn to the following ruling of Rabbenu
Yeroḥam,101 that

If she says, ‘I do not want him. Let him give me get and ketubbah’ and he
says, ‘I do not want you but I do not want to give a get’, then after 1 year we
force him to divorce but she loses the additions [to the ketubbah].

A clear distinction is here made between the husband’s will to terminate
the marriage, and his will to proceed with the procedure for such
termination. In these circumstances, the recalcitrant husband’s will is

100 Goldberg and Villa 2006:290 (at note 607 in the main text), quoting from Yahia’ ʿOmer (III
101 Sefer Mesharim, neviʿ 23, part 8. See also R. Shaʿanan 5750:213, who observes there that we
do not find amongst the posqim anyone who disagrees with this ruling. He notes, however, that
some limit this to cases in which the situation was not the fault of the wife.
clearly regarded as illegitimate\textsuperscript{82} and thus capable of being “corrected” by kefiyeh. Indeed, R. Feinstein has argued that if a husband is willing to divorce his wife, but wants to retain the get as a bargaining chip, then even if he is forced to give up what he wanted to achieve by means of the get, his willingness to divorce renders the get valid (at least bedi’avad).\textsuperscript{83} While Rabbenu Yerotam does not specify the reasons why the husband here does not want to give a get, R. Feinstein is specific in arguing that if the husband wants to retain the get as a bargaining chip, his willingness to divorce renders the coerced get valid and he may be forced to give up what he wanted to achieve by means of it. In short, the get is valid; it is only the condition the husband seeks to impose on it which is not (parallel to the rule applicable to some conditions in qiddushin\textsuperscript{84}). Indeed, R. Feinstein states:

Thus it turns out that the divorce itself he really want[ed] of his own accord, [the problem is] merely that he wanted to obtain by means of the divorce some other thing … and in this case, even if we should say that the settlement constituted real coercion, there was no coercion of the will to divorce, rather [simply coercion that] the divorce would not be a tool with which to obtain something from [the wife], about which there is good reason [to argue] that this is not considered coercion to invalidate the get …\textsuperscript{85}

Similarly, Rav S.-Y. Cohen has also proposed (lema’a’aseh) that if a bet din awards a ḥiyuv and the husband refuses to give a get for a long time, in order to blackmail his wife, abuse her etc., he may then be coerced to give the get.\textsuperscript{86} Though R. Cohen does not appear here to presuppose a case where we know that the husband would say “I do not want you”, we may still identify a conflict in his will, which may admit of similar severance: as a faithful member of the community who has internalised Torah values,

\textsuperscript{82} On the general issue, see further ch.1, section D.

\textsuperscript{83} Igrot Moshe, Even Ha’Ezer 3:44, noted at §1.21, above. R. Feinstein says that this is a strong argument. It should not however be relied upon by itself but may be used as a safeg to combine with other arguments for leniency.

\textsuperscript{84} See §3.6, above, on Tosefta Qiddushin 3:7-8.

\textsuperscript{85} Even Ha’Ezer Part 3, no.44, discussed at ARU 17:166-89, commenting that as presently used as a bargaining tool, “the get is again a means to an end but instead of its end being a separation from a woman the husband has found fault with, it has become the extortion of privileges, behaviours and economic wealth from a wife from whom the husband is, often, already to all intents and purposes separated.” In fact, R. Feinstein here goes beyond the circumstances of the particular case brought to him, where the husband was not actually using the get as a bargaining tool, but stated that he wished he could have done so. R. Feinstein added that one could argue here that even if it was kefiyeh the get would still be kasher, since there was a basic agreement to divorce. To argue that one cannot extrapolate from this to cases where the husband says he does not agree to divorce unless his conditions are met would be to import the Common Law doctrine of ratio decidenti!

1990-201.
we may assume that he betroths subject to rabbinic authority (kol hameqaddesh) and argue that it is his reluctance to observe the ḥiyuv of the bet din which may be severed.\(^7\)

4.62 Some may argue, in this context, that the grounds for coercion (or even the bases on which a woman may claim me’is ‘alay) are closed.\(^3\) R. Bass has cited a responsum of R. Feinstein\(^4\) in which the latter states that it is possible to apply coercion during remission in a case of insanity, even though this is not mentioned explicitly in the Talmud, as a cause for a coerced divorce.\(^5\) R. Feinstein writes that where a husband became afflicted with periods of insanity after the wedding it would be permitted to coerce divorce because the Talmud (Yevamot 112b) applies to insanity the argument that “one cannot dwell with a snake in a single cage”\(^6\) and the Talmud accepts such inability to dwell in the same cage as a snake as grounds for coercing a divorce.\(^7\) In discussing the relationship between the present case and a teshuvah of the Rosh,\(^8\) R. Feinstein argues that we do not coerce in such cases where the husband’s behaviour is no more than very troublesome.

4.63 By analogy, use may be made of this argument in the context of me’is ‘alay. R. Feinstein argues in this case that it is not sufficient that the wife finds the husband (or his behaviour) intolerable if objectively it would be regarded as less serious. Secular criminal law faces a similar issue in the defence of provocation, where in addition to the subjective test (loss of control resulting from the provocation), it is in some jurisdictions also required that the loss of control be reasonable. However, such reasonableness is increasingly judged on the basis not of the average person, but rather the standards to be expected of a person with the

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\(^7\) Cf. ARU 12:4 (§B.VI): “The logic behind the acceptance of a coerced get is that the husband does indeed want in his heart of hearts to obey the words of the Sages as the Rambam explained.” See further R. Abel, in n.1058, below.

\(^3\) See §§4.5, 55, above. The question would then arise as to whether they were closed before the period of the Rishonim, so as to exclude Rabbenu Yeroham (14th cent.).


\(^5\) See further ARU 12:6 (§IX), arguing that R. Feinstein here proves unequivocally that coerced divorce in a case of madness is sanctioned from the Talmud. The issue then becomes simply whether additions may be made to the ‘talmudic list’ by interpretation of the talmudic text.

\(^6\) I.e., one cannot expect a husband and wife to remain together if one has to be constantly on guard – for whatever reason – against the other. Cf. ET I pp. 249-50.

\(^7\) Ketubbot 77a and Tosafot Ket. 70a, s.v. Yotzi’ weyiten ketubbah.

\(^8\) Cited from Tur ‘Even Ha’Ezer 154, where the Rosh ruled that a divorce could not be coerced, although it appeared to be a case of insanity in the husband. R. Feinstein argues however that the husband was in fact sane but bad tempered, so that “it is impossible to dwell with a snake in one cage” was inapplicable.
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particular characteristics of the accused. For those who find me’is ‘alay too broad a ground for divorce if understood simply as subjective disgust, a similar requirement could be devised.\footnote{Perhaps with the onus of disproving the reasonableness of the disgust placed on the husband, as suggested in §4.87, below.}

4.64 The concept of amatlah has assumed a special prominence in modern discussions of the plea of me’is ‘alay, and the possibility of applying kefiyah. We may usefully remind ourselves of the background in Shulhan Arukh ‘Even Ha’Ezer 77:3.\footnote{ARU 16:161.}

And there are those who say that all this [i.e. the loss of all financial claims, which has been discussed before] applies to a woman who does not give amatlah or a reason for why she claims me’is ‘alay. But if she gives amatlah for her claim, for instance when she states that her husband went astray or that he is ill and she is divorced on that ground, then her case has to be decided according to the Geonic rule of dina demetivta (Tur in name of Maharam of Rothenburg), in which the husband is obliged to return to his wife everything that she has brought into the marriage: her nedonah and the nikhesa tson barzel, whether it is still intact or not, the husband has to pay for it. … If it is completely gone, however, then the husband does not need to repay it (dina demetivta, Tur in name of the Rif). Yet, everything he has given to her or which he has given to her in writing, she will not forfeit, and even all that she had seized she need not return (Mordekhai 90). And he will not be forced to divorce her, and she will not be forced to live with him.

Not only does this provide a useful indication, through the examples of illness and infidelity, of what may constitute amatlah; it also indicates that the function of amatlah was not that of a necessary condition for a divorce on the grounds of me’is ‘alay, but rather as marking the distinction (for R. Karo, provided that the husband was willing to grant the divorce) between divorce with the financial protections of the Ge’onim (me’is ‘alay with amatlah) and divorce without the financial protections of the Ge’onim (me’is ‘alay without amatlah).

4.65 The financial consequences of divorce have themselves come to be used as a test of the sincerity of the woman’s plea of me’is ‘alay: claiming her ketubbah at the same time as making this plea arouses suspicion about her true reasons for claiming repulsion and may prompt a fear that her real
motive is financial gain. The “moral fear” argument, that the woman notenot eynehu beater, is no longer the exclusive concern. Indeed, it has been argued that me‘is ‘alay is now often used in practice simply as a formula to bring about a no fault divorce on the part of the wife, and “no fault” may extend to occasional quarrelling or even simple boredom. Amatlah has come to be used as a safeguard against such use of the plea.

For example, the Haifa Rabbinical Court has permitted coercion (albeit not by physical means) provided that the wife’s plea of me‘is ‘alay is supported by amatlah (in the case at hand, domestic violence).

4.66 Indeed, there are indications that some would go further, and require amatlah mevareret. However, it is not clear whether this always functions as a higher standard of proof (or even as an objective standard at all). The use of this latter concept does, however, take us back to the financial issue in Shulhan Arukh ‘Even Ha’Ezer 77:3 (§4.64, above); if the bet din accepts the me‘is ‘alay on the grounds that the woman has given amatlah mevareret, she is not classified as a moredet, which entitles her to her ketubbah if a divorce ensues.

F3 Forms of Coercion in the ‘Aharonim

4.67 The debate over kefiyeh for the moredet me‘is ‘alay extends to the very definition of kefiyeh. It is significant that Rabbenu Tam himself, while opposing “kefiyeh”, approved the use of “lesser” measures, termed harhagot, which he must therefore have regarded as not constituting kefiyeh – and even (as R. Gertner points out) in a case of me‘is ‘alai where there was not even a mitzvah to divorce, since the woman was entitled to her freedom and the community was right to help her achieve it

See ARU 16:192, discussing PDR 6/325-353, but noting that, according to some opinions, a woman does not have to waive her ketubbah explicitly as long as she does not demand it while stating me‘is ‘alay.

E. Westreich 2002a:39.

The introduction of a requirement of amatlah in order to justify kefiyeh of the husband of a moredet is not, of course, an invention of the Rabbinical Courts of Israel. See, e.g., Rosh, Resp. 43:8 (n.752, above).


ARU 16:200.

For an example of where it did, see ARU 16:193 on PDR 3/3-5, where the amatlah mevaret was deemed sufficient to convince the dayanim of her repulsion, but not enough to justify measures of enforcement of a get. However, the fact that the marriage was based on sfek sfeka led eventually to such enforcement.


5758:487-89.
even if the husband was not legally or even morally obliged to divorce. These measures included the following: no-one shall speak to him, enquire after his welfare, show him any respect, do him any favour, invite him to a meal, give him any food or drink, visit him should he fall ill, do any business with him, allow him to sit in the synagogue, give him an ‘aliya, allow him to lead the service or say qaddish, circumcise his children, or allow him burial rights; in fact, all should keep as far from him as possible.

Yet there has been, in more recent times, a reluctance to use these harpaqot, even in Israel where the secular law has enacted a modern form of them. The issue, as so often, is the desire to be strict in gittin, even to the extent of following a minority or lone view. In this context, the source of the opposition is a responsum of Maharibah quoted in Pithei Teshuvah to 'Even Ha'Ezer 154 sub-para. 30. Maharibah argues as follows:

1. Rabbenu Tam said that in cases where we cannot apply physical coercion (such as, in his view, the case of me’is ‘alav), we may not use excommunication (berem or even niddui) either.
2. Nowadays people fear the harpaqot more than niddui. Therefore,
3. Today there is more reason to forbid harpaqot than niddui

R. Yosef, Yabia 'Omer VIII 'Even Ha'Ezer 25:4 (at the end) records that in one case the bet din told the wife’s lawyer that he was free to publicise all the above in the newspapers and anywhere else he saw fit and to bring it to the notice of the synagogue wardens and members throughout the city, so that all should keep apart from the husband and keep him at a distance in every possible manner. The Bet Din may add any stringency they want so long as they do not put him in berem: Rema, 'Even Ha'Ezer 154:21.

Under the Rabbinical Courts (Enforcement of Divorce Judgments) Law, 5755-1995, passports may be confiscated, bank accounts frozen, driver’s licences suspended; there are also sanctions in relation to the holding of public office, professional work and business licences. For the details, see Kaplan (2004), who indicates that the explanatory notes accompanying the Knesset Bill enacted in 1995 claimed that the civil disabilities were consistent with the spirit of Rabbenu Tam’s harpaqot. It appears clear that R. Yosef regards aspects of these measures as implementing Rabbenu Tam’s harpaqot; he mentions non-renewal of passports in his discussion in Yabia 'Omer VIII 'Even Ha'Ezer 25:3-4. R. Jachter writes: “In Israel, laws have been enacted to permit State Rabbinic Courts to take away the driver’s licence and checking accounts of recalcitrant spouses. This is a modern application of Harchakot D’Rabbeinu Tam”: “Viable Solutions II”, http://www.tabc.org/kol Torah/aguna/aguna59.2.htm. The relationship is more fully (and critically) discussed by Kaplan 2004:130-33.

But see §§2.5-10, above.

Gertner 5758:475-89, especially 484(5) and 489(5), examines and summarises all the views.
(which is certainly forbidden).

However, R. Ovadyah Yosef strongly objects to this *humrah* and argues powerfully for a full application of the *harbasgot* wherever they would be sanctioned by Rabbenu Tam. The latter’s point, he observes, is not that *harbasgot* 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 separate themselves totally from a wicked man until he stops sinning. And in that particular case R. Yosef, together with R. Waldenberg and R. Kolitz, ordered the application of *harbasgot* against the recalcitrant husband.

4.69 We are told that *batey hadin* in Israel today are increasingly prepared (more than in the past) in cases of me’is ‘alay to grant a *hijyuv*, but without any form of coercion. Some *dayanim*, however, are prepared to apply *harbasgot*. Indeed, there is an argument, in the context of the power conferred by Israeli law, that imprisonment is halakhically less objectionable than physical coercion, on the grounds (a) that it is indirect, and (b) that conditions in modern prisons are less oppressive

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100 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, s.6: “Where a rabbinical court, by final judgment, has ordered that a husband be compelled to grant his wife a letter of divorce or that a wife be compelled to accept a letter of divorce from her husband, a District court may, upon expiration of six months from the day of the making of the order, on the application of the Attorney General, compel compliance with the order by imprisonment.” The Rabbinical Courts (Enforcement of Divorce Judgments) Law, 5755-1995, grant the rabbinical courts (more limited) powers of imprisonment directly; see Kaplan 2004:126-29.

101 For a discussion of (traditional) *kefiyeh* in relation to concepts of torture and human autonomy, see Hadari, ARU 17:154-62, arguing (at 159) that a free and rational man is sufficiently master of himself to be able to resist *kefiyeh* if he truly so wills, so that what is produced by *kefiyeh* is “coerced consent”: the choice between submitting to ongoing torture and assenting to an act which one does not will, Hadari argues, whilst it may be a rather limited choice, is nonetheless a choice. This is more than a philosophical quibble. It relates directly to the respective roles of the spouses and the *bet din* in the termination process: see ARU 17:160: “... the halakha even in those most extreme situations still requires the husband to make that decision, albeit that it permits the exertion of pressure to encourage him to decide in the affirmative”, noting the distinction of the *Hekhat Yo’ev* (cited in Gertner 5758:465b-466a) between the level of will or intentionality required in, for example, a sale (where there are two parties to the transaction and the *gemirat da’at* of both is required) and that required for the giving of a gift, or a *get* (where the will – *ratsom* – of only one is required): “In the latter case it is ... *qar* – full will – which is required but in the case of legitimate *kefiyeh*, the *Hekhat Yo’ev* asserts, the will of the *bet din* supplies part of the necessary will.” The issue is akin to that of the (declaratory or constitutive) role of the *bet din* in *hafqah*ah (§§5.66-67, below) and that of the capacity of the parties, by means of conditions, to augment the power of the *bet din* (§§3.42, 91, §4.25, above). The overall picture which emerges is that of a partnership between the spouses and the *bet din*, even when (in extreme circumstances) the role of the *bet din* might appear so dominant as to be overriding.

102 Cf. ARU 18:69.
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than in the past. Indeed, R. Daichovsky argues that on R. Herzog’s analysis, both limited financial and physical sanctions (which he does not regard as constituting kefiyot) may be used without rendering any resultant get as a get me’useh, and that this could be done even where there is no formal decision of kefiyot.

4.70 R. Ovadyah Yosef has noted that we also find in the responsa of the Rosh that if a bet din coerced a divorce in the case of me’is ‘alay and she remarried on the basis of this get, she need not leave her new husband. He argues that an illegally coerced get when enforced by the Bet Din is only rabbinically invalid according to the Rambam, at least if issued in error, and that the Mabit, Maharashdash, Maharana and Radbaz therefore rule that if the woman remarried on the basis of such a coerced get she need not leave her new husband. The remarriage is thus valid bedi’avad. Rema, however, takes a contrary view, so that a marriage ended by such a get would be in a state of doubt (at least if the get were coerced under an error as to the halakhah, rather than in knowledge of its illegality) and such a doubt could be taken into account in the context of se’eq se’qa. This is especially so in a she’et hadela’ah, where it is possible to permit lekhatchilah what is usually only permitted bedi’avad. Indeed, R. Feinstein (Igrot Moshe EH III no. 44) and others have noted that even when a get is coerced shelo kadin it may well be rendered valid even rabbinically if the wife is anyhow halakhically separated from the husband, in that the husband is losing nothing and also

913 See Yabia ‘Omer III ‘Even Ha’Ezer 20:34.
914 On R. Daichovsky’s definition, in relation to the value of the husband’s autonomy, see ARU 17:152, and now his “Darko Shel HaRav Herzog Bikhefiyat Get”, in Masu’ah LeYitkah (Jerusalem: Yad Harav Herzog, 2009), 332-342.
916 Resp. 43:6, in §4.47, above; see Responsa Yabia ‘Omer III ‘Even Ha’Ezer 19:21, citing Rashbots.
917 5721:99.
918 So Rambam, though it does seem from a few places in R. Yosef’s writings that even if they knowingly coerced illegally Rambam would regard the get as only rabbinically invalid. It is noteworthy that Rabbenu Tam writes in Sefer HaYashar (beginning of siman 24 = p. 40 lines 4-7 in the Jerusalem 5732 ed.) that no-one can prove whether a divorce illegally coerced by a bet din is biblically or only rabbinically invalid, from which it also seems possible that even a get intentionally enforced illegally by a bet din could be biblically valid.
919 On these sources, see Gertner 5758, section 42, pp.203-07, arguing that it is not possible clearly to prove the argument from them. R. Ovadyah Yosef seems to have had in mind the statement to this effect by ‘Agudat ‘Ezov, ‘Even Ha’Ezer 19 para.18 (which R. Gertner strongly questions).
920 The Bet Yosef (‘Even Ha’Ezer 77) says (only) that if she remarried she need not leave him, the Rema, Darkhei Moshe 10 on Bet Yosef EH 77, says that she must leave him.
gains from the divorce (being exempted from she’er and kesut, and freed himself to remarry, despite the horam deRabbenu Gershom). R. Feinstein adds that though one cannot rely on this alone, it is a powerful argument that may be added to others to permit her remarriage. R. Daichovsky has also maintained that in many cases a compelled get is valid at least bedi’avad.  

4.71 Indeed, there are circumstances, in principle, when some argue that the halakha accepts that the husband’s will may be by-passed entirely. R. Mesheloff notes that on the basis of the rule that והנה יוסי אין לוロー – one may obtain an advantage for another [even] without his [the latter’s] knowledge/agreement – some have suggested that where divorce is ordered by a bet din and the husband does not agree to the get, the bet din may arrange its writing, signing and delivery even without his permission, since it is to the advantage of himself and his wife. However, this path (the get zikkui) has only ever been used when it was absolutely clear that it was to the benefit of both husband and wife, and appears to underlie the observations of R. Feinstein (Iggrot Moshe, Even Ha’Ezer III no. 44) about a situation where the husband is serving life imprisonment and is known to be religiously observant, but where it was impossible to gain access to him, but we are sure that he would not want to chain his wife. This does not apply when the husband objects to the divorce (even though from a halakhic/ethical perspective it is the right and, therefore, advantageous thing to do).  

4.72 A less problematic argument, but to similar effect, relates to the situation where the husband has previously agreed to a get, whether by having it delivered in advance but subject to a condition, or by signing a harsha’ah delegating such delivery (on fulfilment of stated conditions) to a bet din in the future. These are both forms of conditional get, where the issue becomes whether the condition may later be revoked. As argued above

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921 Daichovsky 5768:21.
922 See, however, ARU 5:77 (§30.8.5-6) on R. Morgenstern’s citation of R. Eliyahu Klitzkin.
924 If it were possible to apply חט את מתחם את אשתו הוא שבר על תר, in such circumstances we might have a simple solution for obtaining a divorce for the wife of a Jew who had apostatized – a problem with which the Acharonim grappled at length. Recently, a number of rabbis in America have used this approach but the leading dayanim have totally rejected it – see Responsum She’eriy ‘Esh III no. 32. In no. 25 there, mention is made of the opposition of R. Herzog to the idea. See also ARU 2:67-68 (§5.3.3), 8:37 (§7.2), on R. Morgenstern’s argument.
925 See §§3.44-47, above, on R. Henkin’s proposal.
926 For an argument that such revocation is for the benefit of neither the husband nor the wife, so that the principle of ונה יוסי אין לוロー (see might be applied here), see R. Abel, ARU 18:21:
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in relation to conditional marriage, there are ways of preserving such conditions against subsequent implied revocation. What is important in the present context is that recognition that the condition is still valid (and thus that the husband’s agreement to the get, though given in the past, remains valid) is not regarded as raising an issue of kefiyyah. Indeed, the talmudic case closest to this, where a get entrusted to a shalihah is revoked before delivery to the wife, is discussed in terms of hafqa’ah.

G. Dogmatic Issues I: History and Authority

4.73  The halakhah of the moredet claiming me’is ‘alay presents a particularly complex set of problems concerning the interaction of history and authority, as well as a wealth of material which prompts further reflection on the policy and conceptual issues involved. The object of our enquiry here cannot be reduced to the simple question: “can the taganta demetivta be revived today, in the light of the present state of the authorities?” even though a reassessment of the dogmatic weight of both that tradition and (the distinct) tradition of Rambam do play an important part in our analysis. In this section, we seek to review the historical issues in terms of their dogmatic weight.

4.74  The historical issues we have reviewed are the following:

(a) the recent discovery of a manuscript in which the view of Amemar in the Bavli is explicitly in favour of coercion: רַבִּיעַ יָפֶן יָפֶן (§§4.7-9);
(b) the tradition of Rashi (and others) interpreting non-explicit talmudic statements as already presupposing forms of

(commenting on Berkvits 1967:46, 49, 63-4): “The only “advantage” they would gain by using the alternative policy of foregoing the condition would be that he would then be able to chain her to a dead marriage and she would be able to suffer the agony of being an ‘agunah. Why should we believe that either of them would want to assure themselves, during their nissu’in, of such future “rights”?”

See §§3.60-67, above; ARU 18:57-58. Where the husband tells the wife or any two people explicitly that he declares the get/harsh’ah cancelled, there is no 100% solution – other, perhaps, than including this contingency in the definition of recalcitrance which triggers a termative condition.

For a full discussion of the issues, of principle and drafting, see further R. Abel’s analysis in ARU 18:57-67, arguing, at 58, that a conditional get is preferable to a harsha’ah because of possible problems in later identifying the witnesses to the latter; supporting, at 65f., the suggestion of Berkvits 1967:73, that problems of get muqdam and get yashar may be solved by writing on the get that the date of the actual divorce has been delayed by mutual agreement of the couple; and replying, at 67f., to possible objections based on bererah.

Gitin 33a; see §§5.14-16, below.

See further ARU 5:19 (§§12.2.14), criticising the approach of R. Moshe Morgenstern.
coercion (§§4.10-16);
(c) the possibility that the Ge’onim may have practiced a
different form of *kefiyot*, more akin to annulment (§§4.21-
25);
(d) the possibility that, while the Ge’onim recognised an
emergency situation, they did not base their authority
exclusively on that, but rather assumed that form of talmudic
interpretation which itself already endorsed coercion (§§4.19,
26-29);
(e) the inconsistencies in the text of the *Sefer Hayashar* (§§4.33-
38) in relation not only to Rabbenu Tam’s attitude to *kefiyot*
but also to *bijyu* (and thus his basic attitude to *me’er* ‘alay as
a grounds for divorce);
(f) the acceptance of Ramah’s view beyond the confines of the
Yemenite community (§§4.45-49, 55) – fitting, rather, into a
more general pattern of division between (broadly)
Ashkenazim and Sephardim, itself reflecting the different
cultural environments within which these traditions
developed.

These issues now fall to be considered more systematically in dogmatic
terms.

G1 The Balance of Opinion amongst post-Geonic authorities

4.75 We do not claim that the discovery of the Leningrad Firkovitch MS
necessarily alters our view of the traditional text of the Talmud. Such a
claim would require further examination by palaeographers of the relative
dating of all manuscript sources (both of the Talmud itself and of other
sources where the same issue is raised). However, the issue is not
confined to what was the original text of the Talmud; 
931 even a later textual
tradition may have halakhic significance as evidence of what later
authorities considered to be a necessary correction of the traditional text.
So viewed, the variant reading in the Leningrad Firkovitch MS may rank
alongside evidence of what the Ge’onim and many of the Rishonim
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931 Potentially raising the issue of *hilka* kebatra’ey: see further §4.83, below.
932 As noted above, early Ashkenazi Rishonim, including Rabbenu Gershom Me’or Hagolah,
Rashi and Rashbam, interpreted the talmudic suga as authorising *kefiyot* in the case of the
moreh’s *me’er* ‘alay, the wife who rejected her husband for reasons of “disgust” (§4.10);
indeed, the predecessors of Rabbenu Tam largely favoured unilateral divorce for the wife who
claimed *me’er* ‘alay, as we see from Alfasi (n.757 above, in §4.33). On Rashi’s interpretation,
see §§4.11-16, above.
considered (by interpretation of the traditional text) to be the true talmudic position. More generally, we may ask whether the authority of tradition is affected by what may turn out to have been historical errors concerning its prior development? For example, if Rabbenu Tam did take the view that coercion of the husband is never mentioned in the Talmud and that the Ge’onim did not base themselves on talmudic authority (even a minority opinion in the Talmud), and these claims turn out to be historically incorrect, does that affect the status of the objections Rabbenu Tam made to the reforms of the Ge’onim? Or do we take the view that, like an erroneous textual tradition, error may be validated by subsequent acceptance? Is Rema’s justification of his exception to the principle of hilketa kehatra ey relevant here? He maintained that we need not follow later authorities when the latter were unaware of a previously unpublished geonic responsa since, had it been known, the later authorities may have decided the other way.

4.77 A preliminary question in addressing the issue of the balance of authority is whether recourse to the position before Rabbenu Tam (when me’es ‘alay appears to have been universally accepted as a valid grounds for divorce, and (by most) as a grounds for coerced divorce) remains relevant in the light of the authority gained by Rabbenu Tam’s objections. In part, this raises issues of halakhic epochs (in particular, the status of

953 On the general issue, see §§2.25-37, above.
954 Riskin, 1989:76, implies that this is what the Ge’onim did: “After all, the Mishnah itself teaches that the minority opinion is recorded together with the majority opinion in order to allow a later generation to decide in accordance with the former; and it is precisely because of such situations that the Sages teach, “[both] these and those are the words of the living God.” Hence, the Ge’onim sought and found an Amoraic precedent for not forcing a woman to remain married to a husband she found repulsive. Moreover, the Talmudic decree of the Rabbanan Saborai provided for a bill of divorce even against the wishes of the husband, according to geonic interpretation. This opened the way for subsequent geonic legislation when the Rabbis observed that Jewish women occasionally converted to Islam. The study of the development of the geonic decrees regarding the rebellious wife provides an excellent insight into the internal process of halakhic change.”
955 Thus, Riskin 1989:86 argues: “If it was the Geonim who initially provided for a coerced divorce, then if the Geonic decrees are ever rejected, their provision for a coerced divorce must be rejected as well. If, however, it was the Rabbanan Saborai—i.e., the Talmud itself—who provided for a coerced divorce, then even if we were to reject the Geonic decrees granting the wife monetary compensation, we would nevertheless be forced to uphold the provision for a coerced divorce. Such is the position of Alfasi.” Rif, however, sees the geonic measures as based on taqqanah, not interpretation.
956 Rema to Shulhan Arukh Hoshen Mishpat 25:2, quoted in text at §2.28, above.
957 See §4.33, above, for Raban, Alfasi and Rashbam; §4.45 on the spread of the geonic measures to Paris, on Rabbenu Tam’s own evidence.
geonic opinions in general, when rejected by Rishonim\(^{935}\) and in part issues of the weight of Rabbenu Tam’s own opinion, in the light of doubts regarding the certainty of our knowledge of it on the one hand (§§4.33-38) and the possible application to it, on the other, of Rema’s qualification to *hilketa kebrit*’ey (§§4.80-82, below) on the other. We take the view that these factors, at the very least, raise a *safaq* regarding the authority conventionally attached to Rabbenu Tam’s view, such as to admit Geonic opinions into the balance.

4.78 The assumption of a consensus amongst the Rishonim and later authorities in favour of Rabbenu Tam’s view now appears questionable. While the geonic measures themselves were increasingly rejected as general law (as opposed to local custom\(^ {936}\)), Rambam’s acceptance of *kefiyot* (accompanied by less generous financial provisions than those of the Ge’onim) survived in Spain and amongst communities exiled from there to North Africa after the 1391 expulsion. Indeed, Rashbetz (himself a member of the generation of those exiles) spoke particularly strongly in favour of coercion (§4.46). Nor does it appear to be true that Rambam’s view ultimately survived (after the *Shulhan Arukh*) only in Yemen (§4.55). Rather, there appears to have been a broader division between Ashkenazi and Sephardi authorities (which still appears to persist today).

4.79 Nor has the issue proved to be closed in the era of the ’Abaronim (section F, above). We noted above the position of the Ḥatan Sofer (§4.56) in relation to the view of his grandfather, the Ḥatan Sofer (opposing *kefiyot*). Moreover, R. Herzog has invoked manuscript evidence of (hitherto unknown) responsa of a Rishon, Rabbenu Yeshayahu of Trani, in which the latter rules in accordance with the Ge’onim (§4.57). The view of the Ḥatan Sofer may thus not only be opposed by the views of later *batra*’ey but may also be subject to Rema’s qualification: can we be sure that the Ḥatan Sofer would have maintained his view had he been aware of the responsa of Rabbenu Yeshayahu of Trani (§4.82, below)? Dayan Waldenberg, moreover, has himself re-evaluated the balance of opinion amongst the Rishonim, and concluded that there remains a case for the re-introduction of *kefiyot* on a plea of *me’is ‘alay* (§4.59).

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\(^{935}\) In fact, Rema gives the case of the later authorities who disagreed with the Ge’onim as an application of *hilketa kebrit*’ey: see §2.28, above.

\(^{936}\) Accepted still by Rema: see §4.46 (end).
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G2 Applications of *hilketa kebatra’ey*

4.80 In two important respects, the rules of *hilketa kebatra’ey* prove relevant to the issue. The first relates to the status of Rabbenu Tam’s view (assuming we are confident that we know what it was\(^{440}\)) of the basis on which the Ge’onim proceeded and his criticism that there was no talmudic warrant for what they did. We may ask whether the opposition of many *Rishonim to kefiyeh* would have been withdrawn had they been aware that Rambam’s opinion was supported by a version (that of MS Leningrad Firkovitch) of the talmudic text. Indeed, Rashba\(^{441}\) gave precisely the reading in the MS Leningrad Firkovitch in arguing (against *kefiyeh*) what Amemar *should have said* if Rambam were correct: “According to Rambam, Amemar ought to have said מַעֲשֵׂה יָמָה.” It may be noted, moreover, that this is not a matter of seeking to overthrow a halakhic consensus on the basis of recently discovered MSS. There is here no halakhic consensus.

4.81 The claim of Rabbenu Tam that the Ge’onim lacked authority for coercion in such cases (of *moredet me’is ‘alay*) is in fact based upon a series of assumptions, each one of which is subject to debate: (i) the text of the Talmud available to him, (ii) his interpretation of it (contrary to that of Rashi and others); (iii) his general reluctance to accept halakhic modification on the basis of emergency powers;\(^{442}\) (iv) his unawareness of the claim that the geonic practice had been based in part upon a *tnai.*\(^{443}\)

4.82 The second application of *hilketa kebatra’ey* to this issue relates to the *Shultan ‘Arukh* itself. We have argued (§4.48) that had Maran seen *Tashbets* II:69 and II:180 and the arguments of Ibn Tawwa’ah, he would have accepted the position of the Rosh – and the final position of Rashbets – as being that, though a *get* must not be coerced in cases of *me’is ‘alay,* if it was coerced the woman may remarry *lekhatbillah.*\(^{444}\) Moreover, we are now aware also of the *teshuvot* of Rabbenu Yeshayah of Trani (ruling in accordance with the Ge’onim), to which R. Herzog has drawn attention (§4.57, above).

\(^{440}\) See, in general, §§2.28-29, 33, above.

\(^{441}\) See §§4.33-36, above.

\(^{442}\) See ARU 9:2 note 11.

\(^{443}\) See n.737, above.

\(^{444}\) The view Me’iri attributes to his teachers’ teachers: see §§3.9-17, above.

\(^{445}\) ARU 6:12 (§6.7), citing Resp. Yabia ‘Omer, X, Ḥoshen Mishpat 1, s.v. *Teshuvah.*
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G3  Applications of *safeq* and *sfeq* *sfeqa*

4.83 These issues of *hilketa kehatra’ey* (as well as others not prompted by issues of historical doubt) may also be discussed in terms of the rules of *safeq*.

Indeed, we have already noted the view that *sfeq* *sfeqa* takes priority over *hilketa kehatra’ey* where the two both apply, and even that (according to the Rosh) where the *safeq* is in rabbinic law and the earlier authority rules leniently the earlier authority should be followed in spite of the rule of *batra’ey*. Thus, insofar as the Geonic measures relate to rabbinic law, we should on this view follow them. But even as regards measures relating to biblical law, we have argued that there are sufficient doubts regarding Rabbenu Tam’s opinion to (re-)admit the Geonic opinions into our assessment of the balance of authority.

Thus even if we do not know what Rabbenu Tam would have said to the variant in MS Leningrad Firkovitch, this in itself may count as a *safeq*.

G4  The current situation as a *she’at hadekhaq*

4.84 Arguments from both *hilketa kehatra’ey* and *sfeq* *sfeqa* may be combined with the rules relating to authority in times of urgency, in such a way as to overcome the inhibitions felt by many *dayanim* against applying (i) *lemi’aseh* what otherwise might only be available *lehalakhah* and/or (ii) against adopting *lekhatchillah* what otherwise might only be available *bedi’avad*.

Thus we need to consider whether the situation regarding get refusal today is one of compelling need (*she’at hadekhaq*), so that in our situation the Rashbets – and Maran – would allow, in a case of *me’is ‘alay*, coercion (and, obviously, remarriage), even *lekhatchillah*.

R. Ovadyah Yosef has, indeed, argued that our period, in this respect, is more comparable to that of the Ge’onim than that of Rabbenu Tam, using this as a *partial* justification for reverting to the measures of the Ge’onim: recourse to gentle courts, applying their own criteria, is

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943 See further §2.27, above.
947 See further §2.30, above.
948 See further §§4.37, 77 above.
949 On the various relaxations of the rules of authority permitted in a *she’at hadekhaq*, see §§2.38-41 above, and especially §2.39, noting that it is possible to argue, based on positions taken by Rabbi A.Y. Kook and of R. Ovadyah Yosef, that we may rely in a situation of ‘igpay even on a lone opinion, even when dealing with a biblical prohibition.
950 See R. Shlomo Ishbn, §2.38, above.
951 See further ARU 6:12 (§6.7); ARU 8:35-36 (§6.6 and nn.225-36).
952 Arguing that in the period of the Ramban, women did not go so far as to live with other men without a *get*: today, he argues, women are prepared to leave the religion entirely. See *Yada’* ‘Omer vol.3, ‘Even Ha’Ezer 18:13.
increasingly common, not only for a (required) civil divorce, but also to put pressure on the husband to grant a get, sometimes in ways which are halakhically problematic. Indeed, Dayan Waldenberg, who otherwise opposes kefiyot, has endorsed, in the current context, reliance on the view of Ḥat HaMashulash, that compulsion is permissible if the hour requires it, “for a judge must be guided by the circumstances confronting him”.  

H. Dogmatic Issues 2: meʾ is ‘alay and the Grounds for Divorce

4.85 The various passages in Sefer HaTashar, if all correctly attributed to Rabbenu Tam, reveal an ambivalence in his basic attitude to meʾ is ‘alay as a ground for divorce. On the one hand, his (ultimate?) absolute rejection of kefiyot in the case of the moredet meʾ is ‘alay is compatible with his extension of the “moral fear” argument, that the woman’s real motive may be that she notenet eynehah beʾaḥer, from the cases in Mishnah Nedarim 11:12 to the claim of meʾ is ‘alay (§4.34, above), together with his desire to penalise such a woman (مشاهチェック: §4.35, above). On the other hand, if Rabbenu Tam is really driven here by such a moral policy why does he permit the use of harḥaqot in cases of meʾ is ‘alay (§§4.38, 51, above)?

4.86 It is understandable that, in some social circumstances at least, there should be a desire to put the sincerity of women’s pleas for divorce to the test. We do not, however, encounter such strong “ontological” claims regarding the “moral fear” argument (notenet eynehah beʾaḥer) comparable to those which have been advanced by some in relation to tav lemeitav. Indeed, the “moral fear” argument has come to be used also against men, in that they may have a comparable ulterior motive after Rabbenu Gershom’s ban on polygamy. It is thus questionable whether this moral fear should always (in effect) reverse the burden of proof, imposing

953 See further §§4.58-59, above; ARU 7:24 n.166.
954 For a suggestion that the background to Mishnah Nedarim 11:12 was the loose moral standards of the Herodian aristocracy, see Jackson 2005.
955 See §1.40, above. We do, however, find the Rosh saying (Resp. 43:8): “if a woman will be able to remove herself from under a husband by saying “I do not want him” not a single daughter of Avraham avinu will remain with their husband. They will cast their eyes upon others and will rebel against their husbands.” See ARU 16:115 on the occurrence throughout the ages of the view that “women in our days are promiscuous” and should therefore not be trusted because they will cast their eyes upon other men.
956 See ARU 16:156-59 for instances in Rashba and modern decisions of the Rabbinical Courts in Israel, and noting that a search of the Bar-Ilam database on noten eynah beʾaḥer produces some 300 sources.
on the woman the need to rebut a presumption of ulterior motive through the production of amatlah.\textsuperscript{937} Indeed, the questions whether amatlah is required at all, whether it amounts to a requirement of independent corroboration of the woman’s sincerity in claiming disgust, or whether it amounts to independent grounds for divorce, as a safeguard against using me’is ‘alay as a cover for genuine “no fault” divorce,\textsuperscript{938} may well reflect the reactions of different communities to the perceived moral climate.

4.87 We have seen that Maharam Rothenburg ruled that a moredet me’is ‘alay should either give proof why her husband was not acceptable to her (apparently, the “subjective” ground), or bring proof that he went astray or had a disease.\textsuperscript{939} This shows that me’is ‘alay had come to be a standard divorce plea, even where there were quite distinct substantive grounds, and this appears still to be the practice in Israel, where we encounter cases where me’is ‘alay is based (explicitly) on mumim.\textsuperscript{940} But the linkage made by Maharam Rothenburg has another potential use, which we may derive by analogy with the plea of provocation in secular criminal law.\textsuperscript{941} Here the question arises not only whether the subjective test (loss of control resulting from the provocation) was satisfied, but also whether such loss of control was reasonable in the circumstances (§4.63, above). In a plea of me’is ‘alay which is accepted as sincere, it would perhaps be appropriate to place the onus of disproving the reasonableness of the disgust on the husband.

4.88 This prompts the question whether a victim of recalcitrance may claim to be a moredet me’is ‘alay? If this were the sole grounds, and the question were posed with a view to kefiyah, a necessary condition of any affirmative answer would be that the list of situations where kefiyah is admissible is not closed. On this, as we have seen, opinions are divided.\textsuperscript{942} However, our definition of recalcitrance entails that a bet din has at least made a recommendation that the husband give a get, which itself

\textsuperscript{937} §§4.52-53, above.

\textsuperscript{938} Based, perhaps, on mere boredom, occasional quarrelling or behaviour perceived as irritating: see §4.65, above. This, perhaps, lies behind the criterion of R. Moshe Feinstein (in the context of qiddushet ta’arit), that the behaviour must be more than “very troublesome”; in the case described in §4.62, above.

\textsuperscript{939} See §4.53, above.


\textsuperscript{942} For the view that the list is closed, see R. Shemuel Amar of Morocco in §4.55, above; for the view that it is not closed, see R. Moshe Feinstein in §4.62, above.
presupposes that there are grounds beyond mere recalcitrance. Moreover, even if *kefiyah*, in the traditional sense, is not sought, it is clear that the husband has compounded his offence by refusing to follow the *bet din*’s recommendation.  

The above summary of the criteria for divorce implicit in discussions of *kefiyah* for the *moredet me’is ‘alay* (§§4.85-88) has indicated a range of positions which may well reflect differences in the moral climate in different communities. We have also seen that some have argued for a correlation between the basic differences between Rambam and Rabbenu Tam and the external religio-legal (Islamic or Christian) environment. There is thus good historical warrant for the type of analysis offered by Dayan Broyde in his book, distinguishing different (Orthodox) communities in terms of the exit régimes from marriage which they have adopted. He therefore includes in his tripartite agreement:

We both belong to a community where the majority of the great rabbis and the *batey din* of that community have authorized the use of annulment in cases like this, and I accept the communal decree on this matter as binding upon me. The *beit din* selected by my wife shall be irrevocably authorized to annul this marriage when they feel such is proper and the above conditions are met.

Leaving aside any questions about the reality of such a community, this raises the question of inter-communal recognition. We have argued that even if a “one size fits all” solution is currently beyond reach, we must seek a “global” solution which involves mutual recognition, so that (given especially the phenomenon of “religious mobility”) children are not born who are *kasher* in one community (that of their birth) but *manzerim* in another community (which may be that of their intended marriage). In this context, the distinction between the grounds and procedure of divorce proves crucial: other communities may reject R. Broyde’s grounds for divorce *for themselves*; what matters (on our criteria of globality, which are not those of R. Broyde) is that those other communities accept that the procedure of divorce (the combination of “remedies”) is *kasher*. We may recall, in this context, the willingness in principle of the Schools of Hillel and Shammai to intermarry (*Mishnah Yebamot* 1:4), notwithstanding the halakhic differences between them – differences which included the

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963 See §4.61 (end), above.
964 See §4.44, above.
966 See §2.47, above.
grounds for divorce (Mishnah Gittin 9:10), though the Gemara understands this as meaning that they gave information to each other regarding the eligibility of individual women, so that each could apply its own criteria (Yevamot, 14a).

I. Dogmatic Issues 3: The Husband’s Will and the Role of the Bet Din

4.90 At the beginning of this chapter (§4.3), we posed a basic question: what conception of freedom of the husband’s will is to be assumed as underlying the issue of (permissible and impermissible) kefiydh, and we advanced, as against secular notions of individual autonomy, the notion of the true will of a faithful member of the community who has internalised Torah values (including, we would argue, those discussed in terms of “abuse of rights”: §§1.23-25, above), for whom coercion represents not a violation of his will, but rather a form of education. In this context, the observations of Rabbenu Yeroham, R. Feinstein and Rav S.-Y. Cohen in relation to the husband’s motivation for refusing the get (§4.61) assume a particular importance. These sources point to the conclusion that it is possible to “sever” that part of the husband’s will prompted (as Rambam would say) by the yetser hara from the husband’s “basic” will, which is “I do not want you”. We may surely argue that it is a sin to disobey a bet din, in which case why should a sinner be rewarded (hote niskar)? In short, if kefiydh follows failure of the husband to comply with a hiyyuv (a hiyyuv which Rabbi Ovadyah Yosef is apparently prepared to contemplate: §4.60), should that be regarded as enforcement (by overriding the husband’s will) of a get, or enforcement of the hiyyuv?

4.91 Conversely, we do not construct the decision of the bet din as the exercise of a totally independent (“strong”) discretion, in opposition to and overriding the will of the husband. Rather, the role of the bet din balances that of the husband, not only in representing the community interest (a “partnership” model of the relationship between the parties and the community institutions) but also in ensuring that the husband does indeed behave as a faithful member of the Torah community. Indeed, it is
possible to evaluate the relative claims of the various “solutions” in terms of just such a balance.

1. Dogmatic Issues 4: Forms of Coercion

4.92 In the course of this chapter, we have encountered a range of views and different formulations regarding the (procedural) issue of the very nature of kefiyeh, and argued that they may be related to the (substantive) issues of the grounds for divorce and the status of the husband’s will in relation to the get. One of the most striking of these formulations is that of Rosh’s interpretation (in Shut 43:8) of the geonic measures as a form of hafqa’ah (§§4.22-24), not least in the context of his preference in particular circumstances (Shut 35:2) for coercion over (traditional) annulment. This suggests that the Rosh, even if not willing to adopt the geonic measures for cases of me’is ‘alay generally, did view hafqa’ah as the “ultimate” form of kefiyeh in those circumstances where he regarded its application as justified.

4.93 The Rosh is not alone in having contemplated “non-traditional” forms of kefiyeh. Rav Yehudai Gaon mentions the use of a herem against the husband (§4.21), though this is regarded as more coercive, and thus less acceptable, by Rabbenu Tam.”’ We have also noted the possibility that a get delivered by a bet din rather than the husband is contemplated by the plural verbs of several geonic sources (§4.21) and that the unusual formulations of the divorce clauses in the Genizah ketubbah (§3.70) may (if not authorising the delivery of such gittin by a bet din rather than the husband) indicate purely prospective termination of the marriage by virtue of the condition. If such a condition is indeed enforceable, this too represents a form of coercion and – even more important – a form whose precise modalities are specified by the parties themselves in the ketubbah.

4.94 The full implications of these arguments are considered in our concluding chapter. Suffice it here to indicate two basic questions prompted by our analysis: (a) if kefiyeh follows failure of the husband to comply with a biyyuy issued by a bet din, should that be regarded as enforcement (by overriding the husband’s will) of a get, or enforcement of the bet din’s order? (b) insofar as the parties may by condition contribute to the authority for the application of kefiyeh, may they not specify the time (in

\[\text{See §4.68 and ARU 2.25 n.107.}\]
advancing advance) at which the husband must consent to the get, and render that
delay to such consent irrevocable?

Appendix B: Tosafot Ketubbot, 63b, s.v. Aval

Some say that we coerce a get in cases of me’is ‘alay.

1. Rabbanu Tam asked: Maybe she set her eyes on another (as in the Mishnah end
of Nedarim)?

2. Tosafot respond that in the case of Nedarim she would receive her ketubbah but
in the case of me’is ‘alay she would lose it. She would not countenance such a loss
because of setting her eyes on another so we may believe her complaint of me’is
‘alay.

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3. Tosafot add that her losing her ketubbah answers another question that
Rabbanu Tam could have asked: If me’is ‘alay triggers coercion why is it not
mentioned in the list of cases where coercion is permitted (Ketubbah 7:10 = 77a)?
Answer: that mishnah deals only with those cases of coercion where the ketubbah
must be paid.

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4. Another question Rabbanu Tam could have asked: According to Rav
Mesharshaya (Gittin 88b) a get coerced by a gentile (except where the gentile was
carrying out the orders of a bet din) was invalidated by the Sages, lest Jewish
women who wanted to be free of their husbands would befriend gentiles and
persuade them to force the husband to agree to a divorce. According to
R. Mesharshaya such a divorce would be in all cases biblically valid because ‘due
to the compulsion the husband would truly agree’. To frustrate such counsels the
Sages decreed all such gittin invalid. But what did they achieve?: all she need do is
claim me’is ‘alay and she has what she wants – a valid get. Do not Rav
Mesharshaya’s words imply then that the moredet me’is ‘alay is not entitled to a
coerced get? Answer: She would not so easily claim me’is ‘alay because, again,
she would not want to lose her ketubbah.

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5. Rabbenu Tam asked another question from Gittin 49b. In the course of explaining a baraita there the Gemara says that the said baraita is answering the following unstated question: “If you will enquire - Just as the Sages instituted a ketubbah payment from him to her if he divorces her so should they have instituted a ketubbah payment from her to him when she divorces him.”

To this the baraita responds: “She may be divorced even against her will but he divorces only of his own free will.” (i.e. he can decide against divorce if he wishes and not pay the ketubbah. If he decides to divorce that’s his decision and he must pay. She however is entirely passive and cannot divorce him or force him to divorce her, so why should she ever have to pay him?)

6. Rabbenu Tam asks: If she is entitled to a coerced divorce by merely stating me’is ‘alay she can, in effect, divorce him so why indeed should she not be liable to a ketubbah payment to her husband?

Tosafot answer that since we would coerce only in cases where there is raglayim ladavar [cf. amatlah mevureret] coercion would be a rare occurrence for which, as is known, the Sages would not enact legislation.

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7. In Qiddushin 12b the Talmud relates that Yehudit, wife of Rabbi Ḥiyya, suffered great pain in childbirth as a result of which she told her husband that she had been told by her mother that her father had accepted qiddushin for her from another man during her minority [and Rabbi Ḥiyya would therefore have to divorce her]. Rabbi Ḥiyya responded that it was not within the power of his mother-in-law’s statement to forbid his wife to him. Tosafot ask: if me’is ‘alay triggers a coerced get why did she not simply say me’is ‘alay?

8. Tosafot answer this in two ways:

(a) She did not want to utter such a disgusting lie against her husband.

(b) Raglayim ladavar would be required (as above) and this was certainly not available in the case of Rabbi Ḥiyya.

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9. According to the Mishnah here, Rabbi Yoseh says that even after there is nothing left of her ketubbah the bet din continue to fine her, so that should she
receive some inheritance in the future the payment would be taken from it. Tosafot ask: If me’is ‘alay is entitled to a coerced divorce surely she need only make the claim and she would receive an immediate divorce and be saved from any future loss of inheritance. The position of the Sages [that we fine her only to the point when her ketubbah runs out] is understandable because she would not want to claim me’is ‘alay and lose her ketubbah because she would reckon that he will not sit it out [unable to remarry] until the ketubbah is finished so he will cave in, divorce her and pay her ketubbah [or what is left of it] but once the ketubbah has been lost what gain has she in waiting longer and risking losing her future inheritance [according to Rabbi Yoseh]? Surely she would simply say me’is ‘alay and receive her get immediately if indeed there was such a law?

10. Tosafot answer that in such a case we would not believe her claim since she did not utter it until after the ketubbah was exhausted and is clearly scheming.

[ Maharsha notes that according to the earlier answer of Tosafot, that raglayim ladavar are required, we can easily understand Rabbi Yoseh as referring to the majority of cases where there are no raglayim ladavar, but Tosafot simply wished to illustrate other possible answers.]

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11. The Talmud at the end of Nedarim (91b) says that if a man returned home to see another man breaking through a fence and fleeing from his house, although that indicates that there has been seclusion, he need not fear adultery and may remain married to his wife, since if adultery had occurred the man, out of shame, would have concealed himself in the house (to be sure he would not be recognised) until it would become safe to escape. However, if he had hidden in the house she would be forbidden to her husband. We must understand, Tosafot add, that she said to her husband that she was forbidden to him because otherwise she could not be forbidden to him unless there were witnesses who saw her with another man in a position indicative of adultery. Now if we speak of a case where she has declared herself defiled for him, she would not be eligible to receive her ketubbah payment because it was clearly not a case of duress (as it occurred in her own home and it does not seem from the Talmud that she cried out for help).

Nevertheless, she is forbidden to her husband only if the paramour concealed himself in the house but if he immediately fled she is permitted to her husband and we do not accept her admission of defilement because of the concern that she has set her eyes upon another.
Chapter Four: Coercion

However, Tosafot ask, if she can obtain a get [by coercion if need be] by simply claiming me‘is ‘alay we should accept her admission that she was defiled and forbidden to her husband on the grounds that (miggo) she could anyhow obtain her release from him by means of me‘is ‘alay (since she has anyhow lost her ketubbah).

12. Tosafot now do an about turn and declare that she did not admit defilement. On the contrary, she denied adultery and whether the man hid in the house or not she is permitted to her husband. [So the question of believing her argument to leave her husband on the basis of the miggo of me‘is ‘alay is now inapplicable.] When the Talmud says that if he fled and did not hide in the house she is permitted it means that she is permitted to the suspect if her husband divorced her or died. This is similar to Rabbenu Tam’s interpretation of the Talmud’s statement in Yevamot 24b that “since the situation is squalid she must leave [him]” [the husband comes home to see the peddler exiting and the wife dressing] and Rabbenu Tam says that it means she must leave the suspect.

13. Tosafot then add strength to their new understanding of the Talmud by arguing that if she had said that she was defiled it does not seem possible to permit her to her husband simply because the suspect did not hide in the house because she has made herself a forbidden item (hatikha de‘issura) [which combines with the circumstantial evidence to overcome the suspicion of her having set her eyes on another]. How much more so, says Tosafot, is this last statement correct according to the opinion of the She’iltot (Rav Ada Ga’on - from Shabta) who rules that witnesses to disgraceful behaviour between her and another man – even though there is no testimony to adultery – are sufficient to forbid her to her husband.

14. Another possible answer [to the problem arising from Nedarim 91b – see 11], says Tosafot, is that the Talmud refers to her being permitted/forbidden to her husband [not the suspect as in 12] and it speaks of a case where she was at first silent and only later denied guilt and gave an explanation for her silence. In such a case we say that if he did not hide in the house we can accept her explanation for her silence and she is permitted to her husband. Although once she has given her explanation for her silence we are left with only suspicious circumstances [her being alone with him] and we cannot forbid her on that basis, so why does the Gemara need the additional reason – that the suspect did not hide in the house – to permit her? The answer is that we need an amatlah which is apparent to the bet din but since there are suspicious circumstances (the seclusion) the amatlah is not apparent because the suspicious circumstances support her initial silence [which implied acquiescence = guilt]. However, since there is the argument that he did not hide, which cancels the argument from the suspicious circumstances, she is
believed to give an amatlah for her silence as this will be recognised as reasonable by the bet din.

In this explanation too there is no admission of defilement from her that we do not accept, and so the question of believing her on the basis of a miggo of me’is ‘alay does not arise.

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15. Finally, Tosafot quote the generalised question of Rabbenu Tam that we do not find anywhere that the husband of a moredet me’is ‘alay is to be coerced to divorce. The Talmud discusses only whether or not the wife shall be coerced into compliance. This is the only question the Tosafot do not answer.

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16. Tosafot then explain Amemar and Mar Zutra according to Rabbenu Tam and conclude that both Rabbenu Hanan’el and Rashi disallow coercion. [We may note, however, that many authorities maintain that Rabbenu Hanan’el and Rashi both support coercion: Yabia ’Omer III ’Even Ha’Ezer 18:5&8.]
Chapter Five

Annulment

A. Introduction

5.1 We commence with an apparent anomaly. Whereas for Catholics, annulment is the standard (if difficult) form of termination of marriage \((\textit{inter vivos})\) and divorce is excluded, for Jews divorce is the standard form of termination of marriage \((\textit{inter vivos})\) and annulment is completely unknown in the Bible and even the Mishnah. Yet when we reach the Talmud, and those situations where the husband opposes the termination, it appears to receive at least as much attention (five sugyot) as the other two “remedies” we have considered. Even so, there is a distinct sense that it is regarded as a last resort, and indeed represents a violation of a basic principle, namely that the Torah insists on the free act of the husband as a condition of termination of marriage \((\textit{inter vivos})\).

5.2 It is thus hardly surprising that the use of annulment as a possible solution to the problem of \textit{‘iggun} has proved highly controversial amongst the posqim. Any such use has to address some fundamental objections (discussed in section E, below):

(a) that \textit{hafq’a‘ah} is completely excluded in our days because of a lack of authority (sometimes attributed to all post-talmudic posqim), despite its occurrence in mediaeval \textit{taqkanot haqahal},\(^72\) Rosh’s account of the geonic measures (§§4.22-24), and Rema’s observations on the annulment in favour of the raped wives resulting from the ‘Evil Decree of Austria’ (§5.47);

(b) that \textit{hafq’a‘ah}, while not completely excluded in our days, is strictly limited to the cases found in the five talmudic occurrences;

(c) that \textit{hafq’a‘ah}, where it remains available, must always be accompanied by a \textit{get} – albeit a \textit{get} which would not be sufficient on its own, because it is “externally flawed” – unless it is a case of breach of a \textit{taqqanah}

\(^72\) See further ARU 2:41-47 (§4.3), noted in §5.9 below; §§5.36-40, below; see also the summary at ARU 22:188-89 (§6.73).
imposing additional requirements on the initial qiddushin;

(d) that hafqa‘ah, even if theoretically possible on basis (c), should be avoided, because it retrospectively changes the relationship of the spouses into one of zenut.

Yet despite all the above, some contemporary authorities argue that hafqa‘ah remains available, at least in situations of urgency.

5.3 These various objections, however, raise further questions which require detailed analysis:

(a) what precisely are the bases of authority (an inherent power of the bet din or the implied agreement of the spouses in entering the marriage) and the grounds on which the talmudic (and later) cases of hafqa‘ah are based?

(b) what exactly do we mean by hafqa‘ah and how does it operate? Is it always retrospective, effected by a decision of the bet din (what may be called an act of “constitutive” annulment) or are there circumstances in which the role of the bet din is merely “declaratory”, confirming that some act (or omission) of the parties (other than the delivery of a get) has itself had the effect of terminating the marriage (whether retrospectively or prospectively)?

5.4 All of these questions arise already in the talmudic sugyot; little which is substantively new is added in post-talmudic times (the principal exception being the development of qiddushet ta‘ut). In this chapter, we offer first a broad historical overview (section B) and then proceed to analyse separately two distinct forms of annulment:

(a) prospective annulment, whether by means of validation of an otherwise invalid get, or otherwise (section C);

(b) (retrospective) annulment (section D).

Here, as throughout our analysis, we find that conditions, coercion and annulment are not distinct “remedies” or procedures, but are, both historically and analytically, closely intertwined. In the light of this analysis, we then review the modern debate on the issues identified in §§5.2-3 above: whether hafqa‘ah remains available today, and whether it must always be accompanied by a get (section E); whether the source of the authority to annul is inherent in the bet din or is derived from an implied agreement of the spouses (section F); and what are the respective
roles of the parties and *bet din* in the process of annulment (section G). A concluding summary (section H) forms the background to the proposals in chapter 6.

B. Historical Overview

5.5 In a study of *hafqa’ah* in the Talmud (ARU 11), Dr. Westreich has described the development of the concept through a series of literary strata. The significance of this study is not limited to historical research. The tension between the talmudic layers is a classic basis for the creation of divergent interpretations amongst talmudic commentators. The analysis of the talmudic strata is thus relevant to the ongoing consideration of the dogmatic status of *hafqa’ah* at *qiddushin*.

5.6 According to the Bavli, the concept of *hafqa’ah* appears to originate not in the concept of *qiddushin* but rather that of *terumah*,

where Rav Hisda and Rabbah, two third generation Babylonian Amoraim, discussed whether the Sages have the authority to uproot the laws of the Torah (בראשית ומקרא למסקנות דרור מנה הלוהיה). According to Rav Hisda, the Sages do have such an authority, while Rabbah challenges his view (*Yeb. 89b*).

One of Rav Hisda’s proofs is Rabban Shimon ben Gamli’el’s view in the case of a cancelled get (which, according to the argument at this stage of the *suga*, validates the get and does not invoke *hafqa’ah*). Rabbah then replies:

the Sages do not have the authority to uproot the words of the Torah. Rather, they have an authority to annul, derived from the preliminary agreement between the spouses, who made the betrothal subject to the consent of the Sages.

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973 A more detailed account of many of the sources is given in later sections of this chapter.
975 See further ARU 11:5-6 on *Yevamot* 89b-90b.
976 On the relationship between the *sugya* in *Yevamot* and *Gitin*, and the positions of R. Hisda and Rabbah in them, see ARU 9:9-10 n.57.
977 On its interpretation in the Yerushalmi, see n.1050, below.
978 A possible argument is that this discussion is a later expansion of the basic Amoramic dispute, and was actually edited by later editors. However, this seems to be incorrect. The discussion between R. Hisda and Rabbah was indeed wide and complex and included several arguments for each side. It occurred not on just one occasion but was a continuing debate:

(see *Yevamot* 89b-90b). Therefore it is most reasonable to see our baraita as part of the actual discussion between these two scholars.
The stages of talmudic development may be summarised thus:

(i) At the first stage, annulment (better: “quasi-annulment”) means that the Sages validate an [externally flawed] get. This refers to a case in which the husband gave his wife a valid get and later invalidated it, but the Sages in effect re-validated the get (according to R. Shimon b. Gamli’el, by a taqqa‘ah which retrospectively withdrew his ability to invalidate it). Termination of the marriage is thus entirely prospective, being by validation of the (otherwise invalid) get.

(ii) At the second stage Rabbah, due to wider questions of the authority of the Sages, interpreted the concept of haqqa‘ah as a prospective annulment of marriage. Here, the Sages assume the authority to terminate marriage without any act on the part of the husband, and the termination is valid from that point onward.

(iii) At the third stage haqqa‘at qiddushin becomes retrospective annulment of the marriage. This conceptual change is made by explaining haqqa‘ah as an annulment of the act of betrothal; when, therefore, it is applied after the betrothal has taken place (as in the messenger case: §§5.14-15), it means that the betrothal is retrospectively annulled.

The talmudic sources differ not only in the manner in which they resolve the problem (validation of a get, prospective annulment, retrospective annulment) but also on the authority and types of rationale on which these different procedures are based: whether the Sages have an inherent authority to uproot the laws of the Torah (by validating an invalid get or by a form of annulment) or whether it is the preliminary agreement between the spouses which confers that authority (… אֵן אֵּלֶּה הָלְסֹרָּה, §5.6, above), or whether it is based on the behaviour of the husband (whether he has acted kehogen or not: §5.65, below).

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979 This summary is based on ARU 11:6 and ARU 15:3-4. See also ARU 22:191-92 (§§6.85-86).
980 First, a tannaitic source – Rabban Shimon ben Gamli’el’s view – validated an invalid get based on a decree of the Sages. Then R. Hisdai based this on the Sages’ authority to uproot the words of the Torah. This explanation was adopted in the Yerushalmi in its interpretation of Rabban Shimon ben Gamli’el.
981 Here, Rabbah rejected the radical view in (i). However, he interpreted R. Shimon b. Gamli’el as meaning that the Sages have the authority to validate the divorce, but based this on a specific stipulation at the time of marriage.
5.9 The five cases (in six sugyot⁹² of the Babylonian Talmud) are often divided into two classes, which we may describe as “immediate” and “delayed” annulment: in the first, annulment is granted shortly after but takes effect (retrospectively) from the very moment of betrothal, due to some fault in the procedure of the qiddushin itself; the second is annulment often granted long after the qiddushin (and probably also nissu’în) took place and involves a get which was written and delivered (in one case to an agent, in the other two to the wife herself), but which for some reason was then invalidated. This distinction has assumed a major dogmatic importance in the light of a series of medieval taqkanot haqahal which added additional requirements to the qiddushin, failure to observe which was stated to result in annulment.”⁹³ those who claim that there is no post-talmudic authority for hafqah’ah have to argue that these cases of “immediate” annulment are not relevant to our problem. We may be permitted one preliminary observation on this: despite the “immediacy” of the termination of the marriage, these are (in the original talmudic instances) still cases of retrospective annulment. However, for post-talmudic authorities, which treat the talmudic sugyot as normative rulings which they simply apply (rather than new judicial decisions), there never was in these cases any qiddushin to annul, so that “annulment” here becomes (at least in theory⁹⁴) a declaratory act of the bet din, indicating that there was never any qiddushin, rather than a constitutive act, which retrospectively annuls an otherwise valid qiddushin.⁹⁵ They differ from the cases of “delayed” annulment in two respects: (i) there is no invalid get to be validated; (ii) in most cases (but not necessarily) they occur where only qiddushin and not nissu’în has taken place,⁹⁶ so that marital relations between the spouses have not in fact commenced.

5.10 Some may argue that, for dogmatic purposes, the internal historical development of the talmudic sources is not relevant; what matters is the final view (if we can ascertain it) of the Talmud, identified with the

⁹² Yevamot 110a (Naresh), Baba Batra 48b (forced marriage), Ketubhot 3a (conditional get), Gittin 33a; Yevamot 90 (revoked agency), Gittin 73a (recovered shekhiv mera). For reviews of all the talmudic cases, see Breitowitz 1993:63ff.; Riskin 2002:9-11; Jachter 2000:29-30; Shohetman 1995:350-52.

⁹³ See further ARU 2:41-47 (§4.3).

⁹⁴ In practice, it is difficult to conceive of remarriage being permitted without it.

⁹⁵ See Hana Ben Menachem, “Hu ‘Asa Shelo Kahogen”, Sinai 81 (1977), 157. Thus, for Tashbetz, Vol.1 no.133, the qiddushin here “lo balan”: see ET II p. 139, s.v. Hafqah’ah ibi billat haqiddushin. For further debate on the question, see Wieder 2002:37; Riskin 2002:44.

⁹⁶ Qiddushin and nissu’în being traditionally separated by an interval of a year. Freimann, 1964:18, finds the first signs of a combined ceremony of qiddushin and nissu’în in the time of R. Natrunai Gaon.
position of the ultimate talmudic redactor, which is normally taken as interpreting *hafka’ah* as retrospective annulment. In all five talmudic cases, the Bavli cites the following discussion:

Said Ravina to Rav Ashi: [Your explanation is] satisfactory where the man betrothed [her] with money; what [however, can be said where] he betrothed her by cohabitation? The Rabbis have declared his cohabitation to be an act of mere promiscuity.

However, it is clear that the issue of *be’ilat zenut* is only relevant in the cases of “delayed” annulment, where there is an invalid *get*, if the *hafka’ah* is interpreted as retrospective annulment. But we have noted that this may well not be the original meaning (and is not accepted by all subsequent *posqim*). It is thus unlikely that this discussion between Ravina and Rav Ashi occurred five times; rather, it reflects a harmonisation of the materials by the ultimate talmudic redactor.

5.11 All three approaches to annulment found within the Talmud (§5.7, above) are found in the Rishonim and ‘Aharonim, although the conceptual distinction between the various approaches is not always clearly defined. The final talmudic stage, endorsing retrospective annulment, is certainly the dominant view amongst the Rishonim and ‘Aharonim. But there are variations even within the post-talmudic *posqim* (not least on

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988 See further ARU 11:8-9.

989 It creates some interpretative difficulties: see Tosafot, Ketubbot 3a, s.v. *tenah*: Tosafot implicitly ask why does the Gemara only concern itself with the impurity of the Sages causing *bi’at zanah* when the marriage is by means of *bi’ah*? Surely the same problem arises when it is by means of *kesef* because then also all his *bi’ot*, though not legally declared *zenut*, will become *zenut*? So the question remains – how can it be acceptable for the Sages to do such a thing? Tosafot answer that in the case of *kesef* the act of the Sages is only to appropriate the ring, which is in itself not a sinful act, and the *bi’ot* then automatically become *zenut* – but that is an indirect result of the action of the Sages. No sinful act has been done by them, only caused indirectly. However, in the case of *qiddusheh bi’ah* the Sages undo directly the *bi’at qiddushin* which is a *bi’at mitzvah* and they apparently directly change it into a *bi’at zenut*. It is the propriety of this that the Talmud questions (see Maharam Schiiff, *ibid*.). The Talmud’s response (see Maharsha) is that, having no other choice, they did indeed turn the *bi’at mitzvah* into a *bi’at zanah*.

990 On Rashi, *Gittin* 33a, s.v. *shavya’ah* (and its use by R. Lavi), that the retrospective declaration of the cohabitation as promiscuity is effected by the *get* (thus integrating different approaches), see ARU 11:12.

991 See, e.g., Rashi, *Gittin* 33a, s.v. *tenah* and *shavya’ah*; Tosafot, *ibid*., s.v. *ve’ajke’inhu*; Ramban, Ketubbot 3a, s.v. *shavya’ah* and elsewhere.
whether such annulment needs to be accompanied by a *get*, as will be shown below.

5.12 The same issues are still reflected in contemporary arguments that *hafqa‘ah* remains available only where there is an [externally] invalid *get* – as in the cases in the Talmud. Thus in the debate between R. Shlomo Riskin and R. Zalman Nehemyah Goldberg the latter repeatedly insists, in opposition to R. Riskin, that retrospective annulment without a *get* is nowadays out of the question. R. Riskin’s arguments from the Rosh’s interpretation of the taqqanat haGe’onim (i.e. that the taqqanah was based on post-talmudic *hafqa‘ah*, thus demonstrating that retrospective *hafqa‘ah* is possible even after *ḥitmat haTalmud*) are rejected by R. Goldberg because the enactment of the Ge’onim also operates only together with a *get* (here externally flawed as in the cases of the Talmud, but this time due to talmudically unsanctioned coercion).

C. Prospective Annulment

5.13 In this section, we consider the possibility of a purely prospective annulment, whether by means of validation of an otherwise invalid *get*, or otherwise. Retrospective and prospective forms of annulment have distinctive roles to play in the search for a global solution to the problem of *‘iggun*. Where the woman has remained “chaste”, and the problem is that of her capacity to enter into a new marriage, the prospective form is sufficient, and has the advantage of avoiding entirely any questions of retrospective *zenuṭ*. Where, on the other hand, the woman has not remained “chaste”, but has already entered into a new relationship without receiving a *get* from her husband, retrospectivity is required in order to address any problem of *mamzerut*.

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992 See Riskin, “Ḥaṣa‘at Qiddushin – Pitaron La’aginut”, *Ṭeḥumin* 22 (5762), 191-209; Goldberg, “Ḥaṣa‘at Qiddushin Eynah Pitaron La’aginut”, *Ṭeḥumin* 23 (5763), 158-160; Riskin, “Koah Hahaṣa‘ah Mone’a ‘Igun” (Teguvah Li-iguvah)”, *Ṭeḥumin* 23 (5763), 161-64; Goldberg, “Eyn Ḥaṣa‘at Qiddushin Lelo Get”, *Ṭeḥumin* 23 (5763), 165-68. There is also a summary article of Riskin’s position in *Amudim XIV*, 17-22. For the English version of R. Riskin’s article, see Riskin 2002. See also the exchange between Lifshitz 2004 and R. Uriel Lavi 5767.

993 See §§3.16, 4.22-24, above.

994 However, even if we accept the demand for a *get*, it does not necessarily have to be “externally flawed”. It may be a *get kol-dehu* (see §5.20, below), in order both to prevent a “slippery slope” and make annulment closer to normal divorce: see ARU 11:13-14.

995 Hence, the inability of the “willing” husbands in the Austrian case (§5.47, above) to resolve the issue by *get*.
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5.14 In Gittin 33a/Yevamot 90b, a husband sends an agent to deliver a get to his wife and then, without the knowledge of the wife or the agent (and before the get reaches her) cancels the get or the agency before a bet din kol dehu (as he is mide’orayta entitled to do). By Torah law, the get is rendered ineffective. But since the wife will believe the get to be valid and may remarry unaware of the cancellation, Rabban Gamli’el the Elder forbade such an action by the husband and declared the get valid. His descendants, R. Shimon ben Gamli’el and Rabbi (R. Yehudah Hanasi), disputed the status of the get where the husband ignores Rabban Gamli’el’s decree and cancels the get. According to Rabbi, the get is void (if he informed at least 2 people) and the wife is not divorced, but according to Rabban Shimon ben Gamli’el the get is not void and the wife is divorced.

5.15 According to R. Shimon ben Gamli’el in this case, the husband cannot, in the absence of the agent or wife, cancel a get which had already been given to the agent to deliver to his wife. In his words: “He (the husband) can neither cancel it nor add any additional conditions, since if so, what becomes of the authority of the bet din? (טמא ביה ויתם הם)’”. This is quite explicit: the husband cannot cancel the get, so the get is valid. The Sages act here by validating the get rather than by actively annulling the marriage. This view appears to be shared also by the Yerushalmi, which merely discusses the cancellation of the get and its validation by the Sages.

996 See further ARU 11:3, 4-5, 9, and the debate between Riskin 2002:9, 11; and Wieder 2002:38; Riskin 2002:45.
997 See further Gittin 33a, the various explanations of R. Yoanan and Resh Lakish to טמא ביה ויתם, and compare Yerushalmi, Gittin 4:2, 45c. Interestingly, Resh Lakish explains it as טמא ביה ויתם, i.e. to forestall the problem of agunot, and according to Rashi agunot here means a married woman whose husband (after cancelling the first get) refuses to divorce her; see Rashba, Gittin 33a, s.v. veha.
998 This accords with the opinion of Rabban Shim’on ben Gamli’el. According to Rabbi (Yehudah haNasi), according to whom the Halakhah is fixed, the husband’s cancellation would be allowed to stand if he declared it in the presence of a bet din (of three and some say even two) even though neither the wife nor the agent was informed.
999 The reasoning here is the (inherent) authority attributed to the Sages’ decrees. If the get were not validated, the decree of Rabban Gamli’el the Elder would be rendered otiose.
1000 Yerushalmi, Gittin 4:1, 45c; for the text and discussion, see ARU 11:5, ARU 18:43-44; Arye Edrei, “Ko‘ah Bet Din Vedine Nisu’in Vegerushin”, Shenaton Hamishpat Halvri 21 (1998-2000), 34 n.121. The Yerushalmi in fact mentions both Rabbi’s and Rabban Shimon ben Gamli’el’s views, but appears to prefer that of R. Shimon ben Gamli’el. On the talmudic redactor’s approach to this issue, see §5.10, above.
1001 See also ET II p. 138, at note 22, citing Shitah Mekubetsot on “There are some who answer”. This accords with the view of R. Ḥisda in the Bavli in his dispute with Rabbah: see Yevamot
5.16 In the light of the discussion between Rav Ḥisda and Rabbah on terumah in Yeivamot 89a-b (see §5.6, above) and the baraita on the cancelled get (which, after citing the view of Rabbi, cites the view of R. Shimon ben Gamliʾel[100]) introduced into that discussion in Yeivamot 90b,[100] we may observe a shift between validating the get and annulling the marriage: according to the first approach[104] we need to assume that the Sages have the authority to uproot the words of the Torah. Rabbah on the other hand explains Rabban Shimon ben Gamliʾelʾs ruling as a result of the unique structure of Jewish marriage (in which the authority to annul is unique to marriage and divorce, based on the preliminary agreement of the spouses,[105] who are taken to have made their betrothal subject to the consent of the Sages, kol hameqaddesh ‘adaʾta’ derabbanan megaddesh, and not part of a wider authority of the Sages[106]) and explicitly rejects the view that the Sages can uproot the words of the Torah. When Rabbah speaks about annulling the marriage there is no reason to interpret it (as was done later, as a result of the redactional additions to the sugya: §5.10) as a retrospective annulment, which is much more drastic both conceptually and practically (declaring cohabitation to be promiscuity; the possible effect on the status of the children, etc.). Indeed, it may be argued that haqqʾah in the Talmud means to cancel or to make cease, usually in the context of cancellation of a legal status or of the validity of a legal act, so that ḥalitsah nullifies the levirate bond (zikah: Yeivamot 52b), the Sabbatical year cancels oneʾs debts (Shevuʾot 58b), expropriation (of property) means that an object in oneʾs possession is prospectively excluded from his possession, etc. Status is no different: the

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89a-90b. Note, however, that in given situations Rabbah too would countenance active abrogation: see ET XXV cols. 634-37 (top) and especially notes 205 and 230.

100 As quoted in §5.15, above.
1001 See further ARU 11:9-10.
1002 The view of R. Ḥisda; the Yerushalmi appears to hold a similar view: see Y. Gitin 4:2, in the context of the get cancelled without informing the messenger. See also ARU 2:10 n.41 for further literature.
1003 This is not the only explanation, and some do not explain it as an agreement of the spouses: see ARU 9:7 n.39.
1004 See further ARU 11:5 and n.23.
1005 For an expanded discussion of Rabbahʾs role in this development, see Dr. Westreichʾs forthcoming book, Talmud-Based Solutions to the Problem of the Agunah (in this series).
1006 i.e. declaring the children of an adulterous liaison not to be mamzerim: see Tosafot, Gitin 33a, s.v. veʾafkeʾnhu, and elsewhere.
1007 See Michael Sokoloff, A Dictionary of Jewish Babylonian Aramaic of the Talmud and Geonic Periods (Ramat Gan: Bar Ilan University, 2002), 158, and further discussion in A. Westreich 2010.
status of marriage is prospectively “excluded” from the couple.\footnote{1010}

5.17 Similarly, in Ketubbot 3a,\footnote{1011} a husband issues a conditional get which is to take effect “if I do not return by a certain time”; he failed to return within the time but only because of circumstances beyond his control (דרי). By Torah law the get is not valid because he did everything he could to return and his failure to do so was not his choice. However, Rava, according to one tradition in the Bavli, argues that the claim for סכנת cannot be accepted here and the wife is divorced. The Talmud explains Rava’s reasoning as based on an enactment of the Sages that there can be no סכנה in גיטין – a policy measure designed to protect both chaste women and dissolute women: if the Rabbis had let the biblical law stand, then every time a husband failed to return on time, a chaste wife would think that perhaps this was due to סכנת and would remain an ‘אגונה although there may have been no סכנת and the get is perfectly valid; on the other hand, an immoral wife might always presume that there was no סכנת and would remarry, whereas in fact there may have been an סכנת and the get would thus be void. Once the Sages enacted that there is no סכנת in גיטין, both the chaste and the immoral wife could remarry safely.

5.18 The third talmudic instance of “delayed” annulment is the case discussed in Gittin 73a. A dangerously ill person (שבב מביר) divorced his wife. However the man recovered from his illness and expressed the wish to retract. According to Rav Huna, he can do so because he clearly intended to divorce only because of his impending death: the get is thus annulled (by Torah law), since it was given under the assumption that he would die (a legal assumption – an ‘umbedna – that it was a conditional get). However, Rabbah and Rava declared the divorce valid in spite of his retraction, due to the fear of a mistake: people might mistakenly think that in such cases the get becomes valid only after the husband’s death and will come to validate a get timed to take effect posthumously, and that this is the reason for its annulment when the husband recovered. However, once the Sages ruled that the get is valid even if he recovers no-

\footnote{1010}{Cf. D.W. Halivni, Mekorot Umasonot, Nashim (Toronto: Otsreimu, 1994), 530, according to whom haq’ah at this stage is retrospective, but there is still a distinction between this stage and the discussion of Ravina and R. Ashi: here, since annulment is based on the prior consent of the husband (מו מתעמל אסתרא דרבא) we do not need the Sages to declare his cohabitation as promiscuity.}

\footnote{1011}{See further ARU 18:41-42.
one could possibly think that he gave the get on condition that it take effect after his death.\(^{1012}\)

5.19 The transfer of Ravina and Rav Ashi’s discussion regarding annulment by kesef and bi’ah to the cases of “delayed” annulment entails explaining hafqa’ah as retrospective. While the first development in the understanding of hafqa’ah, i.e. from validating the get to annulling the marriage, is the result of a conceptual process (the debate between Rav Hisdah and Rabbah: §5.16, above), this second move, from prospective to retrospective annulment, appears to result merely from redactional work. Nevertheless, we may assume that it was done with awareness. Transmitting the discussion to a group of cases reflects a quest for harmonization: since a similar concept (hafqa’ah) is mentioned in these various cases, the later talmudic view sought harmony in its meaning and implications. Thus hafqa’ah became a process which refers to the act of marriage even in the cases of improper divorce; in those cases its meaning thus became retrospective annulment of the marriage.\(^{1013}\)

5.20 Despite the logic of validation of an invalid get – that the get becomes valid and thus effective prospectively\(^{1014}\) – this conclusion is not drawn by most of those who insist that hafqa’ah is possible only in the presence of a get (and thus that the required get may be a מִסְכָּל הַבָּשָׁם). If then, a get is required, it must be for external (meta-halakhic) reasons, for example prevention of annulment becoming a “slippery slope” for exit from marriage without the husband’s agreement,\(^{1015}\) or the desire to make

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1012 See Gitin 73a and Rashi there s.v. Gezerah.

1013 See Lifshitz, 2004:317 n.1; 317-319. The shift between annulling the status of marriage and annulling the marriage act was first made by R. Ashi, who applied Rabbah’s concept to the case of Naresh. Yet he did not apply it to the previous cases. However, his move made the next step of the talmudic redactor possible: viewing hafqa’ah in all the five cases in a similar way, and thus understanding it as retrospective annulment.

1014 Jachter 2000:30 cites the view of Rashba (Resp. 1:1162 and commentary to Ket. 3a) that this is not a real retrospective annulment but rather “the rabbis merely render the get effective despite the husband’s initial wishes.” This appears to mean that they threaten retrospectively to dissolve the marriage if the husband does not agree to leave the get valid. In the internet version, Jachter notes that “Rashi in these three cases explains that ‘Haqaat Qiddushin’ works because of the presence of the Get (despite its defects).” See also ARU 6:22 (§8.3), citing Tosaftot, Gitin 32a s.v. Mahu detema ‘iglal miltu’, quoted by R. Agiva Eiger in his gloss to Mishnah Gitin 4:2, no.39; ARU 5:3 (§4.2.1), on Maharsham, Resp. I, 9.

1015 See ARU 11:13, citing Ri Migash in Me’iri, Ketubbot 3a, s.v. kol she’amru; Rashba, Ketubbot, 3a, s.v. kol demeaqqaddish, and noting the possibility, raised by Rashi and Rashba and discussed by Berkovits 1967:127-139, that in some circumstances (such as a disappeared husband), even the מָעַלְר הַבָּשָׁם may be replaced by other devices, such as a single witness.

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hafqa’ah appear as similar as possible to the normal (biblical) manner of terminating marriage.\(^{1017}\)

5.21 Despite the harmonisation effected by the final talmudic redactor, applying the terminology of hafqa’ah together with the rationale of ‘ada’ta’ derabbanan to these cases of marriage termination in the wake of an externally flawed get, the idea that there is a form of ‘annulment’ which serves to cure a defect in a get survives amongst the Rishonim in various forms.\(^{1018}\) Ri Halavan says of the procedure in Ketubbot 3a that the Sages in their decree made [the get] valid mi-de’orayta: he says, ‘and amongst the Sages, and amongst men, and amongst partners’ (טברון), and he argues that where an externally flawed get is given, the Sages used their power to validate it and bring the marriage to an end (non-retrospectively\(^{1019}\)) – a view adopted in modern times by Mar’eh Kohen,\(^{1020}\) and more recently by both Shmuel Atlas\(^{1021}\) and Eliav Shohetman.

5.22 Tosafot in Gittin 32a is also understood by some to mean that annulment may be non-retrospective in particular circumstances, and to be based upon the concept of the rabbinic authority to override Biblical Law.\(^{1022}\)

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\(^{1017}\) See Ra’ah, Shititz Mezahetset, Ketubbot 3a, s.v. rekhen katav hafRa’ah, discussed at ARU 11:13, associating this with the view of R. Ovadyah Yosef, that hafqa’ah leaves a rabbinical marriage in place: see §§5.52, below.

\(^{1018}\) For example, it is possible to view the account given by the Rosh of the measures of the Ge’onim in this way. See Resp. Rosh 43:8, discussed in §§4.22-24, above.

\(^{1019}\) See Tosafot Ri Halavan (London, 1954), Ketubbot 3a, s.v. kol demeqadeash.

\(^{1020}\) Rashba (Ketubbot, 3a, s.v. kol; ibid., Responsa, 1162, following Ramban in the name of Rashbam, Ketubbot, 3a, s.v. shavyaha; ibid., Gittin, 33a, s.v. kol) is close to this view, since he argues that the get is valid and the marriage is not retrospectively annulled. However, in principle he admits that annulment is retrospective. This means that in spite of the husband’s declaration of cancellation of the get, in his heart he really adheres to the ruling of the Sages who validated this get. See ‘Otsar Mefareshei HaTalmud to Gittin 33a, cols. 434-343 and footnote 89. Rashba’s argument is that in practice, since the husband is afraid of a retrospective annulment which would make his cohabitation promiscuous, he cancels the annulment of the agency (Gittin 33a), foregoes his condition (Ketubbot 3a) or, in the case of a dying person (Gittin 73a), agrees that the get should not be annulled even if he recovers. Therefore if the Sages did have the need to use hafqa’ah (which they do not) it would be applied retrospectively (see Pene Yehushu’a, Ketubbot, 3a, s.v. ‘afte’inhu and s.v. kol; Berkovits 1967:127-133). See also see ET II p.137 at note 22; Riskin 2002:16; ARU 18:43; ARU 11:11-12.

\(^{1021}\) On Yevamot 90b. See further ARU 11:1 n.69.


\(^{1024}\) See R. Auerbach (§5.24, below) based on R. Akiva Eiger, glosses to Mishnah Gittin 4.2, number 39 and Tosafot Gittin 32a s.v. Mahu detema; arguing that the annulment counterenanced by R. Yehudah HaNassi (for example, according to the Shulhan Arukh, if the husband made cancellation in the presence of only one person who was neither his wife nor his agent) does
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Similarly, some Rishonim cited by Ritba in the Shittah Mequbetsel maintain that the Talmud means that the Sages annulled his marriage only from the time of the get and not retrospectively from the moment of qiddushin. This appears to have been the understanding of Rashi’s teachers. Ramban argues that the groom’s very awareness of the possibility of rabbinic retrospective annulment – something he does not want, since it will reduce his relationship with his wife from one of holy matrimony to one of secular (and possibly sinful) concubination – will force him to validate the divorce in his heart and so the get remains biblically valid in spite of any indication to the contrary. Again, this means that the termination of the marriage is prospective. This interpretation is also discussed by Hatam Sofer and amongst Jewish Law scholars was recently suggested by Arye Edrei. We may note also that ’Otsar Mefarshey HaTalmud to Gittin 33a, col. 436, s.v. Kammah, states that a number of great ’Akharonim stated that, despite appearances to the contrary, the Rishonim agree that the marriage is in fact annulled only from the time that the (flawed) get reaches her hand, and thus produces a prospective annulment.

5.23 Indeed, it has been suggested that the talmudic case of the revoked get (Gittin 33a/Yevamot: §5.14, above) may be used in order to engineer an

not, according to Tosafot there, function retrospectively but from the moment of declaration by the bet din, so that it would not create retrospective promiscuity.

Shittah Mequbetsel, Ketubbot 3a, s.v. vekhatav haRitva, in the name of ‘אוהב הבת עבודה, לשון הריבא (‘when we say that the Sages annul his betrothal, it does not [apply retrospectively] from the time of betrothal but [it applies] now, at the time of the act’). The get mentioned later in the Ritba (קткиת:רה:בר) has a similar meaning: it is an element required for applying haqfa’ah, but this does not mean that the Sages validate the get (as they do according to Ri Halavan).

Rashi’s teachers’ view is cited – and strongly rejected – by Rashi in the various sugyot on haqfa’ah. Rashi indicates that according to his teachers’ (mistaken) understanding the betrothal is prospectively annulled, as opposed to his interpretation: see Rashi, Ketubbot, 5a, s.v. shavysha, citing Rashbam. See further ARU 5:68 n.225.

Note here, as in Rashbam, the “constructive” account of the husband’s will: we construct his will as what we expect of a faithful member of the religious community.

Hiddushe Hatam Sofer, Gittin, 33a, s.v. tenah. It is not clear according to this interpretation why the Sages should declare the cohabitation to be promiscuity. Harmonizing all the parts of the sugya is quite difficult according to this approach and would apparently (like Ri Halavan’s, above) need to use an historical approach: see further ARU 11:12 n.75.

Edrei 1998:34-35. Edrei claims that this view is not found in previous writings, Rishonim as well as modern scholars. The above discussion indicates some examples of sources which did discuss this view.
annulment. This is the so-called “get Maharsham”, which originated in a case where a wife whose husband had gone missing applied to the bet din for permission to remarry. The bet din concluded that the husband was dead, and granted permission. The wife remarried and had a child. Then the first husband reappeared. He was sympathetic to the wife’s plight, and wished to remove from her the stain of adultery and from the child the status of mamzer. The Maharsham advised that it might be possible to do so by deliberately creating a scenario based on Gittin 33a / Yevamot 90b, i.e. by handing a get to an agent but then cancelling it in the presence of just one person or in breach of other technical evidentiary requirements) before its delivery to the wife (a possibility already raised for such a case by Tosaft), so that the woman was not married to her first husband at the time of conception but had merely been his partner (בבית דין). R. Moshe Morgenstern appears to argue that we could use this as a solution to the problem of *iggun:*

The procedure [of engineering halakhic retrospective annulment] was used in Israel by Chief Rabbi Goren [in cases of soldiers who went missing in combat and later reappeared, after their wives had, with bet din permission, remarried] and documented in a pamphlet known as “The Get of the Maharsham” vol. 1 – responsum 9. The get is given by an agent rather than the husband. When the agent leaves the Rabbinical Court his agency is revoked. Following [this], another get is thrown by the husband to the wife both standing in a public domain, half way where the wife is standing facing the husband. The effect of this procedure is to annul the marriage. This procedure was endorsed by Rav Shelomoh Kluger *Even Ha’Ezer* 141:60. Rav Moshe Feinstein told me orally that post facto he likewise endorses this procedure. In addition to the above, if the husband presently giving the get violates the Sabbath publically, the get is, in effect, an annulment. Such is the ruling of the Manchester UK sage Rav Yits’hak Ya’aqov Weiss writing in *Minhat Yits’hak, Even Ha’Ezer* X no. 126.

There is in fact a record of a conference of dayanim in 1979 at which

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1012 For a critique of this argument, see ARU 5:69-70 (§§27.13-18).
1013 Meaning, presumably, that the get is thrown and lands at a point equidistant from husband and wife.
1014 1783–1869, Galicia, in his Ḥokhmat Shelomo. See further ARU 5:68-69 (§§27.4-11), for an account of what R. Kluger actually wrote.
1015 This in fact is incorrect: R. Weiss says there that nowadays public Shabbat desecration does not render the individual a mumar: see ARU 5:36 (§21.2.6.5).
1016 Qenes HaDayyanim 5739, ed. Hanhalat Batei HaDin HaRabbaniyim, Misrad HaDatot, in the library of Bar-Ilan University, copy very kindly provided by Dr. Amihai Radzyner. See also Rabbi S. Daichovsky, “Batei Din Rabbanı’im Mamlakhtı’im: Be’ayotchem Vehosegehemon”,

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the issue of get Maharsham was raised. It describes Rav Goren’s proposal (lehalakha velo lema’aseh) to use the get Maharsham and its various responses: some, including that of Rav Ovadyah Yosef, seem to support it in unique cases and with limitations, while others strictly reject it.

5.24 The Maharsham in responsum 1:9 did indeed say that it is possible to save a mamzer (conceived in adultery) using bittul get, by deliberately creating a scenario based on Gittin 33a / Yevamot 90b, so that the woman was not married to her first husband at the time of conception but had merely been his partner (לשהור). However, R. Morgenstern does not mention that this approach of Maharsham was criticised by R. Shlomo Zalman Auerbach, who points out, inter alia, that Tosafot, quoted by R. Aqiva Eiger, understood the annulment in this case as non-retrospective according to Rabbi and as an example of the power of the Sages to override, in some cases, the laws of the Torah (לשהור), in this case by abruptly ending a marriage without a (valid) divorce from the husband. This, in fact, is a reversion to what seems to have been the original conception of the authority for (if not precisely the same procedure of) the decision in the talmudic case. But if so, this re-enactment of the talmudic scenario would not be effective in saving the mamzer because, though the annulment would indeed be achieved, it would only operate prospectively, from the time of the delivery of the (invalid) get, so that the mother would still have been a married women at the time of the conception of the child and the conceived child would thus still be a mamzer. R. Morgenstern also failed to report that the Maharsham confined this suggestion to the realm of halakhic theory (לשהור) and that the suggestion was made only in a case where the wife had acted innocently (see §5.23). However, the possibility is raised in Tosafot that a husband may indeed remove the sin of adultery from his wife by sending her a get (through an agent) and

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Diné Israël 13-14 (5748), 15, noting that the idea (with some improvements) was raised by R. Goren, but created “a great storm”.

1037 See further ARU 5:3-4 (§4.2.1), noting the mafloqet between R. Shim’on ben Gamli’el and Rabbi regarding the validity of a cancellation before a bet din.

1038 In fact, the Maharsham could not employ this solution in the particular case with which he was dealing, because the husband had already given his wife a get. Nevertheless, he did attempt to invalidate the get so that annulment could still be employed with the writing and delivery of a new divorce, but in the end had to admit defeat.

1039 Auerbach 1974.

1040 Gittin 32a, s.v. Maha detema ‘isgal milta’.

1041 Glosses to Mishnah Gittin 4:2, no. 39.
cancelling it, and it has been argued that Maharsham would in fact apply it in practice to remove *mamzerut*, in conditions of "great urgency".

Rav Lavi has also recently indicated that Me’iri may have contemplated the use of the *Get Maharsham* in order to prevent *mamzerut*, a view which appears now to be taken by the Supreme Rabbinical Court. It is highly doubtful, however, that this can be used in cases of recalcitrance: the initial delivery of the *get* which is then cancelled cannot be “engineered” by the process.

5.25 A lengthy modern study by Shemuel Atlas concludes that annulment is never really retrospective. Either it means that the husband divorces wholeheartedly because of his fear that otherwise the Sages will annul his marriage retrospectively — something he does not want — or it means that the Sages use their power to uproot biblical law and bring the marriage to an end without a *get*. Either way, the marriage ends now and not retrospectively. While this understanding of *hafqa’ah* has the advantage that it would obviate the problem of *bi’at zenut*, a disadvantage would be that it would not be possible to use *hafqa’ah* to undo cases of *mamzerut*, as was proposed by the Maharsham.

5.26 We are left with both dogmatic and practical problems in any construction of annulment as prospective. The dogmatic problem arises from the application of ‘*ada’ta* derabbanan: “Every-one betroths only with the agreement of the Sages” means that the Sages take their power to annul a marriage from the fact that the marriage was entered into originally upon an implied condition, namely that the Sages agree to it. Hence, the groom himself has agreed to limit his marriage in accordance with the will of the

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1042 See ARU 4:17 (§IX.30) on Tosafot, chapter Hashole’ah, regarding the principle of annulment (*Gitin* 33a s.v. *We’efqe’ehu rabbanan*): R. Shemuel asks how we can ever make an adulterous married woman liable to the death-penalty since the warning is a *hatra’at safeq*, for perhaps he will (at some future time) send her a *get* (through an agent) and cancel it.


1045 File zn 3276 dated 11.11.03, available at www.rbc.gov.il/judgements/docs/12.doc, p.8: in severe cases of *mamzerut* the *bet din* annuls the marriage. Although this does not explicitly refer to the *Get Maharsham*, R. Lavi, 5769-249, says that it does refer to the use of the *Get Maharsham*.


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Sages, and it is from this limitation, accepted by the groom (and bride), that the Sages derive their legal power to annul. But if the Sages themselves derive their authority in this matter (exclusively) from the groom, they cannot (according to most views) annul prospectively (unless there is an explicit condition that they may do so – in which case no further power of the Sages may be needed).

5.27 The practical problem is that prospective annulment may assist only the “chaste” agunah: if, on the other hand, she is “unchaste” and has already entered another relationship before the bet din annuls the marriage, the problems of *eshet ish and mamzerut* are not addressed. But this again highlights the distinction between an explicit condition which operates prospectively to terminate the marriage \(^{1048}\) (where the role of the *bet din* is merely declaratory) and retrospective annulment (where the role of the *bet din* is, at least in cases of “delayed” annulment, constitutive).

D. Retrospective Annulment

5.28 It is a striking fact that in Babylon (where the Amoraim held judicial power over the Jewish community), efforts to stem improper behaviour in the area of betrothal took the form of enactments by the authorities rather than betrothal conditions, as was customary in Palestine (due to the fact that the Amora’im of *Erets Yisra’el* were powerless to enforce Jewish law).\(^{1045}\) Thus Rav forbade “betrothal in the street” (without proper preparation), betrothal without prior shiddukh (= without parental involvement), betrothal by means of sexual intercourse and the groom’s lodging in his father-in-law’s home. Any one of these offences was punishable with makkat mardut – flogging by rabbinic decree (*Qiddushin* 12b). These measures were intended to put an end to the problems of secret or hasty betrothal but, in the event of transgression, resulted only in punishment of the guilty party but *not* in the annulment of the betrothal, which was deemed effective *post factum*.

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\(^{1049}\) See §§3.68-73, above.

\(^{1050}\) See further ARU 18:40. The concept of annulment of marriage is alluded to in the Yerushalmi only in *Y. Gitin* 4:2: “Sages have the power to uproot Torah Law by annulling marriages” (where Rabban Shim’on ben Gamli’el’s ruling is explained as being part of the broader authority of the Sages to abrogate Biblical Law and not as an independent concept of “marriage annulment”); for further literature, see ARU 2:10 n.41. For the development in the Bavli, see §§5.5-6. See further ARU 11:7-8; ARU 18:45 n.124.
5.29 However, Rav’s pupils went further than their teacher. Rav had punished the offenders but had allowed their betrothals to stand. His pupils took the bold step of annulling the improper betrothals entirely. In one case, the Talmud reports (Yevamot 110a) an occurrence that occurred in Naresh: 1051 a minor orphan girl was (rabbinically) married to a man who sought to marry her (biblically) after she became adult, 1052 but a second person “kidnapped” her and married her. 1053 Rav Beruna and Rav Hanan’el ruled that the second betrothal was invalid and she should return to the first husband without a get. Rav Ashi later explained this ruling on the basis that, though the second man had taken her and betrothed her before the first one had made nissu’in, his betrothal, though valid by the law of the Torah, was annulled by the rabbinic authorities (’Afq’inho Rabbanan leqiddushin mineh), on the grounds that “He acted improperly; they, therefore, treated him also improperly.” 1054 There then follows the dialogue regarding the different means of annulment, depending on whether the betrothal had taken place by keseft bi’ah. 1055

5.30 The power of annulment was similarly applied in a case of “betrothal by coercion” (Bava Batra 48b), where the woman was forced (lit. “hanged”, נושה) and then gave her (formally sufficient) 1056 consent. Although a betrothal requires the consent of the woman in order to be valid, where that consent was obtained by force the betrothal would, technically, be

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1051 See further ARU 11:2, ARU 18:40.
1052 When she attained her majority he placed her upon the bridal chair (הሳב), an act which is probably similar to a lapush.
1053 Her agreement is not mentioned, but she probably gave it, at least after being kidnapped (otherwise the marriage was not valid and no haq’ah would have been required): see Ran, 38a in Rif (in the Vilna edition); Ritha, Yevamot 110a, s.v. hu, and compare Ramban, ibid., s.v. R. Ashi.
1054 Contrary to the view of R. Pappa, ibid.
1055 On the origins of the concept that a נושה [or הבנים] act prompts a נושה [or הבנים] response, see ARU 11:7 n.38.
1056 On the significance of the fact that R. Ashi’s explanation is composed of two different parts: one in Hebrew, the other in Aramaic, and the relationship of this explanation to Rabba’s teaching, see ARU 11:6-7.
1057 On which, see §§5.10, 19, above.
1058 The formal validity of the marriage is based on an expansion of R. Hana’s statement (Bava Batra, 47b): (בֶּנֶיה תְּנַחְּמוּ וְיִרְשָׁהוּ מִנִּי נַחֲמֵהוּ תְּנַחְּמוּ וְיִרְשָׁהוּ מִנִּי) which was made by Amemar (but challenged by Mar bar R. Ashi): (בֶּנֶיה תְּנַחֲמֵהוּ וְיִרְשָׁהוּ מִנִּי). R. Hana’s statement is discussed by Binyamin Porat, “Hahoze Hakafuy Veikron Hatzedek Hahozi”, Dine Israel 22 (5763), 49-110. See also R. Abel 2011:31-32, arguing, on the analogy of B.B. 47b that “... It is furthermore possible to say that even if we judge the situation from the point of view of that which obtains in the end, when he is not willing to divorce and does so reluctantly, only to avoid the retroactive annulment of the marriage, that also is considered “of his own free will”.
1059 See further ARU 11:2.
valid. But here too the man’s action was judged to be improper (יָבֵא אָשִׁי). According to the Sages here too annulled the marriage.

5.31 Rashi and Tosafot offer different justifications for the retrospective annulment in these two cases. Rashi understands that in both these cases the power of the Sages to interfere in a betrothal which is a private contract between two willing individuals sanctioned by the Torah derives from the formula used by the groom declaring that the betrothal should be effective “according to the Law of Moses (the Divine Written and Oral Law) and Israel (the Rabbinic Law)”. Since he made his betrothal dependent on the rabbinic authorities, it stands to reason that he meant it to take effect only if they agree with it. It is as if he had made a conditional marriage: you are betrothed to me only if the Sages do not disagree with this marriage (a form of “conditional marriage”, we may note, to which no halakhic objection is taken). But here the Sages do not agree; hence the annulment. The Tosafists point out a difficulty with Rashi’s interpretation, namely that in the two talmudic instances the groom did not in fact betroth in accordance with the will of the Sages. On the contrary, his behaviour was in opposition to their will, so how can we assume that he intended his betrothal to be subject to the Sages’ agreement? Furthermore, the Talmud does not mention here, as it does in the cases of “delayed annulment”, that we take it for granted that he subjected his betrothal to such a condition (קְלַה מֶקֶדֶשׁ ‘עַד ‘תא’ דֶרֶעֳבָנָן מֶקֶדֶשׁ). They therefore explain that in cases such as this the Sages are using their biblically granted power to “uproot” (לַא’אַקְוַר) Biblical Law (by confiscating the wedding ring, invalidating the wedding document or declaring the marital intercourse promiscuous, depending on how the betrothal was effected).

5.32 However, the objection of (some of) the Tosafists would not apply to cases of “delayed annulment”, where the groom did betroth in accordance

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1060 Yevamot, 110a; Bava Batra, 48b. Whereas this reasoning is ascribed in the case of Naresh to R. Ashi, here it appears in the name of Mar bar R. Ashi according to several textual witnesses: see ARU 11.2.3 n.13 for further discussion of the textual, literary and substantive issues involved, responding to earlier academic literature.
1061 See further ARU 11:7.
1062 ARU 18:41.
1063 Yevamot 110a s.v. Weqa’ afqe’inho.
1064 See further §5.32, below.
1065 Cf. Tosafot, Bava’ Batra’ 48b s.v. Timnah.
1066 Ri of Tosafot in Yevamot 110a has an alternative understanding of the difference between the sugyot.
with the will of the Sages, and where the Talmud does mention kol hameqaddesh ‘ada’ta’ derabbanan megaddesh. The logic of what has become the majority view, namely that annulment even here works retroactively to the moment of qiddushin (so that the couple’s marriage is deemed never to have existed), is that since the groom declared that he is marrying according to the biblical and rabbinic law, which is understood to mean that the original qiddushin is conditional on the continuing (not merely initial) acquiescence of the rabbinic authorities, once a situation arises which causes those authorities to withdraw their approval, the condition for preservation of the marriage has been broken and the union becomes automatically and retrospectively defunct.

5.33 In the final generations of the Babylonian Amoraim we find further extensions of annulment, now to the cases of “delayed annulment”. Here, the original betrothal (and marriage) were perfectly acceptable, yet were annulled at a later stage (all in the context of an externally flawed get). These are the cases already described above: the revoked get or agency (§§5.14-16); the conditional get defeated by בטיהר (§5.17); the get of the shekhiv mera who recovered (§5.18). In all three cases the Talmud asks: “Can there be a get which the Torah declares invalid that the Sages validate?” In each case the reply is “Yes,” since everyone who betroths does so on condition of the Sages’ concurrence”. Here, they withdrew their agreement and consequently brought about the retrospective annulment of the betrothal.

5.34 When we reach the Rishonim, it is the position of Rashba (Responsa 1:1185) which is often cited for the proposition that annulment is available today only in those cases where it is explicitly permitted in the Talmud. However, this “conservative” stance of Rashba has not gone without qualification. Berkovits maintains, on the basis of a study of all the responsa of Rashba relevant to post-talmudic annulment, that Rashba accepts annulment even in cases not matching those in the Talmud, provided that the Jewish authorities of the locality (bet din etc.) enact a taqkanah in which hafqa’ah is mentioned explicitly. For example, in

1067 The Talmud answers in the positive: יס (“yes”) in the sense that the get is rendered effective by means of the retrospective dissolution of the qiddushin.
1068 Goldberg and Villa 2006:362: “Where they said it they said it; where they did not say it we cannot say it ourselves”; see further ARU 6:22 (§8.4). On the general issue, see section E, below.
1069 See further §5.49, below.
1070 Berkovits 1967:143-49, summarised at ARU 6:22 (§8.4), where it is noted that Freimann 1964:66-70 comes to the same conclusion.
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Resp. 1, 551. qiddushin had been performed on a widow without her consent. She complained to the king. Rashba’s questioner reported that he had “decided to order the man to give her a divorce and to flog him with whips” and asked Rashba’s opinion. Rashba advised first that he should be “fined in an amount to be decided by the judge appointed by the king.” Moreover, “a [Jewish] competent court may even impose corporal punishment as a protective measure (איסור פְּרָטִים).” He concludes, however, by recommending for the future a communal tagkanah which would annul such marriages (תגנה), citing R. Sherira Gaon and his forebears as having followed this practice.

5.35 Moreover, R. Ovadyah Yosef argues that Rashba viewed the tagkanah heGe’onim as an emergency measure (Responsa VI:72), in response to the circumstances prevailing in Babylonia at the time, and that even according to Rashba, one could introduce retrospective hafqa’ah nowadays for the emergency needs of our time. Not only does he see the Rosh’s interpretation of the tagkanah haGe’onim in terms of hafqa’ah as an application of this principle; he attributes to everyone (e.g. Ramban) who claims that coercion in cases of morede qemis ‘alay is a tagkanah the view that it is based on hafqa’ah. Indeed, he concludes that if the qiddushin were in defiance of a communal enactment explicitly threatening annulment one could enforced a get in practice even where the bride claimed me’is ‘alay.

5.36 By the 14th century, we encounter a turn against tagkanot providing even for “immediate” annulment, based on a defect in the original qiddushin. In resp. 399, the following question was addressed to Rivash (1326–1408, Spain):

The community agreed to adopt an enactment providing that no one may marry any woman except with the knowledge and in the presence of the communal officials, and in the presence of ten persons; and that if anyone should violate the law and marry contrary to these requirements, the marriage is void (םיריחוי צרפת תקנות). At the time a marriage is contracted [in violation of the enactment], the community expropriates the money or other property given to effect the marriage, and the property is considered to

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1071 ARU 2:43-44 (§4.3.3).
1072 ARU 18:51, on R. Yosef’s article of 5721. See also ARU 18:51-52, for R. Yosef’s argument from Ramban, Rosh, and Rambam (per Resposta ‘Ezrat Yisrael).
1073 See §4.22, above.
1074 Yosef 5721:103. See also ARU 6:22-26 (§§8.4-8.9); ARU 12:1-3 (Section A §§VI–XV).
1075 See further ARU 2:44-47 (§4.3.4).
be ownerless and of no value. The marriage is annulled (דוכין), and the woman may marry without any divorce (פריך) and is not even required to obtain a divorce to remove any possible doubt. You are in doubt whether the community has the power to expropriate the property of another ... [and] whether even if the rabbi and elder of the town approve the enactment, they have the power, on the basis of the principle that “all who marry do so subject to the conditions laid down by the Rabbis, and the Rabbis annul this marriage,” to annul a marriage that the Torah regards as valid.

Rivash seeks to reassure the questioner: there is an (independent) power conferred by the Talmud on the Tanna (3). Moreover, he buttresses this with a “consensual” argument: the communal institutions represent the people, so that the people are by such taqkanot, in effect, adopting new standard conditions (תנאים) in their own future marriages. The classical talmudic basis of annulment, by expropriation of the kesefer, is therefore present. He adds that the approval of the local scholar is an additional support, though seemingly Rivash does not here regard it as essential. This basis obviates the need for use of the לְלַכַּד לְדַמָּה principle, which Rivash regards as necessary only where the initial qiddushin was valid. Here, however, there was no valid qiddushin at all, so that no question arises as to whether the groom entered such qiddushin having agreed to rabbinic conditions. He adds, moreover, that even if it were necessary to rely upon the principle of לְלַכַּד לְדַמָּה in cases such as this, the questioner need not hesitate in attributing that power to the community (לְלַכַּד לְהָעָל) as well as to the Rabbis; the consensual basis is here invoked again, to the extent of specifying that when the people of that town marry (after the taqkanah) they need not even recite that they are doing so in accordance with the conditions laid down by the qahal. Having once agreed to those conditions by enacting the taqkanah, the conditions will serve as implied terms (binding even on one who סֵקֵם). Rivash concludes unequivocally that the community has the power to adopt the proposed taqkanah:

... Thus, we reach the conclusion that the community may adopt this enactment, and a marriage that contravenes a communal enactment is invalid, and no divorce is necessary (לְלַכַּד לְדַמָּה).

5.37 That being so, Rivash’s conclusion comes as a surprise:

This is my opinion on this matter in theory. However, as to its practical

1076 B.B. 8b, cited also by Rashba, Resp. 1, 1206: see ARU 2:42-43 (§4.3.2).
application I tend to view the matter strictly (…), and I would not rely on my own opinion, in view of the seriousness of declaring that she needs no divorce to be free [to marry], unless all the halakic authorities of the region concurred (_iffa פקדים נמוך מדמרות), so that only a “chip of the beam”\textsuperscript{1077} should reach me \textit{[i.e., so that I do not take upon myself the full responsibility, but only part of it].}

Rivash is not willing to bear the responsibility for this decision alone; he requires the concurrence of “all the halakic authorities of the region” (iffa פקדים נמוך מדמרות) – despite the fact that he had earlier pronounced the approval of the local scholar as desirable but not essential.

5.38 But this was not the end of the matter. Maharam Al Ashqar (1466-1542) wrote:\textsuperscript{1078}

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

We may note that the Maharam is here willing to rely on the agreement of a majority of the communities. Elon notes that such enactments were still being adopted in the 18th and 19th centuries by certain Sephardi communities.\textsuperscript{1079} The context for annulment, he observes, was the abuse of the \textit{qiddushin} procedure specifically with a view to putting the “husband” in a position to demand money in exchange for a \textit{get}; indeed, according to Schereschewsky, some \textit{taqanot} provided for annulment specifically on the husband’s wilful refusal to grant a \textit{get}.

\textsuperscript{1077} cf. \textit{Sanh.} 7b: “When a case was submitted to R. Huna he used to summon and gather ten schoolmen, in order, as he put it, that each of them might carry a chip of the beam” (Soncino Talmud, \textit{Sanhedrin} I, p.28, translated J. Schachter).

\textsuperscript{1078} As quoted by Goldberg and Villa 2006:378. See ARU 6:25 (§8.9).

\textsuperscript{1079} Elon 1994:II.874-78. Riskin 2002:26 cites Freimann 1964:345 for a list of seven such enactments between 1804 and 1921 in Italy, France, Algeria and Egypt.

\textsuperscript{1080} Ben-Zion Schereschewsky, “\textit{Agunah}”. \textit{Enc. Jud.} II.433, writes: “It was also sought to avoid the disability of an \textit{agunah} by the enactment of a \textit{taqanah} by halakic scholars to the effect that the \textit{kiddushin} should be deemed annulled retrospectively upon the happening or non-fulfillment of certain specified conditions, such as the husband being missing or his wilful refusal to grant a \textit{get}. But this \textit{taqanah}, based on the rule that “a man takes a woman under the conditions laid down by the rabbis … and the rabbis may annul his marriage” (Gitt. 33a), has rarely been employed since the 14th century.” He does not cite the primary source for this, but appears to be relying upon Freimann 1964:385-97; M. Elon, \textit{Ikkalah Datti} (Tel-Aviv:
Moreover, after Rivash we still find an openness to new *tagganot* permitting even “delayed” annulment. In a debate in 15th century Portugal (c.1470) between R. Shemuel Ibn Ḥalath and R. Yosef Ḥayyun, the former mustered a number of arguments to prove that the *bet din* still possessed the authority to annul marriages and maintained that this was so even after the *qidushin* [and *nissuʿin*] had taken place in conformity with *Halakhah* (and communal enactment) if this was necessary to save a woman from *ʿiggum*. R. Ḥayyun responded that whereas marriages *improperly contracted* may be dissolved if there is a communal enactment to annul them, those which have been correctly effected can be annulled later only in cases where there is a *get* (that is disqualified by Torah law but effective by Talmudic law through annulment of the marriage, as explained in the Talmud).\(^{(1081)}\) Rabbi Y.M. Toledano, *Responsa Yam ḤaGadol*, no. 74, tells us that he had found an account of this debate in an ancient manuscript of R. Ḥayyun’s *responsum*,\(^{(1082)}\) which states that a number of Portuguese rabbis of the time accepted Ibn Ḥalath’s ruling and as a result a number of *ʿagunot* were actually released.

A few decades later, in a collection of the customs and practical *novellae* of the early rabbis of Jerusalem from the time of the Nagid R. Yitshaq HaKohen Sulal from the year 5269, we read:\(^{(1083)}\)

In *Yevamot*, ch. *Bet Shammai*, the Sages annulled his marriage because everyone who betroths does so only with the consent of the Sages. Thus when he betroths improperly the Sages annulled his betrothal. I asked Kevod Morenu HaRashag [his identity is unknown] why they did not, accordingly, release the *ʿagunot* in one go and he answered me that the *Geʿonim* said that in a case of a woman already [properly] married that they should persuade him to divorce and it is proper to be concerned [about the leniency of annulment and it is, therefore, better to obtain a get]. Nevertheless, if the Sages would agree to annul marriages [without a get, even after they have been properly contracted and even after *nissuʿin*] that would be *halakhically acceptable*, but [as for] past cases where she was already properly married before any such agreement, we lesser mortals could not annul them.

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1081 See Freimann 1964:80.
1083 This is found in what is described as “a very ancient scroll”, published at the end of *Ḥayyim wa-Ḥared Mosaffa* (Livorno 5604, letter 229). See Freimann 1964:113. See also ARU 18:52, on R. Ovadyah Yosef’s reference to this in 5721:101.
5.41 In this context, a number of important issues arise in relation to the meaning and application of אֶלֶךֶה אֶלֶךֶה רַבַּנָּן מַמְלִיכָם.  

(a) Are the Sages (Rabbanan) referred to only the Talmudic Sages (so that the spouses are taken to have consented to the application of established rabbinic law) or is this power of annulment invested in the leading scholars of every generation (by whom the contemporary bet din would be guided in exercising its judgment on the case in hand) R. Ovadyah Yosef has taken the latter view. And if contemporary batey din do not have any such inherent authority, may it be conferred by an explicit condition?

(b) Is the application of אֶלֶךֶה אֶלֶךֶה רַבַּנָּן מַמְלִיכָם limited to cases where the groom explicitly made such a condition or is it taken as implicit in the formula of betrothal? This may depend upon whether kol hameqaddesh means “everyone who betroths” or “everyone who utters the formula of betrothal”: in the former (the usual) understanding, it is an implicit condition; on the latter an explicit condition.

Both these questions are important in determining precisely what the couple are committing themselves to by uttering the formula of qiddushin. If the answer to (b) is that the condition is implied, there is a subsidiary question regarding the status of the implied condition: is it imposed by the halakhic authorities as a tnal bet din or does it depend upon the assumed intention of the spouses (or at least the husband) as an instance of ada’ta dehakhi found also in other areas of the Halakhah?

E. Is Annulment Available Today?

5.42 The use of annulment as a possible solution to the problem of ‘iggun is highly controversial. Any such use has to address some fundamental objections:

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1084 ARU 18:44.
1085 Freimann 1964:14 notes discussions over whether אֶלֶךֶה אֶלֶךֶה רַבַּנָּן refers only to the rabbanan of the Talmudic era, so that the implied condition afterwards is to comply with rabbinic law rather than the ongoing consent of a particular bet din. See ARU 18:44. However R. Risikoff at least is clear that permission is given to a contemporary bet din if the condition is made explicit. A related point is the claim that such jurisdiction could be exercised only by a bet din of experts like R. Ami and R. Assi: see, e.g., Tashbetz, Vol.2, 5, cited by Lavi 5769.
1086 See further ARU 18:51-52, referring to Rema’s argument on the case of the “Evil Decree of Austria”, §5.47, below.
1087 Tosaftot Ketubbot 3a, s.v. ada’ta, appears to view kedut Moshe veIsrael as an explicit condition.
1088 In this context, see ARU 10, and §3.76, above.
(a) that *hafqa’ah* is completely excluded in our days because of a lack of authority (sometimes attributed to all post-talmudic *posqim*), despite its occurrence in mediaeval *taqqanot haqahal*, Rosh’s account of the geonic measures, and Rema’s observations on the annulment in favour of the raped wives resulting from the ‘Evil Decree of Austria’ (Section E1);

(b) that *hafqa’ah*, while not completely excluded in our days, is strictly limited to the cases found in the five talmudic occurrences (Section E2);

(c) that *hafqa’ah*, where it remains available, must always be accompanied by a *get* – albeit a *get* which would not be sufficient on its own, because it is “externally flawed” – unless it is a case of breach of a *taqqanah* imposing additional requirements on the initial *qiddushin* (Section E3);

(d) that *hafqa’ah*, even if theoretically possible on basis (c), should be avoided, because it retrospectively changes the relationship of the spouses into one of *zenut* (Section E4).

Yet despite all the above, some contemporary authorities argue that *hafqa’ah* remains available, at least in situations of urgency (Section E5).

**E1. The argument that *hafqa’ah* is completely excluded in our days**

5.43 The claim that *hafqa’ah* is completely excluded in our days because of a lack of authority is sometimes conflated with the second claim, in such a way as to suggest that only the Sages of the talmudic era had the authority to apply it (whether in already recognised situations or elsewhere). This is manifestly incorrect, in the light of the series of mediaeval *taqqanot haqahal* which added new requirements for a valid *qiddushin*, failure to observe which entailed annulment (§5.9). Some, however, claim that no such authority exists today, certainly as a matter of

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1089 R. David Lau, “*Hafqa’at Qiddushin leMafroz’ beYemen*”, *Tehumin* XVII (5757), 251-271; R. Lavi (5767), who is less opposed to immediate than to delayed annulment, although he rejects even the former for practice, on the basis of Rema and other considerations. For contrary authorities, see esp. Freimann 1964; Lifshitz 2004:s.12. On the argument of R. Lavi (at section 1.7), based on the Rosh’s analysis (43:8: see §4.22-24, above) of the geonic measures as a form of *hafqa’ah*, that the Rishonim who disagreed with the Ge’onim regarding *moredet* rejected *hafqa’ah* as well, see ARU 15:22, arguing that the dispute between the Ge’onim and Rabbeno Tam relates to the authority for coercing a divorce, and does not take *hafqa’ah* into consideration.
ma'aseh; indeed, the hesitation to approve such cases lema'aseh (even while accepting that the authority exists in theory) is apparent already in the 14th century, in the responsum of Rivash noted above (§5.37), although we have seen that Maharam Al Ashqar and other 15th and 16th cent. authorities still accept that such enactments may be adopted in practice (§§5.38-40). Moreover, even the argument of Rivash does not necessarily exclude a taqkanah from the highest authority, with universal (rather than local) application. On the basis of these and other sources, R. Ovadyah Yosef therefore maintains that there is no problem with “immediate” annulment, as even Rashba (along with many others) accepts: where the qiddushin were improper, having been carried out in defiance of a communal decree, very many Rishonim agree to the contemporary effectiveness of enactments of annulment. Moreover, there is evidence of such a communal decree in Egypt little more than 100 years ago.

5.44 We have seen that Rosh in Resp. 35:2 (§4.23) avoided applying hafga'ah in a case he considered “reasonable to compare to the case of Naresh (Yevamot 110a)”. Nevertheless, he was so determined not to leave the

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100 See further R. Yosef’s analysis in §5.56, below, and the suggestion made in §5.57.

101 R. Yosef (5721), citing Rashba in a responsum cited in Bet Yosef (end of ’Even Ha’Ezer 28); Rivash (Responsa, 399); we may note in this context R. Yosef’s general approach to lehalakhah velo lema’aseh: §2.39; Rashbets (Responsa, II 5); Maharam Alashqat (Responsa, 48), and, for the Acharonim, Keneset Ha’Gedolah (’Even Ha’Ezer 28, Hagehot Bet Yosef 37), and noting that that Mahara ben Shimon in Responsa Umitzur Devash (’Even Ha’Ezer no. 6) maintains, along with many supporters, that one can rely in practice on enactments of annulment and that the bet din that succeeded him did rely on annulment in actual cases. See further ARU 18:52-55.

102 The following details are provided by Freimann 1964:338-344. The Egyptian taqkanah, initiated mainly by Rabbi Refa’el ben Shimon (’Umitzur Devash) with the participation of Rabbi Eliyahu Hazza (author Ta’alumot Lev; see n.440 above) and Rabbi Aharon Mendel Hacohen, was enacted in 5661 (1901). It ruled that betrothal must be performed (a) with the permission of the local Rabbi / ’Av bet din / Gabbay (for small towns without a bet din); (b) in front of 10 persons (including the Rabbi or someone sent by him); (c) and with the giving of a writ of betrothal (ketubbat ’erasin), according to the local (Egyptian) law. It stated that where any one of the above requirements was not fulfilled, the betrothal would be void on the basis of: (a) annulment of the betrothal (hafqa’at qiddushin), according to which the betrothal money would be considered beker; and, to strengthen it further (b) the witnesses would be declared pesulim (pesuley ’edut mide’oraya). Some sages outside Egypt disputed the taqkanah (e.g., Rabbi Mordechai Lurya of Jerusalem), but others approved it (e.g. the Chief Rabbi of Bulgaria, Rabbi David Pipano). In Egypt itself the Sages disagreed as to whether the enactment could annul betrothal only (i.e. without ha'ah) or also marriage (when the couple had cohabitated). The bet din in Cairo followed the first approach (on the basis of Hatam Sofer and the sages of Yerushalayim), while Rabbi Eliyahu Hazza and the court in Alexandria supported annulment even after nisu’in (it was raised in a specific case of a kohen who married a divorcee). According to Rabbi Refa’el ben Shimon, during the 7 years that followed the enactment no one dared to betroth against it. Later, the enactment served as a basis for annulling betrothals which were performed in violation of its requirements.
woman without a remedy that he concluded: “nevertheless we should follow in this case the view of a few of our Rabbis who ruled in the law of *moredet* that [the *bet din*] should compel him to divorce her”, i.e. that (the Maimonidean) *kefiyah* should be applied, despite the fact that the Rosh followed Rabbenu Tam in rejecting the geonic measures. At the same time, we have noted his view that the geonic measures themselves were a form of *haqya’ah*: (Responsa 43:8, §4.22, above). Taking these two *teshuvot* together, we concluded that this amounts to an endorsement of the view that *haqya’ah* remains possible in post-talmudic times if accompanied by a coerced “get” (§4.24).

5.45 Of course, Rivash #399 and Rosh #35:2 both refer to “immediate” rather than “delayed” annulment: there was here an improper initial qiddushin, whereas in the case of recalcitrance the initial qiddushin was entirely proper. That distinction is regarded as crucial by R. Zalman Nebemayah Goldberg, in his debate with R. Shlomo Riskin. R. Goldberg writes:

Annulment subsequent to a properly executed betrothal was very rare even in talmudic times when all the Sages of Israel were together; even then it was only employed in cases where there was a “get” which was valid in itself but had been rendered unfit due to some external factor. We do not find anywhere that this type of annulment can operate without a “get.”

However, there are two sources to be considered in assessing this last claim: on the one hand, the Rosh’s account of the *kefiyeh* of the Ge’onim (§5.46); on the other the case of the women taken captive as a result of the ‘Evil Decree of Austria’ (§5.47).

5.46 We have noted the view of the Rosh that the geonic *kefiyeh* in a situation of me’is ‘alay was a form of *haqya’ah*: (Responsa 43:8, §4.22, above). While there may be doubt as to whether we may consider this as (intended as) an historically accurate account of the geonic remedy, rather than as an anachronistic justification (in the light of its later rejection by Rabbenu Tam) for an earlier halakha, it has

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1093 R. Goldberg agrees that even nowadays one could introduce annulment enactments which would operate at the moment of the qiddushin by invalidating the act of qiddushin (and hence there would be no requirement of a “get”) but points out that the Rema (“Even Ha’Ezer” 28:21) rules that in practice even this is not to be allowed. Cf. *Haftorah*, http://www.torah.org/kolotorah/aguna/aguna59.4.htm, quoting Rema thus: “A community that institutes a policy, accepted by the entire community, that anyone who marries in the absence of a Minyan will have his marriage considered invalid – must, nevertheless, be strict and require a ‘Get’ in this circumstance.”

1094 For the bibliography of the debate, see n.992, above; for further discussion, ARU 18:48-50.

1095 *Teshuvot* 23 (5763), 158-59. See ARU 6:23 (§8.5).
important implications: Rosh here legitimates hafqa’ah in practice at least in bedi’avad cases, when used along with a get. Indeed, R. Yosef agrees inter alia from the rationale suggested by the Rosh for the Geonic taqkanat hamoredet, namely that it is based on the power of annulment, that we may infer that even nowadays the sages of each generation are empowered to enact the annulment of marriage (even after a properly conducted giddushin); such power is not limited to the talmudic sages alone. As already noted, R. Goldberg argues that the enactment of the Ge’onim, even if viewed as a form of hafqa’ah, also operates only together with a get (again externally flawed as in the cases of the Talmud, but this time due to talmudically unsanctioned coercion). Thus, we may conclude that, by taking the two teshuvot of the Rosh together, he endorses the view that hafqa’ah remains possible in post-talmudic times if accompanied by a even by get (even a coerced get).

5.47 There is one recorded instance of the use of hafqa’ah in post-talmudic times in an entirely new situation (neither resembling one of the talmudic cases nor involving breach of additional requirements for giddushin). In 15th century Austria permission was granted by contemporary leading rabbis to women who had been taken captive (as a result of the ‘Evil Decree of Austria’) to return to their husbands if the wives had willingly committed adultery with their captors and even, where the husbands were kohanim, if rape was suspected. The solution was to annul their original marriages. On this, Rema writes:

> It seems to me that the rabbinic authorities may have issued their lenient ruling not on the basis of the strict law, but because of the needs of the hour. For they saw that there was reason to be concerned about what women might do in the future. For if they knew that they would not be permitted to the husbands of their youth, they might sin, and so (the rabbis) were lenient. And don’t say from where do we know that we might be lenient in a case that involves a possible Torah prohibition. It seems to me that they relied on that which they said that whoever betroths a woman betroths her with the understanding that he has rabbinic approval, and the court is authorized to cancel his marriage, so they were like unmarried.

106 5721:97-98.
107 §5.12 and see n.1094, above.
108 Reported in Terumat HaDesen, no. 241.
109 Darkey Moshe (’Even Ha’Ezer 7:13). See also Rema, ’Even Ha’ezer, 28:21; ARU 11:14 n.86.
110 Recorded in Darkey Moshe (’Even Ha’Ezer 7:13).
111 Which might well allow it to stand as a precedent for situations which exhibit comparable necessity. See further ARU 18:51-52.
women, and even if they sinned, they are permitted to their husbands.\footnote{\textit{Agunah: The Manchester Analysis}}

Thus Rema (though not entirely sure of the reasoning behind the original decision\footnote{\textit{Izak B. Fredman (1988): Essentials of Jewish Law. P. 206.}}} was willing to countenance post-talmudic dissolution of marriage even after an appropriate betrothal, in a case not mentioned in the Talmud, without an (externally flawed) get and even in the absence of an enactment embodying annulment or, indeed, of any enactment whatsoever.\footnote{\textit{R. Goldberg argues that the Austrian case did not deal with Torah prohibitions but rather with derabbanan prohibitions (or at most a non-enhanced biblical prohibition (1980, 1987).}} In his response to R. Riskin,\footnote{\textit{R. Goldberg argues that the Austrian case did not deal with Torah prohibitions but rather with derabbanan prohibitions (or at most a non-enhanced biblical prohibition (1980, 1987). Thus far from stabilising the institution of marriage, this particular act of hafq'a'ah supported and bolstered it. Moreover, even if annulment in the Austrian case enabled overruling an ‘issur de’oraya, it was not still a case of permitting an ‘eshet ‘ish to have relations with a man not her husband (and thus a violation of giluy ‘arayot).}}

E2. The argument that hafq'a’ah is limited to the five talmudic instances

5.48 Some argue that hafq’a’ah, while not completely excluded in our days, is strictly limited to the cases found in its five talmudic occurrences.\footnote{\textit{Riskin’s translation, 2002:26. In the version of this at ARU 6:22-23 (§§5.5, the phrase here translated “and the court is authorized to cancel his marriage” is mistakenly quoted as \textit{‘ulam da’amir le’tinyan ma’aseh}, whereas it should be \textit{‘ulam da’amir le’tinyan ma’aseh}.}}\footnote{\textit{Hagahot to Even Ha’Ezer, 28:21: “yesh lehalomer le’tinyan ma’aseh”. See ARU 11:4, arguing that although all the “delayed annulment” cases in the Talmud cases do involve a get, and many Rishonim (but not all) regard this as supporting the view that a get is required in the process of hafq’a’ah, this may be due to various “external” reasons (such as preventing a “slippery slope” in the use of hafq’a’ah, which will damage the stability of Jewish marriage), while conceptually the hafq’a’ah remains a retrospective annulment of the marriage.}}\footnote{\textit{Cf. Riskin 2002:26.}}\footnote{\textit{‘Eyn Haq’at Qiddushin Lelo Get”, Teshumin 23 (5763), 168.}}\footnote{\textit{‘issur zo’ah lekhohen, punishable at most by flogging, and, since the case was one without witnesses, if she denies that she was contaminated and her husband believes her, there is only a rabbinic prohibition in her returning to him.}}\footnote{\textit{Lifshitz (2008) has responded that Rema deals also with cases of ‘issur de’oraya — as when the wives of kohanim without doubt committed adultery. However, there is doubt nowadays about the priestly status of all kohanim: see Ba’er Hetev, ‘Even Ha’Ezer 6:2.}}\footnote{\textit{See further ARU 17:146-47 n.211, and more generally at 121-23, arguing that the hafq’a’ah of the Gedolei Austria is merely a logical extension of the view of Rava in Ket. 51b, who sought to permit married women who had been raped to return to their husbands.}}\footnote{\textit{Often citing Rashba, Responsa 1:1185: see §5.34, above.}} These
five cases, as already noted above (§5.9, above) are often divided into two classes, which we have described as “immediate” and “delayed” annulment. We have noted that R. Ovadyah Yosef maintains that authority for “immediate” annulment is not limited to the talmudic cases, as even Rashba (along with many others) accepts. Thus, where the giddushin were improper, having been carried out in defiance of a communal decree, very many Rishonim agree to the contemporary effectiveness of enactments of annulment (§5.43): there is, thus, a safeg. However, R. Yosef appears willing in some cases of “immediate annulment” to contemplate a coerced get.1110 The only real debate concerns “delayed” annulment (where R. Yosef still requires in practice some other safeg in the marriage, due to the accepted custom of taking account of all opinions).

5.49 R. Zalman Nehemyah Goldberg argues we have no precedent for permitting the practice of annulment in cases of get refusal1111 nowadays (this would be a new case of “delayed” annulment), and cites Rashba, Responsa I:1162, as authority for this. However, this view of Rashba’s position has not gone unchallenged. R. Berkovits argues that any distinction between “immediate” and “delayed” annulment is wrongly inferred from Rashba:1112 what Rashba really maintains is that the fear of ‘iggun by itself is not sufficient for an annulment of the marriage; some other supporting issue is required. Sometimes the support is one witness testifying to the husband’s death or a gentle ‘innocently reporting’ the husband’s demise; either of these may be coupled with the assumption that a wife investigates thoroughly and [only then] remarries. Sometimes it is an [externally flawed] get. Only when the husband acted improperly did the Rabbis annul the marriage without any other support. In the case of both “immediate” and “delayed” annulment, authority to annul flows from the ruling that ‘anyone who betroths does so in accordance with the will of the Rabbis’. Rashba, Berkovits maintains (on the basis of a study of all the responsa of Rashba relevant to post-talmudic annulment), accepts annulment even in cases not matching those in the Talmud.

1110 See further ARU 18:53-54.
1111 He does however accept that there are cases such as the missing husband whose death is attested by only one witness – even if that ‘one witness’ be a pagan’s innocent talk – where the Sages allowed remarriage on the basis of annulment (and without a get) but that is because there is convincing evidence (albeit not proof) that the husband is dead and there is also the assumption that a woman enquires carefully before remarrying (Da’iga’ uminasha’ – cf. Yevamot 25a et al.) due to the fact that she is aware of the severe repercussions that would ensue were she to remarry and her husband subsequently to return.
provided that the authorities of the locality enact a *taq姜™ah* in which *hafa🎀’ah* is mentioned explicitly and the husband has acted improperly. In view of all this, Berkovits concludes, we have plentiful support to institute enactments today to annul [even properly contracted] marriage even after the *nissu’ın*, so long as the enactment precedes the marriage, if there is some additional supporting reason or even due merely to the fact that he acted improperly (specifically in matters touching marital life). All this is because of the gravity of the situation which forces us to put the *Halakah* to practical use.*

5.50 R. Ovadyah Yosef also rejects the limitation derived from Rashba. He suggests that Rashba was following the opinion he expressed elsewhere in *Responsa* VI:72, that the *taq姜™at heGe’onim* (interpreted by Rosh as retrospective *hafa🎀’ah*) was an emergency measure only, from which he infers that, even according to Rashba, we could introduce *hafa🎀’ah* nowadays for the emergency needs of our own time.*

E3. The argument that in cases of “delayed” annullment, where it remains available, the *hafa🎀’ah* must always be accompanied by a *get* – albeit a *get* which would not be sufficient on its own, because it is “externally flawed”

5.51 Less radical (and more relevant for present purposes) is the objection that the Rishonim never proposed annullment subsequent to a properly performed *gìddushin* (“delayed” annullment) except in the presence of an externally flawed *get* – as in the three cases* in the Talmud* (though some Rishonim do appear to have held that a *get* was not necessary,* as stated by Me’iri*). The issue has been debated recently by Rabbis Shlomo Riskin and Zalman Nehemyah Goldberg,* the latter insisting, in opposition to Rabbi Riskin, that retrospective annullment without a *get* is nowadays out of the question. We have noted the arguments concerning both the Austrian case (§5.47) and the Rosh’s interpretation of the geonic

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1113 See further ARU 6:24-25 (§8.9, s.v. “Almost all”); ARU 11:13-14, esp. nn.78-79 (Berkovits’ view on Rashba) and s.2 more generally; ARU 12:1-2 (esp §§A.11, IV, X).
1114 §§35, above; see also the suggestion made at the end of §§55, below.
1115 §§14-18, above.
1116 Shoheṭman 1995:388-92, but see ARU 11:10 n.65, where Dr. Westreich argues that Shoheṭman’s conclusion is neither historically nor dogmatically decisive.
1117 ARU 11:13, citing Rashi (according to some); Ri Migash; Ramban and his disciples: Ra’ah and Rashba. The school of Ri Migash and Ramban, however, do demand a *get* (*get kol deha*).
1118 See Me’iri, *Ketubbot* 3a, s.v. kol she’amru.
1119 See n.992, above.
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measures (§§4.22-24). As regards the latter, it is significant that R. Goldberg understands the Rosh’s interpretation as being hafka’ah operating together with an externally flawed get (as in the cases of the Talmud), even though the flaw in the get is here due to talmudically unsanctioned coercion.

5.52 R. Ovadyah Yosef\(^\text{120}\) gives another reason why a get is required: even after ’affle’inho there remains a rabbinic marriage. This will explain why the Rashba insists that annulment by itself is not enough; \(^\text{132}\) an externally flawed get, \(^\text{112}\) or some other additional reason for permission to remarry, must be present to overcome the problem of the residual rabbinic state of marriage. \(^\text{127}\) On this analysis, we may note, the insistence on such a get represents the prototype of a “combined solution”.

5.53 In a response to a bagats, \(^\text{114}\) R. Daichovsky in 2003 commented on Ketubbot 3a in terms which have been taken to imply that in severe cases (the issue in the case was mamzerut), hafka’ah may still be used even without a get. \(^\text{125}\) This is supported also by the simple meaning of the sugya as stated by Me’iri. \(^\text{116}\) Rav Lavi, however, responded that this was directed mainly to the use of Get Maharsham \(^\text{127}\) in order to prevent mamzerut, and that nothing more general could be derived from it. \(^\text{128}\)

E4. The argument that hafka’ah, even if theoretically possible with a get, should be avoided

5.54 The feeling that hafka’ah, even if theoretically possible, should be avoided, on the grounds that it retrospectively changes the relationship of the spouses into one of zanah, has been addressed in the context of terminative conditions (§§3.48-59, above), where we found a significant body of opinion which throws that status into doubt. However, there may be a distinction between the effects of annulment (without a condition),

\(^{1120}\) R. Yosef 5721:101, final paragraph and at n.162.
\(^{1121}\) Berkovits 1967:123-133, argues that the mention of a get by Rashba (and other Rishonim, including Rashi) is not essential to the process of hafka’ah, but rather contingent, i.e. a descriptive element of the cases in which hafka’ah was applied, while it can be applied in other cases as well.
\(^{1122}\) As in the three talmudic cases of “delayed” annulment: §§5.14-18, above.
\(^{1123}\) See also ARU 11:13 n.82.
\(^{1124}\) High Rabbinical Court, file number: 4276/2003: see esp. pp.5-6.
\(^{1125}\) See Lifshitz 2008.
\(^{1126}\) As Lifshitz indicates. See also ARU 11:13.
\(^{1127}\) See §§5.23-24, above.
\(^{1128}\) Lavi 5769:249-250.
and termination by virtue of a condition. As for the latter, we noted the view of R. Uzziel that there is no issue of zenu when the relationship was conducted on the basis of qiddushin and nissu‘in, even if later annulled by a condition involving an act of the bet din (§3.52). This too points towards the desirability of a “combined solution”.

E5. Arguments of contemporary authorities, at least in situations of urgency

5.55 Despite the reservations above, some contemporary authorities argue that haqqa‘ah remains available, at least in situations of urgency. The writings of both R. Berkovits and R. Yosef emphasise the greater authority available where contemporary conditions demand it. Indeed, R. Yosef notes that however one understands the Rema, it is clear that at a time of great need one can apply annulment even nowadays (i.e. even in cases not mentioned in the Talmud, even after nissu‘in, even where there is no get, and even where there was no preceding enactment of annulment in the given circumstances). Moreover, this does not necessarily require us to declare an “emergency” (tsorekh hasha‘ah) which would allow invocation of the power (following Rashba, Rambam and others) to “abrogate” Torah law (as did the Ge’onim, on some accounts), as opposed to recognition of a she‘at hadehya, in which we may rely on lenient opinions, here the view of those who think that haqqa‘ah today is not a matter of abrogation (as per Rema). If indeed the situation is classified as one of emergency, both retroactive and prospective annulment without a get might be possible; if it is (merely) she‘at

1129 Stressing the “gravity of the situation”; §5.49, above.
1130 R. Yosef 5721:101, final paragraph.
1131 Rashba, contrary to Rambam, says that once the suspension has taken place it can be left on a permanent basis. Interestingly, this goes beyond the early sources, which understand the power as one of suspension, derived from Deut. 18:15 (concerning the “prophet like Moses”). In these sources, a distinction is drawn between the power la‘akor and la‘avor. Compare Sanh. 90a: “R. Abbahu said in R. Johanan’s name: in every matter, if a prophet tells you to transgress (im yomar lehka ‘avor) the commands of the Torah, obey him, with the exception of idolatry; should he even cause the sun to stand still in the middle of the heavens for you (as proof of divine inspiration), do not Hearken to him” with the Baraita on the same page: “Our Rabbis taught: if one prophesies so as to eradicate (la‘akor) a law of the Torah, he is liable (to death); partially to confirm and partially to annul it, – R. Shimon exempts him. But as for idolatry, even if he said, ‘Serve it today and destroy it tomorrow,’ all declare him liable.” See also Yeb. 90b, Sifre ad Deut. 18:15: “Come and hear: unto him ye shall Hearken, even if he tells you “Transgress (‘avor) any of all the commandments of the Torah” as in the case, for instance, of Elijah on Mount Carmel, obey him in every respect in accordance with the needs of the hour.”
1132 On this distinction, see §2.21, above.
1133 ARU 18:43-44(iv) and 45, according to the majority of posqim who rule that emergency legislation is possible nowadays also, even if that would mean actively abrogating Biblical Law. In support of this, R. Abel (ARU 18:45 n.134) cites Responsa Tzemah Yodeq (1) no. 28
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hadelaq, such leniencies may certainly be combined with other factors to justify a solution.

5.56 From the analysis of R. Yosef, it would seem that a declaration of retrospective annulment by the contemporary leading sages of Israel, even without a prior enactment (and certainly with one), even in cases not matching the historical examples of qiddushin and nissu’in (“delayed annulment”) and even without any kind of get, would be sufficiently halakhically effective at least to create a safeq which could combine with another, more substantial, safeq to form a sfeq sfeqa. As for cases of “immediate annulment”, R. Yosef appears willing in some circumstances to contemplate a coerced get. He also notes that where the qiddushin were improper, having been carried out in defiance of a communal decree, very many Rishonim agree to the contemporary effectiveness of enactments of annulment. But since Rema writes that we should not rely on this opinion in practice, the matter is subject to safeq, which could be resolved (in a case of me’is ‘alay) by combining breach of the taqkanah with a coerced get.

5.57 That being so, it may not be impossible (radical as it may sound) to contemplate, as part of an ultimate ‘global solution’, a taqkanah providing that failure to include in the ketubbah (or associated document) a condition which (in effect) rendered the marriage immune to ‘iggun would generate “immediate” annulment (on the model of the mediaeval taqanot haqhal which, inter alia, made the very giving of a ketubbah an essential condition of qiddushin, failure to comply with which equally generated “immediate” annulment).

5.58 R. Shear-Yashuv Cohen also argues that though the authority for annulment was given to the talmudic Sages, nevertheless today we may

in a gloss of the author’s son; Responsa Rashba: VI no. 254, Meyuhadot no. 244; Responsa Hahmey Provincia I no. 64 (where the author also supports the Rambam’s ruling for kefiyot in the case of the moredeh); Yeshu’ot Ya’ayov OH 242 sub-para. 2; Hases Le’Avraham (Te’omim) ‘Even Ha’Ezer 10 s.v. ‘Od, where it is stated explicitly that even the ‘Abaronim possess the authority to abrogate Biblical Law; Responsa Bet Yehudah IBM 11; Responsa Bet Shelomoh Yoreh De’ah 29; Iggrot Moshe OH I.33 (though the subject there is only the abrogation of a positive commandment). Cf. ET XXV, col. 611, footnote 22 & cols. 637-639, at nn.231-44.

1134 §§5.46, 48, above.
1135 See further ARU 18:53-54.
be able use it in *she’at hadelaq* in combination with other factors (and particularly as a support to *kefiyeh*). Otherwise, he maintains that we have no authority today to annul marriages, which would depend upon future acceptance of the authority of the sages of Jerusalem to make such an enactment.

5.59 R. Berkovits has a lengthy argument in favour of the contemporary availability of *hafqa’ah*, combining many of the above arguments. He concludes:

> It is worthwhile to quote from the enactment of annulment of marriages that operated in Egypt in 5660 (= 1900).

...and the cure for this? The only answer is annulment, which has been used by the Ge’onim, Rishonim and ’Aḥaronim in order to put a stop to the lawlessness of the oppressors; although they in their days had real authority over their communities how much more so do we, who have lost the internal authority of earlier days, need the power of communal annulment’.

If the matter was so severe in their days how much more so is it today.

The problems today are not usually problems of *‘agunah* but of married woman who remarry without a *get* and bear *mamzerim*. The truth is that he who is strict nowadays with annulment is in effect multiplying *mamzerim* in Israel. To the point, here are the words of the author of *Ta’alumot Lev* (*Even Ha’Ezer* no. 14): “Even those who in practice take a strict view because of the stringency of forbidden sexual relations, that is only when they can somehow force him to give a *get*. Not so in these lands where none can enforce the words of the sages and everyone does as he pleases …”.

Again, I say that if it was so bad in his time how much more so today.

On the basis of a number of great *poskim* who agreed to annulment in their time – Rosh, Rashba, *Tashbets*, Rivash, Maharam Alashqar – it can be argued that annulment today is not impossible. Maharam Alashqar writes (*Responsea* no. 48): “I agree with Rivash that the community has the power to annul a marriage … on the basis of *ת״ש*, and I note that whereas Rivash agrees to this in theory even in the event of a single community, he allows it in practice only *if all* the communities in the country agree to it. I add that if *all* the rabbis of the country and *all* its communities or *most* of them agree to annulment, I will go along with them.”

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1137 The discussion is set out in Berkovits 1967:119–161; for the conclusion (here quoted in abbreviated form) see 161-64.

1138 See n.1092, above.
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This is also implied by Mabit (Responsa I 206) who says that he follows Tashbets – who forbade the practice of annulment only by individual communities. Tashbets is the source for his son, Rashbash, and Rashbash is the source of the Bet Yosef and Rema (and even if the source of Rema was Mahariq – as claimed in gloss to ‘Even Ha’Ezer 28:21 – Mahariq also spoke only of annulment by a single community or rabbi).

Hence, even those who ruled against the use of annulment nowadays did not speak of enactments of annulment by all or most of the communities and rabbis in a country. Indeed, thanks to modern technology, there is now a possibility to achieve annulment by the enactment of not just all or most communities and rabbis ‘in the country’ but even in the world!

However, Berkovits emphasises the need for a communal enactment, in which “they made it explicit at the time of [the composition of] the enactment that if anyone does not obey the enactment of the bet din or of the community, his betrothal will be annulled. If they did not stipulate this condition from the beginning [= prior to the betrothal], he who transgresses the enactment is called a sinner but his betrothal is valid.”

5.60 In his survey of marriage annulment, Menahem Elon adduces many sources to show that annulment by contemporary sages remains possible even in cases not mentioned in the Talmud. He suggests that the unwillingness of many posqim (including the Shultan ‘Arukh and the Mappah) to permit in practice, in the area of marriage law, that which they regarded as perfectly acceptable in theory was due to the scattering of the Jewish people all over the world and the resultant divisions into countless communities each with its independent bet din. This would inevitably lead to variations in marriage practices, so that a woman whose marriage had been annulled in one place might well be regarded as still married in another – a problem that would hardly arise in other areas of Jewish law. He writes:

It seems that the vast historical change … that has taken place in Jewish existence with the return of Jewish Sovereignty is sufficient to bring about change in the existing tendency towards avoidance of activating the authority to legislate. Just as the cause of this reticence was the fact of scattering and dispersal, of local communal legislation and of the lack of a central Jewish authority, so the cause of reactivating legislative authority must issue from the new situation of ingathering and unification, of the

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formation of a central authority, which will bring about legislation for all Jewry. The Halakhic centre which is in the Land of Israel is fit to be – and in fact is – the main centre and holder of halakhic hegemony over all the Jewish Diaspora. Consequently, it is entitled to take for itself the right to introduce enactments that will be from the moment of their introduction – or in due course – the heritage of the Jewish people everywhere. The new historical situation suffices to bring about also a new halakhic situation whose innovative point will be the return of the Crown to its former glory. This new situation contains also a power of authorisation – which, as it authorises, so it obliges – to restore the activity of legislation in all branches of Jewish Law, including betrothal and marriage, to its full capacity in the interests of the improvement of the world of the Law and the world of Israel.

These words are reminiscent of Freimann, but whereas Freimann underscores the point that a leading halakhic centre in Jerusalem will have the power to introduce enactments of annulment due to its unquestioned seniority of scholarship vis-à-vis all other halakhic bodies, Elon sees the advantage of a renewed Jerusalem halakhic centre as being in its ability to communicate with, and align with itself, all other Jewish religious authorities in the world. The significance in this context of the modern communications revolution is stressed even more directly by Berkovits.  

F. Source of the Authority to Annul

5.61 We have seen that there is a correlation in the talmudic sources between the forms of annulment and the authority on which they are taken to be based: “quasi-annulment” (by validation of the get) is based by Rav Hisda on the residual authority of the Sages (not necessarily restricted to this

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1142 Yoma 69b.
1143 Freimann 1964:397, quoted at ARU 18:45-46, including: “However, the establishment of the highest religious institution in the Land of Israel, the place of the Jewish People’s vitality, has restored to the People of Israel an authoritative religious centre with authority throughout the Jewish World. After the destruction of the Torah centres in the countries of Europe, we have no remnant but the Torah of this land and the eyes of all Israel look to this highest religious institution as to the last fortress for the preservation of the Law and the Tradition which is left to us as a remnant from the destruction of the Exile ... This position gives to the bet din of the chief Rabbinate of the Land of Israel, from a halakhic perspective also, power and authority which no bet din of the people of Israel had during the latter generations ... The most important bet din in a generation possesses great authority – to judge and to hand down rulings and to requisition property and to annul marriages and to institute enactments based upon ‘the superior power of the bet din.’” On the religious Zionist ideology here expressed, as compared to the decentralising approach of Dayan Broyde as well as more ḥaredi religious ideologies, see ARU 17:143-44.

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context\textsuperscript{114} to uproot the words of the Torah in circumstances of need;\textsuperscript{114} annulment is understood by Rabbah (apparently still prospectively: §5.16) as based on the preliminary agreement of the spouses, through the maxim kol hameqaddesh ‘ada’ta’ derabbanan megaddesh. This latter was to become the dominant basis. But important questions then arise: is this an implied term, arising from the simple fact that the spouses marry under rabbinic auspices, or is it an express term, this being precisely the meaning of kedat moshe veysra’el in the formula of giddushin? And if the latter, to what extent may it be capable of modification?

5.62 A possible problem arises from the application of ‘ada’ta’ derabbanan: “Every-one betroths only with the agreement of the Sages” means that the Sages take their power to annul a marriage from the fact that the marriage was entered into originally upon an implied condition, namely that the Sages agree to it. Hence, the groom himself has agreed to limit his marriage in accordance with the will of the Sages, and it is from this limitation placed by the groom (and bride) that the Sages derive their legal power to annul. But if the Sages themselves derive their authority in this matter (exclusively) from the groom, they cannot annul prospectively. Perhaps this could be remedied by an explicit condition indicating that the form of hafqa’ah anticipated by the parties is based on one of the talmudic prospective forms.

5.63 This issue becomes manifest in the different analyses of Rashi and Tosafot (§5.31) of the justifications for retrospective annulment in the two talmudic cases of “immediate annulment”, that of the incident at Naresh (Yevamot 110a: §5.29) and the “betrothal by coercion” case (Bava Batra 48b: §5.30), both of which stress that the behaviour of the man (whose marriage is annulled) was improper (יִבְטַח בַּיִת נַשָּׁה). Rashi understands that in both these cases the power of the Sages to interfere in a betrothal derives from the formula kedat moshe veysra’el: it is in effect a conditional marriage. The Tosafists point out some difficulties with this analysis and argue instead that in cases such as these the Sages are using their biblically granted power to abrogate Biblical Law, by confiscating the wedding ring, invalidating the wedding document or declaring the marital intercourse promiscuous, depending on how the betrothal was effected.

5.64 However, the Tosafists’ objection to Rashi would not apply to cases of

\textsuperscript{114} See §2.38, above.

\textsuperscript{116} §§5.6, 16, 25, 31, above.
“delayed annulment”, where the groom did betroth in accordance with the will of the Sages, and where the Talmud does mention kol hameqaddesh ‘ada’ta’ derabbanan megaddesh (§5.33). The logic of what has become the majority view, namely that annulment even here works retrospectively to the moment of qiddushin (so that the couple’s marriage is deemed never to have existed), is that since the groom declared that he is marrying according to the biblical and rabbinic law – which is understood to mean that the original qiddushin is conditional on the continuing (not merely initial) acquiescence of the rabbinic authorities – once a situation arises which causes those authorities to withdraw their approval, the condition for preservation of the marriage has been broken and the union becomes automatically and retrospectively defunct.

5.65 As regards the maxim qol demeqaddesh ‘ada’ta’ derabbanan megaddesh, views differ not only as to its meaning (that the marriage is subject to talmudic law or subject to the continuing approval of a contemporary bet din),547 but also whether its underlying rationale is that of an implicit condition.548 If we accept the objections to the latter analysis,549 we are deprived of one means of construing haqqa’ah as based in part on the will of the spouses. On the other hand, the fact that ‘ada’ta’ derabbanan megaddesh is exercised in some sugyot on the basis of improper conduct on the part of the husband (hu asah shelo kehogen ...)550 may serve as an alternative route to basing annulment on an act of will of the husband. But the objections to viewing ‘ada’ta’ derabbanan megaddesh as an implicit condition may be met if the condition is made an explicit basis for annulment, as is the case in several modern proposals.551 For example, in 5691 (1931), R. Ya’aqov Moshe Toledano proposed that a condition be made at every marriage making it dependent on the continuing agreement

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547 See n.1085, above. However R. Risikoff (n.1153, below), at least, is clear that permission is given to a contemporary bet din if the condition is made explicit.
548 §§1.13, 3.76, above. The same issue arises in relation to the formula of qiddushin, “kedat Meshe ve’israel”: see §§5.31, above and ARU 11:5 and n.23.
549 On R. Uzziel’s argument (§3.43) that Rashi agrees that kol hameqaddesh works on the principle of ‘on the condition that the Sages do not protest the marriage’ (parallel to ‘al monat sheyivtsesh (or shelo yimtsesh) ‘abba’), see ARU 12:29-30 n.140; ARU 20:3-4 n.2. On Rashi’s view (and different interpretations of it), see ARU 11:7 and n.39.
550 See further ARU 11:7 and n.39-40.
551 Thus R. Uzziel (§3.41) makes the marriage conditional on the continuing acquiescence of the local bet din, the bet din of the locality/country and the bet din of the Chief Rabbinate in Jerusalem. R. Brody comes close to this by including in his Tripartite Agreement; “I hereby grant jurisdiction to any Orthodox bet din selected by my wife to enforce any and all parts of this document and do not consent to jurisdiction in any bet din that my wife does not wish to select...”
of the local bet din, to ensure that if they see that he has not acted fairly with her [married her kedim vekashurah] it can retroactively annul the marriage. Similarly, R. Menahem HaKohen Risikoff proposed a condition making the marriage dependent on the continuing acquiescence of a Great Bet Din in Jerusalem, thus empowering that Bet Din to annul the marriage retroactively in cases of otherwise irresolvable ʿiggum.  

We may note, however, that even such proposals, which seek to give the bet din a “strong” discretion, do so by an act of will of the spouses (in making the condition), who thereby at least confirm, if they do not confer, the jurisdiction of the bet din to act in those circumstances. Those proposals, on the other hand, which prescribe the circumstances in which termination (by virtue of the condition) may occur assume a capacity of the parties to contribute to the definition of the legal régime to which they submit.

G. The Process of Annulment

5.66 Closely related is the question whether the role of the bet din is declaratory or constitutive: if it is declaratory, a significant role is preserved for the spouses in the process of marriage termination. Here, the bet din merely declares (confirms) that termination has (already) taken place, whether in accordance with some condition or some fact which the halakha itself specifies as having the effect of terminating (or barring the creation of) the marriage; where the role of the bet din is constitutive, termination does not take place until the bet din so decides. The practical difference here may not be substantial, in that there will be few cases where a second marriage will be authorised without bet din confirmation that the first has terminated (one such may be cases of manifest incompetence of one of the spouses). But the theoretical difference is important from the viewpoint of those who see any termination of marriage other than by death or a get as a breach of fundamental principle. Here, at least, where the bet din is called upon to declare (confirm) that some act or omission of the spouses has taken place which has brought the marriage to an end, we may speak of a partnership.

1152 Responsa Yamin HaGadol (Cairo 1931) no. 74. See also Freimann 1964:391, para. 8. See further ARU 18:55-56, noting that the wording of this responsum makes it clear that the intention is not really conditional marriage but rabbinic annulment which is validated by the fact that the groom states that he is marrying in accordance with the will of the contemporary local rabbinate, thus engineering a modern day [explicit] equivalent of the Talmudic ‘adaʿa’ derabbanan meqaddesh.

1153 Responsa Sha’arey Shamayim, New York 5697, ’Even Ha’Ezer no. 42, as per Freimann 1964:394. See also ARU 18:56.

1154 For example, R. Pipano, §§.81 above; R. Broyde, §§.92-93 above.
between the spouses and the bet din (acting for the community), rather than termination purely by act of the bet din. In this context, we may distinguish the following situations (though the language of hafqa’ah is not normally used in relation to cases (a) and (c)):

(a) The qiddushin are tainted by the incompetence of one of the spouses, who, for example, is not Jewish or is a shoteh. Here, there never was any qiddushin, and any judgment of a bet din to that effect is purely declaratory. Indeed, any such declaration is strictly unnecessary: a Rabbi satisfied of such facts would be entitled to conduct or authorise a marriage for the other “spouse” without further ado (though in practice he is likely to seek the confirmation of a bet din). It is difficult here to construct a partnership between the spouses and the halakhistik authorities, but this is not a case of marriage termination. Because of lack of competence, there was never a marriage to terminate.

(b) The spouses were both competent, but the qiddushin are tainted by a problem of consent in relation to one of them. These comprise the cases of “immediate” annulment in the Talmud. Despite the “immediacy” of the termination of the marriage, they were (in the original talmudic instances) still cases of retrospective annulment. However, for post-talmudic authorities, which treat the talmudic sugyot as normative rulings which they simply apply (rather than new judicial decisions), there never was in these cases any qiddushin to annul, so that “annulment” here becomes (at least in theory) a declaratory act of the bet din indicating that there was never any qiddushin – rather than a constitutive act, which retrospectively annuls an otherwise valid qiddushin (§5.9, above).

(c) The spouses both consent, but that consent is not “informed”, because a significant (halakhically recognised) “defect” exists at the time of the qiddushin that is not known to one of the spouses. This is the issue of qiddushei ta’ut. Here, it is argued, the role of the bet din is declaratory (of the true intentions of the parties), since it involves a judgment on the

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1155 For the view that treats an apostate as a gentile, see ARU 8:20 n.118; ARU 5:28-29 (§21.2.1).
1156 Mishnah Yeivamot 14:1.
1157 Cf. ARU 5:22 (§16.2.1), on Torat Gitin 121:5.
1158 Yev. 110a, B.B. 48b: see §5.30, above.
1159 See §§3.75-80, above; ARU 2:48-56 (§4.4); ARU 10:3-4.
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particular facts as to what the woman would have done had she been known of the true facts.\footnote{Cf. ARU 10:19: “The three concepts [i.e. conditions, mistake and umdena] here discussed reflect (in different measures) a declaratory function of the rabbinical court. The same outcome, i.e. annulling the marriage, can be achieved in a different way: by a constitutive act of the court.”}  

(d) The qiddushin are tainted by the absence of some further (rabbinic) requirement, such as the consent of parents, the simultaneous execution of a ketubbah, the presence of a minyan. Such additional requirements form the subject matter of a series of medieval tagqanot haqahal, and it is in this context, in particular, that the authority for such annulment has come to be viewed as problematic.\footnote{\S\S 5.67; 43, 59 above. See further ARU 2:41-47 (\S 4.3).} Here, in theory, the role of the bet din may be declaratory (as in (b)), but in practice no rabbi would authorise a second marriage without a decision of the bet din, confirming that there had been a breach of the additional qiddushin requirements. Again, the role of the bet din must be prompted by some act or omission of the parties.  

(e) A get deemed invalid in Torah-law has been delivered to the wife (the “delayed annulment” cases,\footnote{Ket. 3a, Git. 33a, 77a.} e.g. where the husband has withdrawn his consent for it, but the wife, in ignorance of the withdrawal, acts in good faith upon it). Whether we take the view that annulment is here retrospective (the presence of the externally-flawed get being purely “incidental”) or prospective (by validation of that externally-flawed get), the role of the bet din is normally assumed to be constitutive (even though in theory the same distinction could be drawn as that in (b) between the original talmudic cases and later applications of the rules there established). This is, perhaps, the clearest case of a “partnership between the spouses and the halakhic authorities” (\S 5.67): the husband has, at some stage, authorised a get; the bet din either validates that get or retrospectively annuls the marriage.  

Of these, it is (e) which requires retrospective annulment in the strongest sense, for here there is no doubt that a constitutive decision of the bet din will be required: until any such psak, the original qiddushin remain valid.
5.67 The major divide between those who insist that termination of marriage (other than by death) ought in principle to be by an act of the parties rather than an act of the court, and those who insist that annulment is based on an (inherent) authority of the bet din, reflects different evaluations of the respective roles of the spouses and the court in divorce. Yet, here as elsewhere, we may argue that marriage termination, whether by conditions, kefiyyah or annulment, should be viewed as a partnership between the spouses and the halakhic authorities. This is clearly the case where annulment is by validation of an externally flawed get (the “delayed annulment” cases). We have noted above that the “immediate annulment” cases (of dubious consent) also involve a (wrongful) act on the part of the husband. Clearly, the addition of a get, whether delayed or by harsha’ah, would further strengthen this partnership.

H. Conclusions

5.68 We have observed three distinct stages in the development of hofqa’ah, identifiable within the Talmud itself: at the first stage, annulment (better: “quasi-annulment”) means that the Sages validate an [externally flawed] get and termination of the marriage is thus entirely prospective, being by validation of the (otherwise invalid) get. This was based on the authority of the sages to “uproot” a law of the Torah in circumstances of need. At the second stage, the very concept of hofqa’ah is interpreted as a prospective annulment of marriage (now without any act on the part of the husband); at the third stage hofqa’ah at qiddushin becomes retrospective annulment of the marriage, by retrospective invalidation of the act of betrothal. This, the classical form of hofqa’ah, though performed by act of the bet din, was justified in terms of an implicit condition (“ada’ata derabbanan meqaddesh).

5.69 This corresponds to an ideological divide between those who insist that (despite the institution of hofqa’ah), termination of marriage (other than by death) must be an act of the parties rather than an act of the court, and

1163 Cf. §4.90, above. Cf. ARU 17:132: “It would appear from my short analysis of the nature of kiddushin that there are three parties to any Jewish marriage: the husband, the wife and the community. The community is, as a minimal legal requirement, represented in both the initiation of marriage and the effectuation of divorce by the critical presence of edim (as discussed in the previous chapter) – and in some circumstances by the community’s court – the bet din.”

1164 Ket. 3a, Git. 33a, 77a. For Rishonim supporting this view, see n.1014, above.

1165 §5.30, above.
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5.70 Nevertheless, whether annulment is in fact retrospective or prospective (by validation of an externally flawed get), we may argue that there is a partnership between the parties and the bet din (§5.67), whether we classify the role of the bet din as declaratory or constitutive.

5.71 The retrospective and prospective forms of annulment have distinctive roles to play in the search for a global solution to the problem of ‘iggun. Where the woman has remained “chaste”, and the problem is that of her capacity to enter into a new marriage, the prospective form is sufficient, and has the advantage of avoiding entirely any questions of retrospective zenut. Where, on the other hand, the woman has not remained “chaste”, but has already entered into a new relationship without receiving a get from her husband, retrospectivity is required in order to address any problem of mamzerut. How both these objectives are best achieved is addressed in the course of the concluding chapter.

5.72 We have argued in this chapter that there is at least enough authority to sustain a safeg in relation to both the retrospective and the prospective forms of annulment, and that both retain for the spouses a sufficient degree of involvement in the process to rebut the argument that hafqa’ah is in principle a violation of the tradition. Indeed, it has been invoked in the past by leading authorities as a supportive element in a solution. Rosh adopted this approach in his explanation of the Geonic measures in favour of the moredet (§§4.22-24) and Rema was prepared to deploy it in the situation arising from the Austrian pogroms (§5.47). This approach appears to be a potential way for using hafqa’ah as part of the solution to the problem of agunot. Hafqa’ah could be accompanied by different (but still otherwise halakhically problematic) forms of termination of marriage. It could serve as a complement to a compelled get, making the latter a

1166 The issue of be’ilat zenut is discussed in the context of conditions (§§3.48-59, above), where the issue arises of preservation of a condition which may result in retrospective annulment against revocation by subsequent marital relations.

1167 On the issue of hafqa’at kiddushin as a support for a coerced get, see Rav Ovadyah Yosef 5721:96-103. R. Shear-Yashuv Cohen (1990) argues that support for coercion may be derived from the snif of hafqa’ah. In the earlier poskim annulment was mentioned as an additional element together with coercion or when the betrothal was not properly done. He cites in support (at 1990:24) a verdict of the High Rabbinical Court and a verdict of Rabbi Itzhak Weiss, Ab”d of Ha-Edu Ha- baredit (in a case where a mamzer’s marriage was regarded as having terminated on the husband’s conversion to Christianity, hafqa’ah being mentioned here.
(permitted) form of coercion. *Hafqat* may also be accompanied by other forms of termination of marriage, such as conditional marriage or *kiddush* ta‘ut.
Chapter Six

Conclusions

6.1 In this concluding chapter we summarise the effect of the preceding analysis on the possibility of solving the problem of the ‘agunah through a “combined solution” (Section A), review from previous suggestions the various elements which may contribute to it (Section B), offer our own preferred combination (Section C), and indicate some of the practical measures which may be desirable in seeking its implementation (Section D).

A. The Background to “Combined Solutions”

6.2 The argument of our analysis of the classical sources indicates the close historical, dogmatic and conceptual relationships between conditions, coercion and annulment (§1.12). All commence from the basic biblical premise, that qiddushin may be terminated only in two ways: death or delivery of a get. Coercion represents a specification/qualification of the meaning of the rule that the get must be willingly given; (terminative) conditions and retrospective annulment prescribe that the marriage is deemed never to have taken place, the former “automatically”, in the circumstances stated in the condition, the latter by virtue of a decision of a bet din.

6.3 We have noted two particularly prominent interactions between the remedies, in the interpretations by the Rishonim of the geonic measures:

(i) that of the Rosh, who justified those measures as a form of annulment (§§4.22-23);
(ii) that of the teachers of Me’iri’s teachers, based on Palestinian conditions, which specified the modalities of a coerced get for the moredet me’is ‘alay (taken to be talmudic in origin) by removing the 12-month waiting period and altering the financial provisions (§§3.9-15, 4.28).

6.4 When seeking a combined solution to the problem of ‘iggun, we must assess each of its elements in terms of the authority for it, within the
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‘calculus’ of *sfeq sfeqa*\(^{156}\) while a single doubt on a *de’oraita* matter is resolved in favour of strictness (*sfeq de’Oraita leḥamrah*) but on a *derabbanan* matter in favour of leniency (*sfeq derabbanan lequla*), a double doubt is sufficient to permit a Torah prohibition (which would include the remarriage of a ‘doubtfully (still) married’ woman). However, one of the doubts must be *shaqul* (= evenly balanced, i.e. 50-50); the other may be a minority opinion (according to most *posqim*). These rules take precedence over *hilket ha keatra’ey\(^{157}\):* according to the Rosh, where the *sfeq* is in rabbinic law and the earlier authority rules leniently the earlier authority should be followed in spite of the rule of *batra’ey* (§2.30).

6.5 As for the issues of authority, \(^{158}\) we have found justification for the following general propositions

(a) In deciding whether a situation of *ıggun* has arisen, we are in principle bound by the *ḥamrah shel ‘eshet ısh* (§2.5), but this, insofar as it requires that we take into account even a single stringent opinion (even if it is opposed to the lenient rulings of the *Shulḥan ‘Arukh*, the Rema and the vast majority of the *posqim*) appears to be a modern innovation, of purely customary or, at most, rabbinic origin and status (§2.7). Moreover, analysis of a *teshuvah* by R. Moshe Feinstein (*Iggrat Moshe*, *Even Ha’Ezer* I, 79) leads to the conclusion that *insubstantial* minority halakhic opinions, even in matters of *‘erwah*, need not be considered (§2.9 and Appendix A).

(b) Once a situation of *ıggun* has materialised we revert to the usual rule of *rov posqim* and the *Shulḥan ‘Arukh*\(^{159}\). This represents the mainstream (majority) view, as expressed by R. Ovadyah Yosef, R. Elyashiv and others (§§2.10, 14). However, in the absence of a solution to an *ıggun* situation according to *rov posqim*, we may rely on lenient minority views and even on a lone opinion.\(^{160}\)

(c) In a situation of “urgency” (*she’at hadeha*) – a category lower than that of “emergency” (*tsorekh hasha’ah*) – it is generally accepted that leniencies may be adopted, going

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\(^{156}\) §§2.18-21, 36; ARU 22:173 (§6.20), regarding historical doubts. For use of *sfeq sfeqa* in *qiddushin* and *gitin*, see §§2.22-23, above.

\(^{157}\) On which, see §§2.28-30, 33-34, above. See also ARU 22:173 (§6.21).

\(^{158}\) See also the summary at ARU 22:171-75 (§§6.12-25).

\(^{159}\) The precise meaning of which may itself be subject to *sfeq*: see §§2.8, 11; ARU 7:18 (§4.23).

\(^{160}\) §§2.11. See also ARU 22:172 (§6.17).
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beyond what would otherwise be possible, including permitting lekhatḥillah what otherwise would be permitted only bedi’avad, following a minority opinion and even a lone lenient opinion (according to the Taz), despite the fact that a biblical prohibition may be involved. We may also note in this context the view of R. Ovadyah Yosef that when we find earlier posqim saying that a particular course of action is permissible lehalakhah but not lema’aseh, we can assume that this is merely due to humility and may therefore rely on it even in practice (§2.39). However one might regard R. Yosef’s view in normal times, we may certainly regard this leniency as applicable in she’at hadeqq.

6.6 We may apply the above to our situation as follows:

(a) We have noted that the question whether a situation of ‘iggun has arisen is central to the very definition of our problem. Yet we find very little discussion of it in the halakhic (as opposed to the polemical) literature. It reflects meta-halakhic issues including the nature of the husband’s ‘veto’, the morality of demanding a price for a get, and the practices of batey din in relation to the modalities of their decisions (ḥeyyun, hamlatsah, mitsvah, etc.). Like the question of the precise grounds for divorce, we conclude that it is a matter which can and should be specified in an advance agreement by the spouses.

(b) The respective applications of rov posqim and the more lenient approach of the Taz, together with the issue of leniencies in a she’at hadeqq, are discussed in §§6.7-9 below, in relation to the different remedies.

(c) R. Ovadyah Yosef and others have argued that our period may well be comparable to that of the Ge’onim (§4.84). At the very least, we may argue that the situation regarding get-refusal today is one of “urgency” (§2.38). To the extent that the leniencies which become available in a she’at hadeqq provide remedies only on a case by case basis, they may fail to fulfil the criteria of a “global” solution (§2.40). Yet the

1173 §§2.38-41, 45, 4.83, 5.55. See also ARU 22:172 (§6.22).
1174 R. Yosef argues that according to the consensus of scholarly opinion following the Rambam, the rule that doubts in Torah Law are resolved strictly (safeg de’Ora’ita leḥumrah) is itself only rabbinic in nature (§§2.13, 20). Hence it would be possible to accept the greater leniency of the Taz against the more cautious approach of the Shakh.
As regards conditions, we assume that the condition is one which accords a role to the bet din, as opposed to the French conditions against which 'Eyn Tnai Be'Nissu'in was directed. Conditional marriage (qiddushin and nissu'in) would be effective according to the vast majority of posqim provided that the Halakhah is meticulously adhered to both in the substance and form of the condition. We have summarised the authority for this in §3.89 above. It would be possible to neutralise the opposition to conditional marriage on the bases indicated in chapter two (the status of minority opinions in areas of doubt, or reliance on she'at hadekhaq). However, a better strategy is to combine conditions with other remedies, in a way which will invoke sfeq sfeqa.

As regards coercion there is a tradition that had R. Karo seen the other volumes of Tashbets subsequent to volume I and found in them a contradiction to his rulings in Shulchan Arukh he would have retracted his decision in favour of R. Duran’s – even frombamrah to qula and even in vitin and qiddushin. On this basis it has been argued that had Maran seen the responsa of Rashbets (§4.48), he would have accepted that, though a get must not be coerced in cases of me’is ‘alay, if it was coerced the woman may remarry lekhathillah. Furthermore, if the situation nowadays in this area is she’at hadekhaq (as accepted, for example, in Teshuvot Ma’alot Shelomoh) then one may apply the rule that in she’at hadekhaq one may act lekhathillah in a manner normally accepted only bedi’avad and thus permit the coercion of a get in a case of me’is ‘alay according to the Shulchan ‘Arukh. Furthermore, in most cases of get recalcitrance the situation is one of me’is ‘alay with amatlah mevureret where all would agree that the wife is not halakhically obliged to live with her husband, and it has been argued that in such circumstances the payment of even a modest sum would render the coerced get valid and the she’at hadekhaq would render the application of coercion permitted ab initio. Such a coerced get, even though considered insufficient by itself, would certainly be a powerful contribution to a sfeq sfeqa.

6.9 As regards annulment, there are three questions to be answered: (a) is it possible today without a get?; (ii) is it possible today with a get?; (iii)
insofar as there is still a fear of retrospective zenut, can the annulment be made prospective rather than retrospective? Our responses are:

(i) According to rov posqim, annulment without a get is not possible in cases of “delayed annulment”.

(ii) whether annulment with a get is possible today is more debateable and is at least supported by minority opinion, so as to generate a safeq (if not safeq shaqul).

(iii) As regards prospective annulment, this has not been systematically debated as an halakhic issue, but has been suggested as a reading of Tosafot (§5.24), while Ri Halavan (§5.21) sees the requirement of a get as indicating that annulment takes place by validating that get (and is thus prospective), as appears in the earliest stratum of the talmudic texts themselves (§§5.14-15).

6.10 However, though annulment nowadays, in cases of recalcitrance, would be supported only by a small minority of the posqim (even with an externally flawed get), it can still contribute to a solution as a safeq (where there already exists at least one safeq hashaqul), since, as R. Ovadyah Yosef has shown:

(i) most posqim say that the rule of rov does not apply biblically in maḥeqot haposqim so that min haTorah the matter is always considered a doubt, and

(ii) the rule safeq de’Oraita leṭumrah is only a rabbinic stringency.

Indeed, it is because of this that the Taz and his school maintain that in any case of otherwise insoluble ‘iggun one may permit the wife’s remarriage on the basis of a lone opinion even when the question is one of biblical law. Although the Shakh and his school limited this permissive ruling to cases of rabbinic law, that is because:

(i) the Shakh maintains that safeq de’Oraita leṭumrah is a biblical law and

(ii) that rov is biblically effective even in maḥeqot haposqim.

Footnotes:

1175 There are two distinct issues here: (a) whether the fear of retrospective zenut would entail revocation of any condition authorising annulment, to which there appears to be a widespread opinion that it can be protected against revocation (§§3.65-67, 4.72) and in any event the power of the bet din to annul is not necessarily dependent on an express condition; (b) whether retrospective annulment does in fact produce zenut, on which there is considerable doubt (and the ’issur of zenut is derabbanan), but in any event this is not a form of zenut which would render the children mamzerim, since when the couple cohabitated she (and he) were not married.

1176 See further ARU 18:38.
However, from the analysis of R. Ovadyah Yosef (§2.13, above) the Taz’s view on these two points appears to be the halakhically correct one. At the very least, Taz’s opinion is sufficient to generate a safeq capable of combining with others in a sfeq sfeqa (safeq hara’uy lehitstaref). Moreover, irrespective of whether we follow the Taz, the above arguments are available in a she’at hadelq even if they are minority views.

6.11 In relation to both conditions and annulment we have been concerned to specify the respective roles of the spouses and the bet din in such a way as to ensure that any annulment does not completely override the will of the husband, and thus violate biblical principle. This has led us to a “partnership” model of that relationship (§§5.66-67), which has the practical conclusion that the parties specify in the condition as much as is permissible according to the halakah in relation to both the grounds of divorce (section B(i) below) and the modalities of the termination of the marriage (sections B(ii-iv) below).

B. The Various Elements of a Solution

6.12 In this section we review the various elements which may contribute to a combined solution, taking account of previous suggestions. We do so bearing in mind our criteria (not necessarily shared by other proposals) of a ‘global’ solution – one which recognises that there is no “one size fits all” formula, given the diversity of halakhic approaches within the Orthodox community, but which demands also that any solution must be capable of achieving mutual recognition, so that the children of remarriages are not regarded as kasher by some communities but mamzerim by others. This is no easy task, given the cultural, ideological and organisational differences within Orthodoxy, and the impact of religious politics in the State of Israel.

B1. The grounds for divorce

6.13 Halakhic literature in fact discloses a wide range of positions (some, but not all, associated with the Ashkenazi-Sephardi divide) on the acceptable grounds for divorce, ranging from serious fault-based grounds to no-fault grounds amounting to “irretrievable breakdown” (§§1.29). It is only when no-fault grounds reach the stage of triviality (§§1.33, 4.65), or are used as a “cover” for illegitimate ulterior motives, that there appears to be a

\[\text{1177 See further §6.54, below.}\]
consensus that this crosses the bounds of what is acceptable within the halakha (§6.39). However, this range of views on the acceptable grounds for divorce is correlated, inter alia, with different positions relating to the financial consequences of divorce (notably, whether a moredet me’is ‘alay can claim her ketubbah: §1.35).

6.14 Both particular communities and the spouses themselves have in the past specified their choices as to the grounds for divorce: witness both the “Palestinian” tradition (§§3.2-17) and the reform of Rabben Gershom. Nor is it doubted that conditions may be adopted correlating the financial consequences of divorce with the grounds for divorce, as in the traditional interpretation of R. Yoseh’s condition (§3.3).

6.15 This prompts the possibility of using release of the ketubbah debt itself (given a real rather than a purely symbolic or enigmatic value) as an incentive where the wife seeks divorce on purely unilateral grounds. Other means may then be sought to ensure the wife’s financial position. This may prove preferable to the current position, where PNA’s using a financial stick are used to seek to persuade the husband to grant a divorce, or where a fund is sometimes used by the rabbinic courts effectively to bribe the husband.

6.16 Some recent proposals (e.g. that of R. Toledano: §§3.85, 5.65) for conditions which entail annulment in circumstances of recalcitrance provide no specification of the grounds for divorce or the behaviour of the husband which triggers the condition, but leave these matters to the discretion of the bet din. This is regrettable for both theoretical and practical reasons: it diminishes the role of the spouses in the ultimate termination and fails to provide the transparency required (see further §§6.34-37, below) in order to form part of any ‘global’ solution. We favour (as to a large extent does R. Broyde) explicit statement of the

1178 From the conditions in the Yerushalmi, through the Geniza ketubbot (and the observations of Ra’aya) to the interpretation of the teachers of the teachers of Me’iri: see §§3.2-17, above.
1180 Cf. the divorce clauses in the Elephantine papyri: nn. 278, 369 above.
1181 Susan Weiss writes in a forthcoming article: “The rabbinic courts even have a special fund earmarked for paying off stubborn husbands known as the “agunah fund”. The Executive Offices of the Rabbinic Courts have claimed that the fund is financed both from donations, as well as with taxpayer money - public funds.”
1182 “Each and every prospective couple must choose the model of marriage within which they wish to live together. They codify their choice through a prenuptial agreement regarding a
grounds for divorce, together with measures (§§6.57-59, below) designed to ensure that the couple know the full consequences of their choices (on both the grounds and other matters) not only in their own community, but also elsewhere. As argued in relation to R. Broyde’s proposal (§§3.95-95, above), it is not sufficient to create what in effect are halakhically-defined and ghettoised communities, within which (alone) the problem is solved, even though this may prove a useful starting point (§6.54, below).

B2. Defining recalcitrance

6.17 Just as we argue that the agreement must be transparent as regards the grounds for divorce, so too must it be transparent as regards the circumstances (of recalcitrance) designed to trigger any ultimate annulment. As Mrs. Hadari puts it, “I would strongly urge the development of a mechanism by which kinan marriage may be dissolved in particular circumstances, delineated by rabbinic authorities, agreed by the entire community and known in advance of the marriage by the husband.”

6.18 Such transparency in defining the recalcitrance which triggers annulment is exemplified by the proposal of R. Pipano, which provides for annulment if (inter alia) “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” (§3.83).

6.19 In this respect, R. Broyde’s current formulation is lacking. It merely has the husband:

... recognize that my wife has agreed to marry me only with the understanding that should she wish to be divorced that I would give a Get within fifteen months of her requesting such a bill of divorce. I recognize that should I decline to give such a Get for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for

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153 ARU 17:170 (emphasis in original). The mechanism she has in mind, however, would probably not involve a form of conditional marriage.

154 Though in fact the formulation of R. Pipano does not satisfy Hadari’s criteria for the circumstances that may legitimately be stipulated in advance to terminate kinan-marriage, being overly dependent upon the wife/bet din rather than the husband’s action/inaction.

155 Probably including mitzvah, if not hamlatsah.
our marriage, and I consent for our marriage to be labeled a nullity based on
the decree of our community that all marriages ought to end with a Get
given within fifteen months (§3.95, above).

There is no mention here of bet din involvement (not even a hamlatsah); the
wife merely has to request a get, and the husband “consent[s] for our
marriage to be labeled a nullity” fifteen months later, if he has not granted
it. This certainly makes termination dependent on the act (here, omission) of
the husband, but any hint of a “partnership” between the couple and the bet
din (§5.66) is entirely absent. Perhaps R. Brody is seeking here to make
the annulment purely prospective, and the role of the bet din purely
declaratory.

B3. Possible modalities of get

6.20 The classical model of the get is that of direct delivery by husband to
wife, with immediate effect in terminating the marriage. But this classical
model may be modified in a number of ways: (i) immediate delivery
subject to a suspensive condition, so that the get does not have immediate
effect, but rather comes into effect in the future, on satisfaction of the
condition; (ii) delivery not by the husband but by an agent authorised by
him to write and deliver it (only) in given future circumstances
(harsha’ah).

6.21 Problems of implied cancellation of either the harsha’ah (which is itself
subject to condition) or the delayed get itself are basically the same as that
of revocation of a conditional marriage, discussed above (§§3.60-67). It is
however argued in this context that the problem could be solved by the
husband’s advance declaration (both in an agreement and on the back of a
delayed get delivered as part of that agreement) that his wife shall be
believed when she says that no reconciliation ever took place,1135 and
account may be taken of the more stringent ruling of the Rambam (that
seclusion is equivalent to an explicit statement by the husband before
witnesses that he has cancelled the agency) by the groom’s swearing an
oath al da’at harabbim that he will never cancel the harsha’ah, and this is

1136 On Brody’s position in this respect, see also ARU 8:11 (§2.7.2) and his somewhat ambiguous
formulation quoted in ARU 8:10 (§2.5.6) at n.44.
1137 Cf. ARU 17:146, suggesting that “Brody’s tripartite agreement rests on the assumption that
no bet din ever does have to annul a marriage, as the marriage self-destructs or is terminated
through some other mechanism before it should ever come to the point of annulment.”
1138 See Maggid Mishneh, Gerushin 9:25 citing Biddushey Ramban to Gittin 26b.
especially the case (perhaps even without an oath) where the *harsha’ah* is being employed (and is stated to be employed) to avoid future ‘*iggun*.’

6.22 The two forms of this solution differ in that the *harsha’ah* (if provided in a document which encapsulates the various elements of a combined solution) is subject to the problem that the husband does not verbally and directly instruct the scribe, witnesses and agent to act, while the delayed *get* is subject to problems of *get muqdam/get yashan*. Neither problem, however, is insoluble as a matter of halakhah, especially when taking account of the permissibility of leniencies in order to solve ‘*iggun* and the likely classification of contemporary conditions as she‘at hadeḥaq. The *harsha’ah*, however, is subject to the practical difficulty that the longer the period before it is implemented, the more difficult it may be to find people who recognize the handwriting of the witnesses to it (unless the view is taken that this is not necessary for a *harsha’ah* originally signed in the *bet din*).

6.23 As for the problems of *get muqdam/get yashan*, there is an initial doubt as to whether the particular form here contemplated, namely a *get* written and signed on the date recorded, and delivered that same day to the wife, but subject to a condition that it take effect only in the future, is indeed properly classified as *get muqdam* at all. The problem rather is that of *get yashan*, which is permitted only bedi‘avad (but then becomes permitted lekhateḥillah in she‘at hadeḥaq). It has been suggested, moreover, that the whole problem may be solved by writing on the *get* that the date of the actual divorce has been delayed by mutual agreement of the couple.

6.24 There is thus little to choose at the technical level between the *harsha’ah* and the conditional *get*. Two factors, however, prompt us to prefer

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1189 See further ARU 18:57-58.
1190 See further ARU 18:58.
1191 See further ARU 18:64-65. As noted at ARU 18:61: “The reason for the enactment against a *get yashan* is that she should become pregnant during the seclusion (in the period between the writing and receiving of the *get*), when she bears the child people may see the date on the *get*, presume that it accurately reflects the date of the divorce – whereas in fact she was divorced later - and say that the child must have been conceived out of wedlock. Though not a *mamzer*, the child would be “blemished”: Bet Hillel, Mishnah, *Giton* 79b and Gemara and Rashi there - EV col. 690 at notes 14-16.”
1192 See further ARU 18:65-66.
1193 The custom recorded by the *Rishonim* not to write any condition in a *get* is only a customary stringency which is hardly relevant when *gittin* are no longer privately written; in order to avoid ‘*iggun* one could presumably permit such a practice: see further ARU 18:65-66.
R. Henkin’s model of a delayed get (§§3.44-45) to R. Broyde’s use of a harbha’ah, despite the perceived psychological and ideological problems in giving (or depositing) a real get at the time of marriage. First, the Talmud already considers the problem of the husband’s change of mind before delivery where an agent is involved (§§5.14-15): it is this which leads to the classical debates concerning annulment (§5.9). Indeed, if a get is cancelled it is still a get kol dehu but if the harbha’ah is cancelled the get written after such a cancellation may not even qualify as a kol dehu. Moreover, the fact that the delayed get can (and we would maintain should) be handed directly by the husband to the wife reduces the distance (as compared to the harbha’ah) from the original biblical model, and also involves a positive action on the part of the husband.

6.25 Neither the harbha’ah nor the conditional get provide a complete solution. We have argued for a distinction between the husband’s will to have the marriage terminated and his will to participate in the get procedure (§4.61): we maintain that his change of mind on the latter can be discounted so long as he has not also changed his mind on the former. Where the former has occurred, a different solution (§6.43) is required.

6.26 If the spouses may by advance agreement modify the normal temporal modalities of the get – so that the husband is not necessarily required explicitly to consent to the get procedure at the time of delivery of the get (harbha’ah) or at the time of its coming into effect (delayed get) – may they also authorise a degree of compulsion (and if so what degree)? If the husband swears an oath not to rescind his agreement and to follow even a recommendation (hamlatsah) to give a get, then measures of compulsion (where available) might be contemplated (according to some poskim) to induce him to fulfil his oath (in his own best interest). In this context, it is argued that the harhawot deRabbenu Tam do not constitute kefiyah since, being addressed to the community to “distance” itself from the recalcitrant husband, they are applied to the husband only indirectly (§§4.68-69); explicit recognition, in an agreement, of the acceptability of such measures might reduce the halakhic objections to them still entertained in some circles. Even those opposed to harhawot would have to regard the resultant get as at least subject to safeq, so that it may contribute to a combined solution justified by sfeq sfeqa.

1194 An understanding of the reasons for it would, of course, form part of the halakhic counselling we advocate before every marriage: see §6.36, below.

1195 See further ARU 18.76 and §6.43, below.
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B4. Defining the temporal modalities of annulment

6.27 As we have argued (§3.68), there is an advantage in prospective annulment (at least as regards the “chaste wife”) if it can be achieved: any question of retrospective zenut simply does not arise. But we have also noted R. Waldenberg’s rejection of the prospective model (at least when resulting from a condition: §3.69), notwithstanding the views of some Amoraim (§5.7), the interpretation by Tosafot, Ri Halavan and some other Rishonim of the talmudic “delayed annulment” cases in at least some special circumstances (§§5.21-22), and a possible reading of the procedure envisaged in the Genizah ketubbah (§§3.8, 16, 70). In the absence of a general tagqanah authorising prospective annulment (in the light of tsorekh hasha’ah), prospective termination is best achieved by a non-standard get (by harsha’ah or a delayed get). Of course, R. Broide’s tripartite agreement does include such a harsha’ah, but it is not made sufficiently clear (as it is in R. Henkin’s model) that retrospective termination of the marriage comes into play only on the failure of such a harsha’ah (for whatever reason) to produce a get.196

B5. Retrospective zenut and preservation of the tnai

6.28 The issue of retrospective zenut raises in a special form the relationship between traditional qiddushin and other forms of ‘marital’ relationship, and thus represents a particular challenge to the search for a ‘global’ solution. For there are different views197 on the following issues:

(a) whether ‘Eyn ‘adam ‘oseh be’ilato be’ilat zenut is

196 Despite Hadari’s reading of its assumptions (n.1187, above). The sequence of R. Broide’s agreement is: (a) a condition for (apparently automatic) termination without a get: “… if I am absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (kiddushin) and our marriage (nisu’ah) will have been null and void”; (b) a harsha’ah, which apparently assumes that, despite the automatic nullity of (a), a get is preferable (whether as itself terminating the marriage, or as a concomitant of the ultimate annulment): “Should a Jewish divorce be required of me for whatever reason, by any Orthodox rabbinical court (be’it din) selected by my wife…”; (c) annulment (perhaps prospective) in the event of recalcitrance (presumably, accompanied by withdrawal, despite the oath, of the initial condition): “I recognize that should I decline to give such a Get for whatever reason (even a reason based on my duress), I have violated the agreement that is the predicate for our marriage, and I consent for our marriage to be labeled a nullity based on the decree of our community that all marriages ought to end with a Get given within fifteen months …” Thus, for R. Broide, the get appears to be paramount, failing which the condition, failing which the halqa’ah. R. Broide apparently thinks that the husband by recalcitrance can revoke the harsha’ah, but seeks to fortify it by an oath: see n.571, above.

197 See further §§3.48-59, above.
(i) an argument against annulment, on the grounds that annulment *would* produce a state of retrospective *zenut* (despite the fact that the relationship at the time was undoubtedly *leshem ishut*),\footnote{See R. Eleazar in the *baraita* in *Yebamot* 61b, discussed at §§3.49-50, above.} or

(ii) an argument that marital intercourse creates a presumption of revocation of any condition placed on the *qiddushin* because of the fear of a *zenut* which it is feared would *otherwise* occur;

(b) if (i), what precisely is the status of children born during a marriage which is later retrospectively annulled, since while all agree that they are not *mamzerim*, some believe (§3.48) that nonetheless some form of spiritual blemish attaches to them – a feeling perhaps associated with the wide connotations of the term *zenut*, despite the fact that a more accurate account of the resultant status is probably *pilagshut* (§§3.58-59), and therefore marriage with them should be discouraged, even if not prohibited;\footnote{On this view, the boundaries between *qiddushin* and *zenut* are effectively redrawn, with the horror of retrospective *zenut* (as a perceived consequence of annulment) transferred to any form of *qiddushin* (and certainly to non-*qiddushin* relationships such as *pilagshut*) which gives the wife a grounds for divorce wider than those provided in the classical *qiddushin* model.}

(c) if (ii), how effective are the measures designed to protect the condition against revocation (such as repetition and the use of an oath)?

6.29 All these are issues on which there are strong answers. But just as there is an argument, in such matters, against any attempt by one community to impose its own *bimrot* on other communities (§2.47), so too there is an argument against any attempt by one community to impose its own *quilot* on other communities. We would advocate, in such matters of (often contested) doubt, a pluralistic approach in which communities accept that more lenient stances than they themselves adopt should be recognised to the extent that they do not inhibit the religious mobility of the children of the more lenient communities. In all this, we argue below (§§6.34-37), transparency is crucial (for both halakhic and policy reasons): a means must be found to ensure that every couple makes its choices on the basis of accurate knowledge of their full consequences, not only in their own community but also elsewhere.
Here as elsewhere, explicit statement of the intentions of the couple on all
the issues mentioned in §6.26 can only prove helpful. This is relevant to
irreligious as well as religious couples in the light of the argument
advanced by some that, though they may not believe in (or object to)
zenut and any consequences some may believe attach to children born in
it, they too may be presumed to abandon any condition for fear that it
undermines the definite married (if not halakhic) status they seek. 200

B6. Validity conditions

Is it possible to construct a solution with the ‘safety net’ of a ‘validity
condition’, which says that if other (substantive) conditions (or
procedures) do not validly result in the halakhic termination of a
traditional (qiddushin) marriage, the parties shall be taken to have
intended no qiddushin at all (in effect, a self-executing annulment
clause)? That appears to be the intention of the clause in R. Broyde’s
tripartite agreement (“Furthermore, should this agreement be deemed
ineffective as a matter of halachah (Jewish law) at any time, we would not
have married at all”), if not that of R. Henkin’s provision regarding the
consequences of (technical) failure of his get al tni (§§3.45, 74).

The issue once again becomes one of the scope of the solution. R. Broyde
may envisage a halakhic community capable of accepting such a broad
validity condition for itself, but cannot impose that understanding on
others. Would other communities here accept the pluralistic approach or
would they “sever” this condition, leaving an unconditional marriage
which has not been terminated? It is this prospect which leads to the
choice (discussed below: §§6.44-47) between a problematic qiddushin
marriage and a non-qiddushin marriage.

On the other hand, R. Broyde is right to include within his agreement
explicit mention of the basis of its halakhic validity. This is a necessary
element of the transparency for which we argue, and informs our own
view that an agreement should include detailed recitals of the basis of its
own authority (§6.37).

B7. Transparency

There are both halakhic and policy reasons in favour of optimal

200 See further ARU 18:20-21.
transparency. The objection to any proposal for a delayed get arises from
the fact that such a get may run into the problem of bererah if the time at
which the get comes into effect is clarified only by an event after that
point. Absolute transparency regarding the circumstances in which the
husband’s own actions (for example, his infidelity or physical abuse of his
wife) trigger the get eliminates this problem, there being nothing
retrospective about the clarification: the bet din merely confirms that such
actions have taken place. In terms of policy, it may be argued that the
sanctity of Jewish marriage is more likely to remain and be perceived to
remain intact if the grounds on which the bet din may declare a marriage
void are in no way nebulous. Further, the hierarchical structure of
marriage remains unchallenged if these grounds are fully in the husband’s
own control. Against this, there is an argument (assumed in the proposal
made in §§6.49-50 below) that it is better to take the risk of a safeq
bererah in order to secure the get against revocation (in case the husband
breaches his oath) and thus leave a “kosher” (according to most opinions)
get which can be used to fortify hafqa’ah. For if we choose to avoid the
risk of a safeq bererah (for both technical and policy reasons) and thereby
risk revocation (and thus also, for many, failure of hafqa’ah), everything
then depends upon the validity of the condition. While there is, as we
have seen, good reason for supporting such a condition even standing
alone, couples should be counselled about the risk of such an outcome,
and advised also of other options.

6.35 Transparency has also become an issue within the halakhah in relation to
the wife’s knowledge of the full legal régime into which she is entering.
The Talmud already recognises the principle ‘ada’ta’ dehakh lo’
qiddeshah ‘atsmah, that the woman did not enter qiddushin on such a
basis. This was applied by R. Moshe Feinstein in ‘Iggrot Moshe, ‘Even
Ha’Ezer 4.121 (the case of the communist levir”) to a wife’s mistake, at
the time of the marriage, in believing that (should she become a childless

1201 See ARU 17:163 for R. Aharon Kotler, Mishnat Rabbi Aharon, ‘Even Ha’Ezer 60; ARU
18:22-24 for R. Meir Simhah HaKohen of Dvinsk and the argument from bererah in relation to
pilagshut. See also ARU 18:67-68 and ARU 18:88 for R. Henkin’s claim that his formulation
is immune to such objection.
1202 ARU 8:12 (§2.8.1), ARU 10:1 on Baba Kamma 110–111a.
1203 See also the discussion at ARU 5:41 (§21.2.6.11.4) of Seridey ‘Esh III 33:2, regarding the case
of an apostate groom whose apostasy was not disclosed to the bride, where R. Weinberg argues
that there is no need to use the argument of ‘ada’ta’ dehakh because at the time of the
qiddushin the consent of the bride was obtained in error. This was a factual rather than a
halakhic error, though in the context of safeq we have seen that the halakhah does not appear
to regard this as a significant difference.
widow) she would not be bound in a levirate obligation to her brother-in-law, since the latter was (in this case), already an apostate. Thus the wife was able to rely upon her mistake of law in order to argue that she did not enter qiddushin on such a basis. It may be argued that this was a mistake relating to a specific detail of the halakhah, i.e. the Jewish status of the converted brother (the wife having adopted the geonic view that there are no levirate bonds to an apostate), rather than a “a general mistake” as to basic legal principles.204 As to the latter, the issue has provoked some controversy.205 However, the degree of halakhic knowledge to be expected of a woman entering qiddushin must surely be a function of the kind of community to which she belongs, and it is difficult to avoid the conclusion that R. Feinstein’s decision reflects a basic endorsement of the value and need for transparency, not least given the severity of the consequences which may ensue.

6.36 Such problems may be avoided if appropriate measures are taken, at the pastoral level, to ensure that every man and woman entering qiddushin is made fully aware of the halakhic consequences of so doing, and the risks which they may incur in the event of marital breakdown. Our argument for a global solution entails that they be made fully aware (whether by their communal Rabbi or by specialist counsellors appointed for this purpose by the congregational organisation to which they belong) of the attitudes not only of their own kehillah to any agreement they are contemplating, but also the attitudes of other kehillot to such agreements. For this purpose, there is a need for a worldwide source of information (kept up-to-date) regarding the halakhic attitudes of the various kehillot. We may note R. Henkin’s recognition of this issue when he included in his proposal the requirement that: “The Bet Din shall publish documents of conditions of the enactment of the Bet Din of all Israel of such and such

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1204 See ARU 10:17 and nn.77-78, while recognising the importance of the ṭidduḥ of such recognition of a mistake regarding current knowledge of the law.
1205 S. Aranoff, “Halachic Principles and Procedures For Freeing Agunot”, first published in the New York Jewish Week, August 28th 1997, now available at http://www.agunahinternational.com/halakic.htm, arguing for annulment on the grounds that the wife did not realise, at the time of the marriage, that there was a possibility that she might ultimately find herself “chained”, and that “no woman views marriage as a transaction in which her husband “acquires” her”. This is supported by R. Moshe Schochet: see §3.75 and ARU 18:87 at n.329, and by Professor Feldblum. These propositions are strongly attacked by R. David Bleich (1998), but no objection is raised to the fact that they are based on mistake of law. See also ARU 2:48 (§4.4.1).
1206 For recognition of leniency in relation to mistake of facts, in order to avoid ṭiggun, see ARU 5:43 (§21.2.6.11.5).
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a year and at the time of the giddushin there shall be delivered together with the giddushin [the] document of conditions. They shall publicise the conditions in books and in newspapers and in synagogues and in study-halls so that it will not be necessary to speak of the matter at the time of the marriage.”

6.37 If we are to achieve transparency not only at the level of the individual marriage and community, but also between communities, it is necessary that whatever measures are taken are transparent also in respect of the basis of authority which they claim. This has been a recurrent theme of our own analysis, and should be reflected in any agreement designed to prevent ‘iggun, which should therefore include outline recitals of the authority on which it is based, backed up by more detailed statements available on request. In our Preliminary Report, we provided an example of what such a set of recitals might look like when applied at the level of a general taqqanah with the haskamah of the gedoley hador. The same principle (but necessarily making lesser claims as to the basis of authority) should be adopted at the level of agreements not yet authorised by a general taqqanah.

B8. Towards a truly global solution

6.38 The need for such a ‘global’ solution (§6.12) is probably greater now than at any time in Jewish history, given the phenomenon of religious mobility and the claim that “the number of people who will cross from one community to another in the course of their life is exponentially higher now than at any time in the past.” Moreover, communities differ not only on the validity of particular halakhic propositions, but also on their approach to the halakkah (and the recognition of who has authority within it”) in general (§1.14), and their approach to the meta-halakhic issues

1207 Quoted at ARU 18:89.
1208 ARU 8:38 (§7.4).
1209 ARU 17:144-45, in the context of a discussion of R. Broyde’s approach to this matter.
1210 Thus, Hadari: “...unless every religious community agrees that every bet din has the authority to annul marriage, it would be an extraordinary risk for any bet din to take to actually annul a marriage” (ARU 17:144-45); “The Broyde proposal would give the authority to implement a harsha’ah for a get to “every orthodox bet din”. Unfortunately, there are few in the Orthodox world who will accept the kashrut certification of just “any orthodox bet din” – a situation which is reflective of precisely the communal diffusion which Broyde himself describes” (ARU 17:146).
underlying problems of marriage and divorce in particular.\footnote{1211} This generates not only an inter-generational problem, affecting the marital prospects of children of second marriages; the spouses themselves may be members of a different religious community at the time of marital breakdown than at the time of the marriage. We thus need to consider, in relation to each element of a solution, not only the arguments for its halakhic acceptability, but also its consequences in other communities. These consequences may be of two kinds: either partial recognition (“we would not do this ourselves, but we will recognise it (bedi’avad) when done by (perhaps specified) others”) or complete rejection (entailing the mamzerut of the children of such second marriages). This is why the need for transparency as regards the attitudes of other kehillot (§6.36) is so important. For where there is a risk that an agreement may elsewhere be regarded as resulting in mamzerut, a couple may wish to consider a form of relationship recognised by the halakhah as not constituting giddushin but after the termination of which children equally are not mamzerim, and thus to whose religious mobility there is no halakhic objection. In this section, we merely highlight the various issues involved.

6.39 First, the grounds for divorce (section (i), above). We have indicated both the range of acceptable grounds for divorce (§§1.29-35, 4.85-88) reflective of different cultural environments (§4.89). At the halakhic level, this should constitute no barrier to a ‘global’ solution; whether some communities would in fact accept the children of marriages capable of being terminated unilaterally without claim of fault, may be more debateable. We do not, however, advocate an ‘anything goes’ policy: issues of ulterior motive (if properly proved) remain relevant.

6.40 Second, there is the very definition of recalcitrance (section (ii), above), which constitutes the other part of the “trigger” of a conditional solution (whether a conditional get or a condition itself terminating the marriage). We noted above (§6.18) the formulation of R. Pipano (“and the bet din

\footnote{1211} As Hadari puts it: “To insist that all marriage should be governed by new rules (such as a taqqua) that there should be a condition in all marriages which allows either party to leave at will, or which predicates the continuance of the marriage on the ongoing approval of a bet din) attempts to render such an option [that of a woman who “believes that the emotional and material security she obtains for herself and for her children through marriage to a man who cannot leave her without her consent (under the herem d’Rabbeinu Gershon) outweighs the possible gain of not being able to leave and marry another man might she one day prefer to”] unavailable and, in my view rightly, earns the antagonism of more conservative thinkers who would wish to see Jewish communities exemplifying more family stability than our gentile counterparts” (ABU 17:151).
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make me liable in any way”), which may extend as far as mitsvah if not hamlatzah. This ought not to form a barrier to a ‘global’ solution: the consequence of such recalcitrance would be the operation of a terminative condition rather than kafiyah (which clearly would not be available in such cases).

6.41 Third, there are differing views (partly informed by meta-halakhic considerations\textsuperscript{1212}) on conditional marriage, despite our claim that an appropriate condition, where termination depends in part on a decision of a bet din, would be effective according to rov posqim. What would be the effect in a community which did not accept such a condition? The normal answer is that the marriage would be valid but the condition would be severed. If then the marriage were terminated by virtue of the invalid condition, that termination would be invalid and could result in mamzerim from the woman’s second partnership. This is a risk of which couples need to be aware.

6.42 Fourth, there are substantial differences on the availability of annulment, even in the presence of a get kol dehu, to the extent that we advocate it (in effect) only together with a terminative condition and a delayed get. But what are the consequences for those who would not accept it even in such a context (despite the approval of an appropriate halakhic authority)? At that point, and in the absence of an appropriate taqcanah, the proposed combined solution fails to be globally effective.

6.43 Fifth, what would be the effect of including within the proposal a form of kafiyah which others might regard as resulting in a get me’useh? A marriage ended by such a get would be in a state of doubt, at least if the get were coerced under an error as to the halakhah, rather than in knowledge of its illegality, and such a doubt could be taken into account in the context of sfeq sfeqa\textsuperscript{1213}. Moreover, we have the authority of R. Ovadyah Yosef, echoing such a view as adopted by the Rosh, that such a get is valid bedi’avad even in a case me’is ‘alay, and R. Feinstein goes further in the circumstances he regards as creating a strong safeq in the marriage, despite an illegally coerced get (§4.70). If there is a danger that even such authority may not be accepted, even as part of a composite solution, recourse to a non-qiddushin form of marriage, – “a form of

\textsuperscript{1212} See further the argument at ARU 22:169 (§6.6), and more generally Chapter One above and the summary at ARU 22:167-71.

\textsuperscript{1213} See the argument at ARU 18:71, and also that of R. Ovadyah Yosef at §4.70 above.
consecrated, monogamous union which the woman can leave at will” and which is clearly labelled as distinct from traditional *qiddushin* — would be advisable.

6.44 But communities may differ also in their approaches to non-*qiddushin* forms of marriage. We have had occasion to comment on the concept of *zimut* as one which may inhibit intermarriage notwithstanding the fact that there is no issue of *manzerut* (§6.28). Traditionally, this problem has arisen in the context of arguments about the possible effects of either conditional marriage or annulment. However, the issue also arises in respect of forms of relationship designed from the outset not to conform to traditional *qiddushin*, whether for reasons of general religious ideology (§6.45) or specifically with a view to avoiding entirely the problem of ’iggun. Two possibilities are debated in this latter context: *pilagshut* (§6.46) and marriage *derekh qiddushin* (§6.47).

6.45 Those who marry only by a civil ceremony (as may become available in Israel if civil marriage is introduced – a course of action advocated by former Chief Rabbi Bakshi-Doron) are generally regarded as having formed a relationship *leshem ishut* which is not *qiddushin*, and though a get *letamrath* may be sought, remarriage is permitted if it cannot be obtained. This is already partially recognised by the rabbinical courts in Israel, in their handling of “Cypriot” marriages (§1.11). A similar view is taken of some Conservative and all Reform ceremonies (§1.7).

6.46 *Pilagshut* (“concubinage”) – which has a very respectable biblical lineage – is terminable without a get, and could certainly be undertaken subject to a monogamy condition and indeed a form of *ketubah*. The problem with it is the (minority) opinion of Rambam that it is permitted only to kings. But that does not make children born of it *manzerim*.” It is argued

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1214 For this argument, see particularly ARU 17:150-51, 169.
1215 As in the controversy over the French conditional marriage proposal: see ARU 4:26 (§IX.59), ARU 18:23.
1217 Such a condition has been common in the marriages of Sephardim, who did not accept the *horem deRabbenu Gershom* (this is not to suggest that the (biblical) polygamy otherwise available to Sephardim was *pilagshut*).
1218 As argued at ARU 6:7 (§5.4), in the context of Feldblum’s *derekh qiddushin* proposal. On concubinage, see further Goldberg and Villa 2006:ch.5; ARU 6:4-6.
1219 In his discussion of concubinage, R. Abel, ARU 5:106 (§47.19), also notes the view of *Responsa Maharam Padua* 19 that a concubine, who had left her husband and been married to another man with *qiddushin* and then divorced, is permitted to return as a concubine to her first
that Sheva Berakhot may legitimately be recited at ceremonies for such non-qiddushin unions. 1220

6.47 More hopeful in this respect is Feldblum’s suggestion1221 (for discussion) of derekh qiddushin (§1.9), for which the (restricted) talmudic base may be used as a model if not a precedent. He regards it as compatible with a ceremony akin to qiddushin, including blessings,1222 but clearly distinct from the ceremony for regular qiddushin in that the oral formula would be different: Feldblum suggested harey at mevukelet li, but this may create doubtful qiddushin (and thus necessitate a get out of doubt); “Behold I am your husband by this ring” may be preferable.1223 There would be no problem in incorporating financial terms in a ketubbah.1224 While Feldblum advocates derekh qiddushin primarily for non-religious couples (and regards it as preferable to civil marriage in retaining a link with the tradition1225), we take the view that its particular value is for religious couples who wish to avoid the risks of traditional qiddushin in a world of religious mobility; indeed, it may be argued that for non-religious couples, ordinary civil marriage is (even from a halakhic point of view) the better option.

1220 R. Elisha Ancselovits, “The Man Divorces – the Woman Gets Divorced: Explaining the Halakha as an aid to solving the problem of marriage for the Secular Sector”, Ma’agarim 3 (5760/2000), 99-121, argues that the recital of the sheva berakhot does not constitute berakhot levatalah so long as the person reciting each berakah believes that the union being consecrated is a true, non-violable marriage. Moreover, he argues (in the last section) that even someone who does not believe that a non-qiddushin union is a valid marriage should not attempt to prevent sheva berakhot from being recited, on the grounds that the recital of the berakhot strengthens the union (in the eyes of the couple and the community and, thus, in reality in terms of the couple treating their obligations to one another seriously).

1221 Feldblum 1997; see further Goldberg and Villa 2006:ch.6 (pp.235-55), and comments on it at ARU 6:6-9 (§§5.0-5.7).

1222 That of a minor male living with a female without qiddushin. In the geonic literature, it was extended to a minor female married by her family because her father had gone abroad. Feldblum argues that for Tosafot it is neither pilagshut nor zenut (it may even be a mitzvah), while Rambam and the Shulhan Arukh regard the marriage of a minor as prohibited and likely to be classified as zenut. Rosh defines the cases of both the minor male and minor female as derekh qiddushin.

1223 Here following Radhaz, who permits blessings in the case of the minor.

1224 See ARU 6:6 (§5.2), arguing that a declaration like “Behold I am your husband by this ring” would be ideal in that it definitely does not create a state of qiddushin (Yad, Ishut, 3:6 and ‘Even Ha’Ezer 27:6: even if he had been speaking to her of qiddushin just prior to his declaration).

1225 See n.1218, above.

1226 See further ARU 6:7-8 (§5.5).
C. The Manchester Proposal

6.48 All this leads us to consider a “combined solution”,1227 by which we mean not one which simply presents different remedies as alternatives, but rather one which presents them as part of a single unit (to which the doctrine of sfeq sfeqa applies as a whole, rather than to its individual parts). Implementation would be subject to the appropriate rabbinc approvals (as would be made clear in the halakhic counselling we advocate: §§6.57-58).

6.49 If the husband has not divorced after 12 months since the bet din recommended ending the marriage with an indisputably valid get (willingly written and delivered by the husband to the wife, albeit subject to such coercion as the halakhah may permit in the particular circumstances), the marriage shall be dissolved by means of all of the following three processes:

(a) breach of a condition written into the ketubbah or in a separate document making the marriage dependent on the non-objection of a bet din for qiddushin and gittin recognised by the Gedolim (set up for this purpose in Jerusalem), hereafter termed “BDJ”;

(b) a get (so long as it is still in existence) initially given at the marriage but stated to take effect (inter alia) one minute before the BDJ withdraws its acquiescence from the marriage; and

(c) a formal declaration of annulment of the marriage by the BDJ 12 months after the husband was first advised to divorce and has still failed to do so, or 12 months after the husband’s disappearance, insanity, etc.1228

6.50 This might be implemented by the following process:

(i) Prior to the qiddushin, the spouses will agree and sign an agreement which includes the conditions subject to which both the marriage (ii, below) and the get (v, below) operate and which explains the functions of the BDJ, which will exercise the various powers indicated below.

(ii) Either:

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1227 For the use of this strategy in other, modern proposals, see §§2.24, 3.43-44, 92-93, above.
1228 See §5.57, above, for a suggestion as to the type of taqqunah which might best authorise such annulment.
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(a) By means of a correctly constructed tnah kafal, the groom would make his marriage formula dependant on the BDJ’s never objecting to his marriage during his life and after his death. In addition, in order to fortify the annulment, he would conclude by adding, after “according to the Law of Moses and Israel”, “and the opinion of the BDJ”; or

(b) The details all the necessary conditions, having been explained to bride and groom and agreed to by them, could be written into the ketubbah, and, by means of a correctly constructed tnah kafal, the groom could then make his marriage formula dependant on the fulfilment of “all those conditions in the ketubbah [or other document]”; he would conclude by adding, after “according to the Law of Moses and Israel”, “and the opinion of the BDJ”.

(iii) The woman affirms that she married only on the condition that the above is halakhically valid and thus that she would not become chained, thus enabling a bet din to declare the marriage never to have existed if the condition is broken.

(iv) The couple would then swear an oath on G-d’s name that they will never cancel the condition nor will they ever marry by means of any future act of intercourse.

(v) The groom would immediately after the ceremony order the writing and delivery of a get to be delivered to the bride to take effect one minute before he cancels it, one minute before he becomes insane, one minute before his death or one minute before the BDJ declares its objection to the marriage, whichever comes first.

(vi) Where the bet din recommends/orders a get but fails to obtain it from the husband of his own free will, then after 12 months of waiting/persuading, the BDJ shall declare their objection to

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1229 R. Abel’s preference.
1230 While the Ataronim largely sought to make the groom speak out every word of the ah mumar condition, R. Pipano (§3.83) was content to rely on incorporation in the oral declaration of the conditions written in the ketubbah: the groom says, “If the conditions added to our ketubbah are fulfilled barey at ... and if they are not fulfilled ...”
the marriage, thus triggering breach of the condition and thereby dissolving the marriage. This would also retrospectively clarify that the get was triggered one minute earlier. The BDJ would also then declare the marriage annulled by means of ‘afqe’inhu, in accordance with a taqganah adopted by that community.

(vii) As a further precaution it may be considered worthwhile by the bet din to obtain a coerced divorce (as in §6.49, above). This could be done after the 12 months of waiting. Whether coercion succeeds or not, the bet din should proceed with the declaration of objection and the annulment.

Obviously, the details of the condition and delayed get may be subject to variation in accordance with the halakhic stance of the particular community. More important is the principle of the combined solution, which derives from our analysis of the various authority issues (§§6.5-10). If that can be accepted, the details are a comparatively easy matter.

6.51 The agreement would include (or incorporate from a document authorised by the kehillah concerned) recitals regarding the basis of its authority, such as:

(a) the application of sfeq sfeqa to the various elements of the agreement;
(b) the authority for leniency once a state of ‘iggun has arisen;
(c) the reliance on contemporary circumstances constituting a she’at hadelhq (and the definition of such a she’at hadelhq in the context of ‘iggun: §2.40), and the leniencies consequent on that designation.
(d) the halakhic bases for each of the individual elements of the agreement.

6.52 The agreement would include recitals regarding the attitudes of the spouses, such as:

(a) We enter into this marriage after full counselling as regards its halakhic implications and risks and after considering alternative forms of marital arrangement;
(b) We have sworn an oath ‘al da’at harabbim that marital relations between us shall be assumed, without further evidence but in the absence of evidence to the contrary, to have been accompanied by a declaration that we reiterate our intention that the mait shall remain in force, despite marital intercourse;
(c) We accept that in the event of recalcitrance, such measures comparable to harakot as are available within the halakhah may be taken.

6.53 The Orthodox community as a whole would facilitate the implementation of this proposal on a ‘global’ basis by taking the following measures:

- (a) any halakhic authority implementing this agreement shall provide a te’udot to that effect;
- (b) each institutional halakhic authority will publish and make available to a common source its stance on each of the halakhic issues involved in this proposal, so that it may be clear whether termination effected under its terms will be recognised (whether lekhatfilla or bedi’avad) by that community;
- (c) there shall be convened at an appropriate time a meeting of gedoley hador with a view to (i) incorporating this agreement in qiddushin marriages as a tna’i bet din, and (ii) confirming the halakhic status of an alternative form of marriage which may be terminated without a get.

D. Towards Practical Implementation

6.54 We advocate a ‘roadmap’, or incremental path towards implementation of this proposal. It may well commence with adoption and implementation only within a small number of halakhic communities, but religious mobility will inevitably result in its presentation to more traditional communities, often in the form of marriage applications of children of the second marriage of a wife whose first marriage was terminated under this agreement. Since the termination of the first marriage was based on discretionary leniencies derived from sfeaq sfeqa, hilketa kebatra’ey and she’at haderag (even if the more traditional community does not itself employ such leniencies), it follows that no ‘issur has been violated and therefore any children born to the woman in a second marriages are not mamzerim. \(^{1231}\) Such applications may gradually lead to bedi’avad recognition and ultimately to demands for adoption of the agreement

\(^{1231}\) Any safek in the get does not produce safek mamzer but rather a permitted child. See R. Feinstein’s responsum on civil marriage, ‘Iggrot Moshe, ’Even Ha’Ezer 2:19: “We try to have a get due to tamar ‘eshet ‘ish, and I have permitted [the wife] if it is impossible to receive a get. However, as regards the child, which is only ‘issur lav of mamzer, and there is an additional leniency since safek mamzer is permitted mid’orayta, we should not be strict at all, even lekhatfilla.” See also ARU 22:174 (§§6.23-24).
within such communities. Pressure in this direction will also be exerted by the choices of some couples, in the light of the risks of traditional giddushin (and the transparency which we advocate) to adopt instead alternative forms of marriage, such as derekh giddushin. Once a sufficient movement has developed in favour of the agreement, it may be opportune to request of the gedolei hador that they convene with a view to making these arrangements generally available (§6.53(c)).

6.55 Such an incremental approach is “bottom-up” (subject to an initial haskamah: §6.48). But this is not to exclude “top-down” measures, such as adoption of tagganot haqahal in particular communities, or indeed on a broad basis should the current atmosphere change.

6.56 Such a programme requires a high degree of self-consciousness and commitment on the part of all concerned in the process: couples contemplating marriage, their congregational rabbis, the halakhic authorities of the different congregational groups, dayanim and the gedolei hador. We conclude with a brief word on the roles of each of these participants in the process.

6.57 Couples contemplating marriage have both a duty to themselves and their unborn children to enter giddushin on the basis of full knowledge of its possible consequences and an opportunity to contribute to removal of the problem by the choices they make. Some will, in a spirit of altruism, undertake a degree of risk (but a known risk, given the measures of transparency we advocate) by entering an agreement of this kind; others will opt for no risk (an alternative to giddushin) and will thereby contribute to the solution of the problem in a different way. Those who opt for traditional giddushin without an agreement of this kind should do so in full realisation of the (different) risks they thereby incur.

6.58 Congregational rabbis are the first port of call of couples contemplating marriage. If they feel they do not have the ability or inclination to provide the halakhic counselling which we have argued is necessary for the informed choices couples have to make, they should at least ensure that the couple is referred to someone who has that ability and inclination.

6.59 The halakhic authorities of the different congregational groups are requested to engage in deliberation on the issues raised in this study, not only in respect of how they wish to advise the members of their own kehillah, but also how they will view those seeking marriage within their
Chapter Six: Conclusions

kehilla after the termination of an earlier marriage under an agreement such as the one here proposed. The results of these deliberations must be available to klal yisra’el, so that couples may receive proper advice on the risks and benefits of different arrangements in a global halakhic environment.

6.60 Individual posqim and dayanim have traditionally taken account of their personal accountability to the Almighty in making decisions (the “chip of the beam” argument: §5.37). But a balance must here be struck. A prominent contemporary dayan, in his retirement letter to his colleagues, has recently argued that it is in fact the duty of the dayan to risk his personal accountability in the interests of doing justice to the parties before him (§2.49).

6.61 Most if not all posqim recognise that a tagganah with global effect is possible only with the agreement of the gedolei hador, and calls for a meeting (or at least agreement: §2.41) of leading posqim have not been lacking.132 This would need to be a bet din of Gedolei HaDor acceptable to all streams and communities if the measures taken involved permission to remarry without a get, since this has possible future repercussions on the entire Jewish people. There is little doubt that such a meeting could take decisions on a majority basis. In earlier decades, it was natural to look to Israel for such a lead (§5.60); today, in different circumstances, one may hope that Diaspora leaders may cast off any self-imposed reticence.

6.62 The prospects for such a process may not appear great today. But the vision which underlies this report is one which rejects the inevitability of a fracture within klal yisra’el, and is premised upon the possibility of gradual, incremental progress, without imposing a single model upon communities who vary considerably in their attitudes, but with the practical goal of preserving Jewish unity and the possibility of religious mobility within the community.

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NB: A composite Index of the halakhic sources cited in this and the other books in this series will appear on the web site of the Agunah Research Unit, when ready.

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