Plonit v. Ploni: The Get from the Man in a Permanent Vegetative State

By: MICHAEL J. BROYDE

Introduction

The rabbinical courts of the State of Israel predate the establishment of the State, and are one of the country's distinctive features. To the best of my knowledge, Israel is the only Western democracy that recognizes religious courts as apparatuses of the state and grants them exclusive jurisdiction over both marriage and divorce.[1] Over the last decades, rabbinical court rulings (*piskei din rabbaniyim*) have been a welcome addition to the halakhic literature. But inferior (regional) rabbinical courts do not usually produce novel halakhic rulings; for the most part, they apply the classical rules and precedents of Jewish law to the circumstances of modern Israeli life.

Recently, however, a very unusual halakhic ruling was issued by the Safed Rabbinical Court, that represents a groundbreaking—and controversial—application of Jewish law. The case of *Plonit v. Ploni (a ward)*[2] addresses the question of the giving and receiving of a *get* after the husband

---

1 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, §1. The practice of relegating matters of personal status to religious authorities dates back to the Ottoman Empire and was continued under the British Mandate. In other matters, rabbinical courts have concurrent jurisdiction with the secular courts and functionally sit as courts of arbitration by consent of the parties.

2 File No. 861974/2, Rabbinical Court (Safed), *Plonit v. Ploni (ward)* (May 20, 2014) (Opinion by *Av Beit Din* R. Uriel Lavi, joined by Rabbis Ḥayyim Bezek and Yosef Yagoda). For the beginning of the full text of this lengthy opinion, see <http://www.daat.ac.il/daat/psk/psk.asp?id=1054>. The opinion has yet to be published in an official reporter formal publication version; my page number references are to the official PDF version shared by the rabbinical courts themselves.

Michael J. Broyde is a Professor of Law at Emory University and the Projects Director for the Center for the Study of Law and Religion. He has written numerous books and articles on matters of Jewish law and is co-author of the recent book, "The Codification of Jewish Law and an Introduction to the Jurisprudence of the *Mishna Berura*."

has been in an accident that leaves him in a permanent vegetative state (PVS).[3]

The basic facts of the case are straightforward. The husband unexpectedly entered a PVS and left no instructions about issuing his wife a *get*. After several years of no improvement, the medical consensus was that his condition was permanent and unrecoverable, and the wife petitioned to end the marriage. The rabbinical court developed a rationale (discussed below) as to why a *get* may be issued in such a case. The opinion also states that R. Zalman Neḥemiah Goldberg approved the *get* in the narrow circumstances of this particular case (further discussed in Part III). The *get* was in fact given, and the case is now formally over.[4]

This brief, multi-part article seeks to explain the court's ruling and begin the process of analyzing it; the author considers his English analysis tentative, as the literature continues to grow.[5] Aside from this opening, the article has four main sections. Part I contains an introduction and a discussion of the first section of the ruling, which argues that marriages

---

[3] The medical terminology for someone in a long-term unconscious and unresponsive state (as distinct from a coma) is not uniform. In the U.S. and much of the world, "persistent vegetative state" (PVS) has been the term of choice for the last 20 years. Others (including the neurosurgeon who originally coined the term) have found the word "persistent" to be problematic and use "*permanent* vegetative state" (PVS) to denote an unresponsive, unconscious state lasting longer than 12 months. See Bryan Jennett, "A Syndrome in Search of a Name," in *The Vegetative State: Medical Facts, Ethical and Legal Dilemmas*, 1–6 (Cambridge University Press, 2002). The latter is the preferred term in the U.K. and the one I intend to use throughout this article.

[4] Dr. Rachel Levmore notes that there will be no appeal in this case to the Rabbinical Court of Appeals, so there will be no further proceedings in the rabbinical court. An appeal requires the guardian of the husband seek an appeal and the guardian is not doing so. As a matter of legal standing, no one else can; see File No. 861974/3, Rabbinical Court (Safed), *Almoni v. Plonit & Ploni (ward)* (July 20, 2014) <http://www.daat.ac.il/daat/psk/psk.asp?id= 1082> (denying the request of a third party to intervene); but see the newspaper הפלס on 29 Sivan 5774, page 4 (I am not aware of a web page link).

[5] The literature is continuously growing. Besides the opinion itself by the panel, there is a letter of R. Israel Rothenberg to the Director of the Rabbinical Courts, a reply to it, an open letter from R. Moshe Mordekhai Farbstein to the panel, their reply to R. Farbstein, and his response. There is also an analysis of this issue by the Sephardic Chief Rabbi, Rabbi Yiẓḥak Yosef. There are also countless short comments in Hebrew on various internet forums as well as many newspaper articles. For a basic collection of all the documents as well as numerous comments by many pundits of various stature, see <http://www.otzar.org/forums/viewtopic.php?f=7&t=17862>.

can, perhaps, be annulled by events subsequent to their enactment, albeit in rare cases. Part II discusses the issue of *get zikkui*, which is the other fundamental basis for the decision in this case. Part III contains some criticism of the reasoning employed by the rabbinical court in this case, and Part IV addresses some questions about the factual basis of their reasoning. The article ends with a short conclusion and postscript.

This court's well-written and detailed opinion is long[6] and aims to be comprehensive. It advances two basic, intertwined arguments to support the validity of the *get*. The first argument is that when a husband enters a PVS, the marriage may retroactively be deemed invalid (as a matter of Torah law and even rabbinic law). The second argument is that one should be permitted to write a *get* in the name of the husband because he would have likely authorized the writing of such a *get* in these circumstances, as the *get* benefits him.

Part I: Future Conditions?

A. Does A Marriage Stop Being Valid When a Husband Enters a PVS?

The first component of the ruling is the most startling, and analytically weaker than its second prong (which is addressed below in Part II). It argues that in some situations an unfortunate event can invalidate an otherwise valid marriage even if that event occurs after the marriage was properly (and unconditionally) contracted. Basing themselves on a *teshuvah* from R. Ẓvi Pesaḥ Frank,[7] the *beit din* concludes that a marriage with a severe post-enactment defect might not be valid. As such, the *beit din* argues that it is possible to annul a marriage when a man enters a PVS, no different than the case of *yibbum* discussed by R. Frank.

While they note that many halakhic authorities argue with this approach, the *dayyanim* claim that it is essentially based on *Tosafot* who permit one to end a marriage based on factors that develop later on in the marriage. The crucial paragraph on this issue (on p. 15) is as follows:

> אך בעיקר הענין כבר בתוספות ראינו שלא מצא מניעה להקיש מדין נפלה לייבום לדינו של בעל. התוספות במסכת כתובות דף מז: (ד"ה שלא), כתבו בלשון זו:
>
> "ולא דמי ללוקח חפץ ואירע בו אונס דלא אמרינן דאדעתא דהכי לא קנה ומבטל המקח, דאינו תלוי בדעת הקונה לבדו, דהא איכא נמי דעת מקנה שלא היה מקנה

---

6 The printed opinion is 93 pages long, and the Internet version cited above in note 2 spans four web pages (follow hyperlinks at the bottom of each page).

7 Addressing the situation of a *get* that was given with the wrong father's name listed and cannot be given again and who actually quotes this only as a secondary factor without which the *teshuwah* would stand anyway.

לו לדעתו אם לא יפרש. להכי פריך שפיר מיבמה שנפלה לפני מוכה שחין, משום דבדידה תלוין הקידושין, שברור לנו שהוא לא יעכב בשביל שום דבר שאירע אחר מיתתו כי אינו חושש במה שאירע אחריו. ולהכי לא פריך מאשה שנעשה בעלה בעל מום, תיפוק בלא גט דאדעתא דהכי לא קידשה נפשה, כיוון דתלוי נמי בדעת המקדש, וכן כל הנהו דמייתי התם אין תלוי אלא בדעתו."

לפי סברת התוספות נראה כשם שכתבו "כי אינו חושש במה שאירע אחריו" הוא הדין בנידון דנן שהבעל מוגדר כ"צמח" אינו מתפקד כלל, ואין לו כל הכרה ביחס לסובב אותו, גם קיימת הסברא שאינו חושש במה שקורה מאז שנפגע, אם יישאר נשוי או יבוטלו נישואיו, דלא חלי ולא מרגיש אף שהוא בגדר אדם חי.

The main matter is already discussed by *Tosafot* who do not see a problem relating the rule of a *yavam* to that of a husband. The *Tosafot* in *Ketubbot* 47b (s.v. *she-lo*) wrote:

"The case [in *Bava Batra*] is not analogous to one who purchases an object and it is unexpectedly destroyed, where we do not say, "Had he known, he would not have bought it" and void the sale. [This is because a valid sale] depends not only on the intent of the purchaser, but also on the seller, who would not have agreed to sell it under those terms. This explains why the Talmud rightly poses a question from the case of a *yevamah* who falls to a man with boils [*mukkeh sheḥin*], since the validity of the marriage depends [solely] on her. It is clear to us that the husband will not object [to undoing the marriage] over anything that will happen post-mortem, since a man is not concerned about what will take place after he dies. That is also why the Talmud did not suggest that a woman whose husband develops a physical deformity ought to be able to leave without a *get* on the theory that had she known, she would not have consented to be married, because marriage is dependent on the husband's intent as well. All the other cases discussed there also depend solely on the intent of a single party."

By this logic of *Tosafot*, just as "a man is not concerned about what will take place after he dies," the same should hold true in our case of a man in a PVS who does not function at all and has no recognition of what is going on around him—it likewise stands to reason that he does not care what happens to him once he enters a PVS, whether he remains married or the marriage is voided, as he has no movement and no sensation even though he is still alive.

The core of this issue is an attempt to explain why, in cases where the brother of a man who died without children is seriously defective, according to some *rishonim* no *yibbum* or *ḥalizah* is needed. Although this is the opinion of a small number of *rishonim*, the normative halakhah is not in accordance with this view, and even the rabbinical court opinion seems

to acknowledge that. Nonetheless, the court considers the matter to be in doubt given the many *aḥaronim* who consider this view.[8]

B. Recasting the Issue: Is a Man in a PVS Analogous to a Dead Man in Any Way?

The rabbinical court's claim is that the case of a man in a PVS is different from all other cases of a post-marriage defect in the husband (or where the marriage is over and the woman wants a *get* but the man does not want to give it), because a man in a PVS is like he is dead in that he does not care at all about his marriage. The husband in a PVS is comparable to the deceased husband who has a brother with boils, in that in neither case does the husband care since he is functionally gone.

Furthermore, based on this *Tosafot*, the claim is made that while bilateral transactions ordinarily cannot be voided based on a subsequent defect, since either the buyer or the seller will generally object, in unilateral transactions it may well be that a court can take notice of a subsequent occurrence to unwind them retroactively. Although marriage generally requires a meeting of the minds of both parties, the status of a marriage after the husband's death can be considered a unilateral transaction because he truly no longer has any interest in the matter. A court could therefore deem the marriage to be void retroactively rather than allow a childless widow to fall to a brother-in-law with a severe defect. Likewise, the *dayyanim* argue, a court may do the same when the husband has no interest in whether his marriage is extant or valid because he is in a PVS.

The court's opinion—after citing some halakhic authorities who accept the possibility that *Tosafot* can be relied on as one factor when many other important factors are present[9]—still concludes that the view of *Tosafot* is insufficient to free the woman, since most halakhic authorities fundamentally reject the view of *Tosafot* even in the case of a woman who is a *yevamah* and the *yavam* is an apostate or otherwise completely defective. But the rabbinical court holds that this is a matter of reasonable doubt and the woman in the case of a man who falls into a PVS is only perhaps

---

8 See Parts III and IV below.

9 What is commonly called a *snif le-hakel* and which is not vital to the holding. These *posekim* are quoted on pages 7–15 of the decision. I am not aware of a single authority that relies on this *Tosafot* to end a marriage in a case where the defect develops after the start of the marriage, the husband is still alive, and no *get* is given.

(*safek*) married.[10]

The opinion of the court here can be subject to three critiques, each of which the *dayyanim* seem to be aware of and try to respond to:

- The normative halakhah does not clearly follow the view of *Tosafot* here (to which they respond that indeed this is correct, but the normative halakhah does not clearly reject the view of *Tosafot*, either).
- The analogy between being in a PVS and being dead may not be correct: maybe the husband does care about the validity of his marriage post PVS, even if he would not post-mortem. (The opinion denies this possibility.)
- The opinion here is unprecedented in that no previous cases of PVS were ever resolved this way. (The opinion responds by noting the novelty of long-term PVS and distinguishing between PVS and general insanity.)

All of these objections (as well as other issues) will be fleshed out in Parts III and IV.

Part II: *Get Zikkui*

A. An Introduction to *Get Zikkui*

In the previous section, this article explained that the first issue is whether a marriage remains valid even after the husband falls into a PVS, and it noted the view of this opinion that that matter was in dispute. This prong, however, is not the thrust of this novel ruling. The heart of the opinion is its second part, which focuses on *get zikkui,* issuing a bill of divorce when one party has not explicitly consented.[11] In the classic *get zikkui* case, a

---

[10] Perhaps there is a more fundamental tension here between the two prongs of this decision. This *Tosafot* and the extension of it to a person in a PVS is predicated on the idea that the husband truly does not care about any of these matters, while the second grounds (the *get zikkui*, which will be discussed in Part II) is predicated on the idea that the husband *does* care and would want a *get* to be given. For more on this, see note 34 which discusses whether *zikkui* is objective or subjective. Consider, for example, the conversion of an infant (who clearly has no will) as an example of an objective benefit.

[11] For a thorough analysis of this mechanism, and its inapplicability to cases of recalcitrant husbands, see Rabbi J. David Bleich's excellent article, "Constructive Agency in Religious Divorce: An Examination of *Get Zikkuy*," *Tradition: A Journal of Orthodox Jewish Thought* 35:4(2001), 44–73.

rabbinical court appoints a person to acquire (*le-zakkot*) the *get* for a woman, without her explicit agreement.[12]

There is a long and elaborate Talmudic history of *get zikkui* predicated on the idea that there are situations where a woman should be divorced even though she does not appreciate the urgency of the matter and is not even aware of the divorce.[13] The *beit din* authorizing the *get* concludes that it is in the woman's complete and total interest to receive a Jewish divorce. This mechanism is further developed in medieval rabbinic literature and is discussed by the Rama in the *Shulḥan Arukh*. Rama sees it as a way for a husband to properly issue a *get* after his wife has apostatized and therefore cannot accept a *get* (*Even ha-Ezer* 1:10). It can also be used when the husband is dying and the couple has no children, whereby the *get* frees her from having to undergo *yibbum* or *ḥalizah* (*Even ha-Ezer* 140:5), among other cases.

In the classic examples, a *get zikkui* can be done on behalf of a woman even though she did not agree to be divorced, did not appoint an agent to accept the divorce, and did not even know that she was being divorced. This is based on the Talmudic principle of *zakhin le-adam she-lo be-fanav*, which means that one may perform an act that benefits another person even without his permission. For example, if one were to see an abandoned $100 bill on the ground, pick it up, and declare that it is being acquired on behalf of Moshe Cohen, the money would then belong to Cohen in every respect.

This principle is true even though it is clear that according to Torah law a woman may not be divorced without her knowledge. (For this reason, an insane woman cannot be divorced.) Yet, classical Jewish law theory insists that when divorce is in the complete best interests of the wife, the *get zikkui* procedure could be used on the understanding that had she known, she certainly would have consented (just as our fictional Moshe Cohen above ought to want his $100 gratis). *Get zikkui* is used to this very day in numerous situations by many different rabbinical courts, and this writer has participated in a few.

In the pre-modern sources, however, *zikkui* was never used to allow the writing of a *get* by a man without *his* consent for reasons that will be explained shortly.

---

[12] It is worth noting that while *Pitḥei Teshuvah* 1:21 cites sources that seem to connect *get zikkui* to *get ba'al korḥah* (a *get* given against her will), this is not really analytically correct. A *get* cannot be given as a matter of Torah law without the woman's *knowledge*, even if as a matter of Torah law it can be given without her *consent*. This is why *get zikkui* is so novel.

[13] See Rabbi Bleich, supra note 11.

Several secondary issues need to be explained to fully understand why this *beit din* allowed a *get* to be written on behalf of a man in a PVS. The main point, however, is that they ruled that the man undoubtedly benefits from this divorce, and would have authorized it if he could.

B. *Zakhin Me-Adam She-Lo Be-Fanav*—Acting in the Benefit of Another Person by Taking from Him

It is clearly established in Jewish law that one may *give* something to (or acquire something for) a person without his or her knowledge or permission when it is for the recipient's benefit. However, it is a matter of dispute whether one may *take* something from a person without his or her knowledge or permission when it is for that person's benefit.

The court's ruling answers this question in the affirmative and adduces many fine proofs for the proposition. For example, on pages 22-23, it quotes the *Ḥazon Ish*, among many others:

> העולה מדברינו, שיטת החזו"א היא דבכה"ג שהבעל השוטה לא ציווה לכתוב וליתן גט בהיותו פקח, אם אין ספק שזו זכות גמורה לבעל שיתגרש, ניתן לכתוב לחתום וליתן הגט מכח זכיה עבורו, אף בעת היותו שוטה.
>
> What emerges from our analysis is the *Ḥazon Ish* is of the view that in a case of an insane husband who did not give instructions to write and give a *get* when he was lucid, if there is no doubt that it is entirely beneficial for the husband to divorce, then it is possible to write, sign, and deliver the *get* on his behalf based on the benefit to him, even while he is insane.

This ruling is consistent with the rules of Jewish law in other areas as well. As the court notes on page 35:

> **העולה מדברינו**: קיי"ל כפסק הרמב"ם והשו"ע שהמזכה לשוטה על ידי אחר, קנה השוטה, וזו זכייה גמורה מהתורה.
>
> **What emerges from our analysis:** We accept the rule of the Rambam and the *Shulḥan Arukh* that one may acquire things for one who is insane by means of another person, and the insane person fully acquires it in accordance with Torah law.

This is also noted by R. Ḥayyim Ozer Grodzinsky (*Aḥiezer* 1:28; p. 39 of the opinion):

> בזכות גמור דעת האחרונים דמהני גם בזכין מאדם וגם בגירושין מהני בזכות ודאי, דלא כמש"כ הקצוה"ח בסי' רמ"ג וסי' שפ"ב דלא מהני בגט תורת זכי', וכ"כ החת"ס אהע"ז סי' י"א דהלכה רוחת בישראל למכור חמצו של חברו בתורת זכי', וכ"כ הברית אברהם בסוס"י ק"א.

> In a case of unquestionable benefit, it is the view of the *aḥaronim* that it is possible to acquire on behalf of another person, and even in divorce it is effective when the benefit is certain. This is unlike the position of the *Kezot* in §243 and §382, who rules that in matters of divorce *zekhiyyah* does not work. Similarly, the *Ḥatam Sofer, Even ha-Ezer* 11, wrote that it is a widely established rule in the Jewish community to sell the *ḥamez* of one's fellow Jew [without his permission], as it is a benefit for him. Such is also written in the *Berit Avraham*, at the end of ch. 101.

The view that one may give as well as take on another's behalf (*zakhin me-adam*) is well supported by the text of the *Shulḥan Arukh* (*Oraḥ Ḥayyim* 443:2) itself, which notes:

> ישראל שהיה בידו חמצו של ישראל אחר בפקדון, יעכבנו עד שעה חמישית, ואם לא בא בעליו ימכרנו לא"י.
>
> A Jew who has in his possession the *ḥamez* of another Jew as a deposit should put it aside until the fifth hour, and if its owner does not come, he should sell it to a non-Jew.

Why may he sell it? Because the owner benefits from the sale, and one does not need his explicit consent to do that which all know he would want.

It might follow then that in the circumstances where all know that the husband desires a divorce, the court may appoint an agent for him to divorce his wife as the agent sees fit. Indeed, more than fifty years ago a famous case arose involving a number of men stuck behind the Iron Curtain who had appointed an agent to write, sign and deliver bills of divorce to their wives and the agent unexpectedly died. Then-Chief Rabbi Yiẓḥak Herzog (*Heikhal Yiẓḥak* 2:51–56) and many other great Torah scholars discussed this case, and most concluded that an unauthorized agent could be used instead, since the husbands clearly wished to be divorced. The crucial aspect of their ruling is that if the husbands could have been consulted, they would have undoubtedly agreed with the appointment of the (substitute) agent.

The rulings of R. Herzog and his contemporaries also establish that in extenuating circumstances, the *sofer* and the witnesses do not need to actually hear the husband's words appointing them to their roles. This view is widely accepted by many *batei din* as well.

C. Is the Direct Consent of the Husband Always Needed?

The final issue that the ruling addresses is the question—uniquely in divorce—of whether the husband is required to express his wishes as his will (*raẓon)* directly and with certainty. If so, the whole enterprise of a *get zikkui* from a husband does not work because even if the divorce would unquestionably be good for him, it is missing his explicit will and authorization. It seems plausible from the sources that while an affirmative expression of will is proper and generally needed, in cases where such cannot be given, the *get* is valid without it when the husband really does want a divorce. The ruling concludes that such an expression of will is not needed. It concedes that this too is a dispute, but it notes that there certainly are numerous halakhic decisors who conclude that expressed free will (*raẓon*) is no more than a manifestation of wanting divorce. Consider the quote from Rabbi Asher Weiss (page 71 of the opinion):

> ולכאורה נראה דהו"א דכשם שהאשה מתגרשת בע"כ, כך גם האיש מגרש בע"כ, ואין דין רצון בגירושין.
>
> It is logical to claim that just as a woman can be divorced against her will, so too a man can be divorced against his will, and there is no unique requirement of volition (*raẓon*) in divorce.

This seemingly broad statement should not be misunderstood. It means only that when the husband's intent to divorce is somehow manifest, that is considered enough to constitute *raẓon*. The opinion adduces a fine proof for this proposition (on page 69) from the formation of a marriage (which also needs consent or *raẓon*) where the Rosh (*Kiddushin* 2:7) notes that:

> אם גילה בדעתו לשדכן שהוא חפץ באשה פלונית ואמר לשדכה לו לקדשה בלא מינוי שליחות שהיא מקודשת לו.
>
> If a man reveals his will to the matchmaker that he wishes to marry a certain woman, and he says he wishes to be matched with her, and the matchmaker goes and marries her [to this man], even though the matchmaker was not appointed an agent [by that man] she is married to that man.

And this is codified in *Shulḥan Arukh, Even ha-Ezer* 34:4. Just as explicit will is not needed for marriage, it is not needed for divorce. Desire to marry or divorce is crucial—expression of it is not, at least in time of need.

In a few places, the ruling notes that our *seder ha-get* process is (correctly) designed to incorporate many diverse opinions. This is done in order that the legitimacy of every divorce be accepted by all authorities.

However, in a situation of *iggun* (such as this case), the minimum is all that is needed and this opinion concludes that the consent of the husband (*raẓon ha-ba'al*) can be inferred from context.

D. The Combination of Lenient Rulings

The combination of lenient rulings is where this opinion makes a very large intellectual leap. All of the previous examples that it cites, in which *ẓakhin me-adam* is employed, are cases where the will of the husband to be divorced had already been clearly conveyed in one way or another, but in ways that were simply legally deficient. Alternatively, it was a situation where the husband was most likely dead, and the *get* was being given for added security (or some other additional factor). There are no *teshuvot* that deal with implementing the rule of *ẓakhin me-adam* and *get ẓikkui* in which there was no clear expression of consent by the husband to issue the divorce and the husband was unquestionably alive. Using both *get ẓikkui* and substitute *raẓon* is simply unprecedented.

The final paragraphs of the opinion (page 79) before the review conclude:

> מכל הנ"ל נראה בנידון שבפנינו, מאחר ובעיגון גמור עסקינן, והבעל הוא במצב המתואר לעיל שהפוסקים הגדירו מעמדו שאינו אף "בעל כל דהו", ואינה יותר מספק אשת איש, וסתמא ודאי לגירושין קיימא, וזו זכות גמורה עבור הבעל שלא לעגן אשה שהיא ספק אשתו כשאין לו כל תועלת בנישואין אלו, בית הדין רשאי לזכות לבעל את כתיבת הגט וחתימתו ומסירתו לאשה.
>
> From all of the above, it appears that in the matter before us, since we are dealing with a clear case of *iggun*, and the husband is in a state that the authorities classify as "useless," and the couple is only "perhaps" married, we can assume that he would want the divorce. It is beneficial to the husband not to chain his "possible" wife into a nonexistent marriage that is of no benefit to him either. The *beit din* is authorized to act in the benefit of the husband and write a *get* and give it to his wife.

The basic criticism of this section is well addressed and responded to by the ruling. There certainly are eminent authorities who rule that one may not take something from someone without his or her consent, even when it is for that person's own benefit; others deny its applicability in matters of marriage and divorce or when the husband's will has not been elsewhere expressed. But many permit all of the above.

But the most serious criticism that they struggle to address is: in what way is a divorce of benefit to the husband in a PVS? This is plausibly answered by their argument that it is reasonable to assume that no good

person would like to chain another to a marriage from which neither spouse derives any benefit. The court states:

> רק כשהבעל בפנינו, ומצבו ידוע וברור שהוא חסר כל תיפקוד לחלוטין, כגון שהוא במצב המכונה "צמח" וכיוצ"ב, וללא תקווה לריפוי...
> Only when the husband is in front of us, and his situation is known and clear that he absolutely lacks all function, such as when he is in a PVS or similar condition, with no chance of recovery…

It is simply not certain that this view is factually correct, and its tension with the first section—which argues that the husband is completely gone and worthless—seems apparent.[14] (See more on this issue in Part IV.)

Part III: A Critical Review of the Decision

In Part I, this paper explained the view of the rabbinical court as to whether a marriage remains valid after the husband falls into a PVS, and noted that the rabbinical court's view was that this is a matter of dispute. In Part II this article summarized the view that a *get ẓikkui* works in cases where the husband's wishes can be presumed, even though he has not articulated them. It further argues that any man in a PVS would agree to divorce his wife. In this section and the next, this article explains some objections to portions of the logic in this opinion and comes to certain conclusions.

Essentially, three objections can be raised:

- The non-normative status of *Tosafot*'s position that a marriage can end without a *get* through post-marriage changes,
- The question of whether this case is "urgent enough" to warrant stringing together heretofore unstrung reasons, and
- The facts of the case: would he actually want to give a *get*?

The first and second are discussed in part III and the third, being factual, in part IV.

---

[14] Supporting this are a host of modern scientific data that note that people who are in a PVS who sometimes retain some awareness of that which is going on around them. See, for example, <http://www.dailymail.co.uk/sciencetech/ article-2525721/Can-people-vegetative-state-recognise-friends-family-Patients-shown-react-emotionally-photo-familiar-faces.html>, which notes that people in a PVS show brain stimulation when they interact with that which is familiar to them.

A. Does the Husband's PVS make the Marriage only "Perhaps Valid"?

This section will show that the theory that a marriage may be terminated (or even "perhaps terminated") by means of a post-marriage defect is mistaken. It is neither normative halakhah, nor is it being properly applied to this case.

In order for a defect to be a consideration for terminating a marriage, the defect had to be present, albeit unrevealed, before the marriage.[15] Although *Tosafot* adopt a theoretically different view by considering a post-mortem retroactive termination of the marriage based on a defect that developed during the marriage (such as a brother becoming a *mukkeh shehin* after the marriage), it is clear that the normative halakhah rejects that view. Indeed, even if one were to accept *Tosafot*'s view, one could readily limit it to cases of *yibbum*, as *Tosafot* appear to do.

Shulḥan Arukh, Even ha-Ezer 157:4 recounts simply that:

> נפלה לפני יבם מומר, יש מי שמתיר אם היה מומר כשנשאה אחיו; ואין לסמוך עליו.
>
> A woman who is subject to *yibbum* [to a brother-in-law] who is an apostate: There is an authority that permits her to marry [someone else—i.e., she is exempt from *yibbum*] if the brother-in-law was an apostate at the time she married his brother [i.e., her late husband]. One should not rely on this view.

The *Shulḥan Arukh* considers but clearly rejects the view that a pre-marriage defect is able to terminate a marriage. The Rama is less clear, and states simply:

> הגה: מיהו אם עברה ונשאת בלא חליצה, כי לא ידעה שהיה לה יבם, ואח"כ נודע שיש לה יבם מומר, לא תצא וי"א דוקא אם חלץ לה לבסוף.
>
> Rama: But if she violated [this rule] and married without *ḥalizah* because she did not know that she was subject to *yibbum,* and she later discovers that there is an apostate brother, she need not leave her marriage. Some say this is true only if *ḥalizah* is actually performed in the end.

---

[15] For more on this, see my "Error in the Creation of Marriages in Modern Times under Jewish Law," *Dinei Israel*, Tel Aviv University Law School 22 (2003), 39–65; "*Kiddushei Ta'ut bi-Zmaneinu*" "קידושי טעות בזמננו" [="Error in the Creation of Marriage"], *Teḥumin* 22 (2003), 231–242; and "Review Essay: An Unsuccessful Defense of the Bet Din of Rabbi Emanuel Rackman: *The Tears of the Oppressed*," *Edah Journal* 4:2 (Winter 2005), 1–28, available at <http://www.edah.org/backend/JournalArticle/4_2_Broyde.pdf>.

The first view of the Rama acknowledges that if the brother had a defect that was present and hidden prior to the marriage, it may be enough to remove the obligation to engage in the levirate marriage. The second view denies this.

One sees that there is a three-way dispute that seems to leave out a fourth view: If the view of *Tosafot* was at all normative, the Rama should have claimed a more radical possibility, namely, that it does not matter if she knew about it or not, and that it does not matter if the brother became defective before or after the wedding (as *Tosafot* claim). Indeed, none of the primary commentaries of the *Shulḥan Arukh* cites this approach of *Tosafot* as normative. Although *Tosafot*'s sources and arguments may be plausible, the halakhah is not in accordance with this view when the husband is still alive, at the very least.

This is not a small point. R. Moshe Feinstein, in a very important *teshuvah* about the widow of a Russian soldier in World War II killed shortly after the wedding, leaving her with no children and a *yavam* who was a Communist apostate, does adopt portions of the logic of *Tosafot* in some form and cites this *Tosafot*.[16] But it is grounded in the basic approach of implied conditional marriage, which halakhah permits to avoid *yibbum* or *ḥalizah* but not to end the marriage when the husband is alive.

Simply put, halakhah has a firm and long-standing halakhic rule (perhaps a compromise of sorts, intellectually, although perfectly logical) that permits implied or actual conditional marriage (after *nisu'in*) to be used to void a marriage after the husband is dead only to avoid *yibbum*, but not to otherwise end a marriage; see Rama 157:4—and even that compromise is rejected by the *Shulḥan Arukh* itself. This is part of the general dispute about conditional marriages, and a detailed discussion is beyond the scope of this article.[17]

While the opinion (on pp. 7–15) spends much time citing *aḥaronim* who discuss this approach of *Tosafot*, not a single one of them is directly on point. Each is addressing a case where either the husband was dead

---

16 *Iggerot Moshe, Even ha-Ezer* 4:121. For more on this *teshuvah*, see my Review Essay, note 15 above, pp. 8-9.

17 See R. Isser Zalman Meltzer, *Even ha-Azel*, *Hil. Ishut* 3:2, and R. Dov Berish Rapoport, *Derekh Hamelekh, Hil. Ḥamez u-Mazah* 6:3 (and other places in *Derekh Hamelekh*, as well). See also R. Ya'akov Lorberbaum, *Netivot ha-Mishpat* 230:1 and R. Yeḥezkel Landau, *Noda bi-Yehudah, Mahadura Kamma*, *Yoreh De'ah* no. 69 (s.v. *ve-od*) who explicitly limits this to *hitḥayyevut* and not sale. It is very logical to conclude that in any case where an explicit condition cannot work, certainly an *umdana* cannot.

already or a *get* was given that was somehow technically defective or there was an independent ground or grounds for ending the marriage other than the logic of *Tosafot*.[18] This is certainly the case for the responsa of both R. David b. Ḥayyim ha-Kohen (*Radakh* 9) and R. Ẓvi Pesaḥ Frank (*Har Ẓvi, Even ha-Ezer* 133), from which the opinion quotes at length.

It is also important not to leap indiscriminately from cases of *yibbum* to cases of marriage, for both jurisprudential and logical reasons. Logically, cases of *yibbum* by their very nature involve situations where the husband is dead: *Tosafot*'s logic is on its face limited to such cases and grows progressively weaker when applied to an extant marriage (indeed, *Tosafot* note this). Jurisprudentially, cases of *yibbum* are held to a different standard, since they involve neither matters of *ervah* nor matters of *eshet ish*. The dilemmas of hard cases of marital *agunah* are really a balancing act between two rabbinic values: the hesitancy to permit what might be adultery (*ḥumerah* of *eshet ish*) with the deep sense of rabbinic injustice associated with chaining a woman to a "marriage" with an absent husband (*mi-shum iguna' akilu bah rabbanan*). Such is not the case with regard to matters of *yibbum*.[19]

Furthermore, it is quite a stretch to suggest extending the status of "after death" to include a man who falls into a PVS. Indeed, it is hard to find a logical basis to distinguish between a husband in a PVS and long-

---

18 See also *Shu"t Maharsham* II:110, s.v. *ve-gam mah she-katav kevod torato*.

19 Consider for example the problems of a man who disappears in waters that have no boundaries (*mayim she-ein lahem sof*). As a matter of Torah law, when a man disappears in such waters, he is presumed dead, since most die in such situations. Yet, the Talmudic rabbis decreed that one should sometimes be strict in such cases, exactly out of fear that a woman would remarry on the presumption that her husband was dead only to have him reappear, creating a terribly difficult situation. (Consider, for example, the true story of Tom Gordy, as recounted by President Jimmy Carter: "When the Japanese bombed Pearl Harbor, my Uncle Tom Gordy and about thirty other sailors were stationed on Guam…. Tom and the others were captured about a month after the war began, and taken to Japan as prisoner. Tom's wife, Dorothy, and their three children left San Francisco and came to Georgia to stay with my grandparents…. In the summer of 1943, the International Red Cross notified Dorothy officially that Tom was dead and she began receiving a widow's pension…. After a year or so, she married a friend of the family who had a stable job and promised to care for her and the children. Two years later, when the war ended and American troops entered Japan, they found Tom Gordy still alive! … Tom wrote me about his situation and said that he still loved his wife and children and wanted to be with them. Dorothy quickly decided to have her second marriage annulled, but Tom was very weak, and unable to resist his mother and sisters who convinced him that Dorothy had betrayed him and committed adultery while he was a prisoner of war. He got a divorce." Jimmy Carter, *An Hour before Daylight* 252–53 (Simon and Schuster, 2001). The rabbinic decree was designed to avoid these tragic situations.)

term situation in which the husband is gone, not dead, and yet undoubtedly not returning (although the opinion notes some differences). For all these reasons, although this rabbinical court ruling declares the view of *Tosafot* as a matter of doubt, the consensus of the matter is that *Tosafot* is simply not accepted as the normative halakhah even when applied to a situation in which the husband is dead. This is even more so true when the husband is still alive. This is very much part of *Tosafot*'s logic: bilateral transactions continue to be bilateral until one of the parties is dead.

Indeed, if the normative halakhah did follow *Tosafot* in cases where the couple is married and the husband has disappeared, the classic medieval *agunah* problems that are so much a part of the Jewish law system and comprise almost all of the lengthy chapter 17 of *Shulḥan Arukh, Even ha-Ezer* would need to be codified very differently, as cases where the husband is alive but not returning have a resolution. In fact, this *Tosafot* is virtually ignored in the literature of long-disappeared husbands. In premodern times when a man disappeared in unbounded waters, there were three factual possibilities: the first was that the husband was dead, the second was that he was struggling to return home, and the third was that he had washed ashore and restarted his life elsewhere, abandoning his prior family. Halakhic authorities considered the second case legally identical to the third, whereas *Tosafot*'s logic would not. Indeed, there were many situations a little over a century ago of men who abandoned their wives in Eastern Europe and started families anew in America. This would seem to be a perfect case to apply *Tosafot*'s logic when the man is still alive. Yet, as far as I can tell, no *posekim* did so.[20]

---

20 Consider the following modern (albeit inexact) parallel: After 9/11, the Beth Din of America addressed the question of husbands who disappeared in light of the destruction of the World Trade Center. These *teshuvot* were published in *Contending with Catastrophe: Jewish Perspectives on September 11th* (K'hal Publishing, 2011), which contains translations of all the *teshuvot* written on this topic by rabbinical giants of that time. In the work there is not a single mention of this Tosafot! For a contrary view, see the excellent article by Dr. Avishalom Westreich, "*Bitul Nisu'in be-Ta'anat Ta'ut 'o Tenai be-Ikbot Hitpateḥut Atidit*" ["Retroactive Nullification of Marriage by Claim of Error or a Condition Following a Future Development,"] ביטול נישואין בטענת טעות או תנאי בעקבות התפתחות עתידית, *Teḥumin* 34 (5764) 419–29. My view, as I have noted before, is that *umdana* can be no stronger than an explicit condition itself. Since the normative halakhah does not allow conditional marriages, it cannot allow this either, other than in a case of *yibbum,* where conditional marriages are sometimes permitted.

B. The *Get Zikkui*

The validity of the *get zikkui* theory stands on much stronger grounds as a matter of halakhic fact and analysis. For one, the halakhic analysis is logical. Indeed, there are many eminent authorities who in extenuating circumstances permit a *get* to be given without the explicit instruction of the husband when all know for certain that it is the desire of the husband to do so. As this opinion notes on page 44:

> **העולה מדברינו**: הרבה פוסקים ובראשם מגדולי הפוסקים האחרונים, הסכימו שבמקום עיגון יש מקום להכשיר מתן הגט לאשה בדרך של זכייה עבור הבעל, בנסיבות בהן הגירושין הן זכות גמורה עבור הבעל, גם כשהנותן לאשה אינו פועל מכוח מינוי שליחות מטעם הבעל, ולדעתם מסירת הגט לאשה באמצעות זכייה, תיחשב כנתינת הבעל גופו ומתייחסת אליו. כתבו כן –הנודע ביהודה ומוהר"ר גרשון ז"ל אב"ד נ"ש, הרב מקראטשין שבמרכבת המשנה, החת"ס, הג"ר אברהם טיקטין ז"ל מח"ס פתח הבית, מהר"ש ענגיל, הגרי"א מקאוונא ז"ל, בספר משנת רבי אלעזר, האחיעזר, בספר ערך שי, הג"ר יוסף צבי הלוי ז"ל אב"ד יפו, הר צבי והגאון רי"ש אלישיב ז"ל וכן בספר ציץ אליעזר.
>
> **What emerges from here:** Many authorities, led by many great modern authorities, agree that in a case of *iggun*, there is room to permit the giving of a *get* to a woman through the mechanism of *zekhiyyah* (*zikkui*) on behalf of the husband when the divorce is clearly beneficial to him. This is true even when the *get* is given without being instructed by the husband. In their view, the giving of the *get* to the woman by means of *zekhiyyah* is considered as having been done by him. Those who wrote similarly include: The *Noda bi-Yehudah*, R. Gershon [Chajes] of Nikolsburg, the Rabbi of Krotoschin cited in [R. Aharon Alfandri's] "*Merkevet ha-Mishnah*," the *Ḥatam Sofer*, R. Avraham Tiktin (author of *Petaḥ ha-Bayit*), R. Shmuel Engel, R. Yiẓḥak Elḥanan of Kovno, R. Eliezer Mishel, the Aḥiezer, Erekh Shai, R. Yosef Ẓvi of Yaffo, the Har Ẓvi, R. Shalom Yosef Elyashiv, and the same is written in the *Ẓiẓ* Eliezer.

That is an impressive list of *posekim*, and others are cited in the opinion as well. The argument also makes logical sense. Just as a divorce is not valid without the woman's knowledge that she is being divorced, yet a *get zikkui* is effective when all are completely certain that this what she would really want, the same should logically be true for the man as well.

Furthermore, the historical fact is that the mechanism of *get zikkui* has been employed before. As the ruling notes on pages 62-63:

> עוד יצויין לדברי הגרי"א הרצוג ז"ל בשאלתו לבעל השרידי אש, המצויה בשרידי אש ח"ג סי' כה (ובמהדורה החדשה בסי' צ'), שהביא עדותו של הגאון רבי שלמה דוד כהנא ז"ל שעשו מעשה בווארשא לזכות גט בלא מינוי מפורש מצד הבעל (אף שלא הובהר מה היו הנסיבות). ומאחר שהגאון רבי שלמה דוד כהנא ז"ל היה

> אותה עת הראב"ד של וואַרשא, עיר שבה קרוב ל400,000 יהודים קודם למלחמה ובהם גדולי תורה רבים, מעיד כך, אין ספק שמעשה זה הוסכם על בית הדין של וואַרשא בזמנו ובראשם הראב"ד, כשהגירושין הן זכות גמורה עבור הבעל.
>
> It is worth noting the words of Rabbi Yiẓḥak Isaac Herzog in his question to [R. Yeḥiel Ya'akov Weinberg], author of the *Seridei Eish* 3:25 (chapter 90 in the new edition) who cited the testimony of R. Shelomoh David Kahana that they did exactly this in Warsaw, namely, to authorize a *get* without the explicit instruction of the husband (although the exact circumstances are unclear). And since the great R. Shelomoh David Kahana—who was then head of the rabbinical court in Warsaw, a city of close to 400,000 Jews before the war, many Torah giants among them—attested to this, there is no doubt that this act was approved by the Warsaw rabbinical court in his day and by its head, in a case where the divorce is entirely beneficial to the husband.

This approach has the approval of many halakhic authorities in situations in which it is clear that the resultant divorce is actually what the husband would have wanted. Even R. Moshe Feinstein's view can be understood as approving this approach, as the opinion notes on page 62. (Indeed, one who reads *Iggerot Mosheh, Even ha-Ezer* 1:117 hears an echo of this approach in his *pesak* there.[21])

C. A Question of *Lomdus*: Taking from a Person for their Benefit (*Zakhin Me-Adam She-Lo Be-Fanav*)

The basic premise of the court's opinion is that just as one may take *for* a person when that taking is to their benefit, so too one may take *from* a person when that taking *from* is a benefit. This raises important issues of theoretical learning (*lomdus*) that need to be explored to understand this opinion.

The Talmud is clear about only two concepts: One may take possession for a person without their presence or consent (*zakhin le-adam she-lo be-fanav*) and one may not do something to a person's detriment absent

---

[21] The case in *Iggerot Mosheh, Even ha-Ezer* 1:117, contains language (see the paragraph *ve-ein le-hakshot*) that makes it clear that R. Feinstein accepts that one may infer one's unarticulated intent in cases where such would be—even after the fact—clear and obvious. This *teshuvah* addresses what to do when the husband authorized a *get* written by an agent and the husband has disappeared and the agent is deceased. (Do not take this to imply that Rav Moshe would or would not have agreed with the rabbinical court in this case.)

their consent (*ain ḥavin lo ela be-fanav*).[22] The *rishonim* disagree about the basis for both of these rules. One school of thought argues that these rules are based on the theory of implied agency—we are certain (*anan sahadei*) that the principal would have appointed an agent to receive this item if only the principal were made aware.[23] Others argue that this principle is based not on the concept of formal agency at all, but on general ideas that one may do a good for another without their permission (*yad*) or other similar concepts and includes cases where for one reason or another agency cannot work.[24]

The principle that one cannot hold another financially responsible except with his permission (*ein ḥavin [le-adam] ela be-fanav)* is simply the flip side of the same coin. When a transaction has both benefits and detriments, and it requires a calculation as to whether this is something a person might want or not, to engage in such a transaction requires the consent of the principal and cannot be done without that person's involvement.[25]

But the notion that we may perform a benefit to a person by **taking** something from his or her possession (*zakhin me-adam she-lo be-fanav*) has a much more recent provenance and is a matter of deep dispute among the halakhic authorities. The classic formulation of discussion of this dispute focuses on the question of whether one may separate *ḥallah* from dough on behalf of a person who does not consent to such a separation (because he or she is not present). This act entails taking something from someone and is a classic example of *zakhin me-adam she-lo be-fanav*. The *Shulḥan Arukh* (*Yoreh De'ah* 328:3) states the rule matter-of-factly and directly:

> אין מפרישין חלה בלא רשות בעל העיסה.
>
> One may not separate *ḥallah* without the permission of the owner of the dough.

But the Rama (*Yoreh De'ah* 328:3, citing *Terumat ha-Deshen* 188), argues:

> הגה: מיהו אם ידעינן דזכות הוא לבעל העיסה, כגון שהיתה העיסה מתקלקלת, מותר ליטול חלה בלא רשותו, דזכין לאדם שלא בפניו. וכן משרתת שבבית יכולה ליטול חלה בלא רשותו, כיון שרגילה היא לפעמים שבעלת הבית נותנת לה רשות.

---

22 This concept appears several times in the Talmud, including *Gittin* 11b, *Kiddushin* 23a and *Bava Meẓi'a* 12a.

23 See *Encyclopedia Talmudit*, *zakhin le-adam* 12: column 136 (Yad Harav Herzog, 2000).

24 Id. at 137.

25 Transactions that are clearly of value, but have some aspect of detriment are a dispute among Jewish law decisions for obvious conceptual reasons. Id. at 138-139.

> Rama: However, if we know that the owner of the dough would benefit from this, such as otherwise the dough would sour, it is permitted to take *ḥallah* without authorization, since we act for someone's benefit without his consent. So too, household help may separate *ḥallah* without authorization since it is common that the woman of the house has at other times given authorization.

Levush (328:3), *Shakh* (328:5) and *Taz* (328:2) all appear comfortable with the idea that there are situations where a person may take another's property when such is to his benefit, grounded either in general implied permission or in retroactive non-nullification.

Such is not the view of the *Kezot* and others. *Kezot*[26] maintains that there is no basic concept called *zakhin me-adam she-lo be-fanav* other than when it is based on agency in some form and that a person is **never** permitted to take the property of another without authorization, even when we would reasonably infer that the person would consent to the taking if he were present, and even when there is an unmitigated benefit. Property rights, the *Kezot* avers, are simply not constructed in the manner explained by the *Terumat ha-Deshen*. One's property may not be taken away without one's express consent or the consent of a duly appointed agent.

It is worth understanding the *lomdus* here closely. *Kezot* recognizes that there are cases where Jewish law affirms that anyone—even without any agency relationship—can acquire for another (*yad*) and he even recognizes the possibility that when something is a clear unmitigated good, one can acquire that item for someone even against that person's apparent will.[27] But, what the *Kezot* denies that is relevant to this case is that one can take something from another without his consent, even if it is good for him. Separating *ḥallah* is one such example, and so is giving a *get*.

Although there is considerable analytical learning supporting the view of the *Kezot*, and to limiting *zakhin me-adam she-lo be-fanav* to cases of agency[28] (as well as some halakhic support as well[29]), there is also a fairly deep and strong tradition among halakhic authorities permitting *zakhin*

---

26 R. Aryeh Leib Heller, *Kezot ha-Ḥoshen* 105:1, 195:2-3 and most importantly 243:8.

27 R. Solomon b. Abraham Aderet, *Ḥiddushei ha-Rashba*, *Kiddushin* 23a, suggests that one can acquire a bill of manumission for a slave against his will and the Kẹzot used this as an important proof that this is not agency. Rashba, *Niddarim* 36b adopts this view even more clearly as a general matter of agency law; see *Kezot, Ḥoshen Mishpat* 243:8.

28 See for example, the new novella of R. Yeḥiel Ya'akov Weinberg, *Seridei Eish*, *Bava Meẓi'a* 35, *Shi'urei R. David Povarsky, Nedarim* 36b, and *Imrei Binah*, *Halva'ah* 13.

29 See R. Moshe Sofer, *Teshuvot Ḥatam Sofer, Even ha-Ezer* 1:11.

me-adam she-lo be-fanav,[30] and it has its defenders in the world of *lomdus* also.[31] The conclusion reached in this opinion (page 84 and other places), that the clear majority of halakhic authorities endorse the view that *zakhin me-adam she-lo be-fanav* works as a matter of halakhah, is the consensus opinion of the last century of halakhic authorities, and this aspect of the opinion could be disagreed with (as the *Kezot* and his adherents do), but cannot be considered outside the norm.

D. **Conclusion to this Section**

The novelty, and the questionable legitimacy, of this ruling is its combination of several plausible halakhic leniencies in a single case. There is a reasonable foundation to the idea of *zakhin me-adam she-lo be-fanav* (albeit disputed). There is also a reasonable foundation to the idea that when a man wants to give a *get* but cannot formally express his will completely, a rabbinical court is permitted to infer his consent for the details (who can be his agent and the like) and assume he would consent to such. And finally, there is historical precedent to giving a *get zikkui* (albeit when the husband is most likely dead). None of these precedents, however, is exactly this case at all, a match that would require all three leniencies combined at once. Indeed, had the husband indicated that he would want a *get* written in the event he were to fall into a PVS, many *aḥaronim* would have permitted doing so, based largely on the view of the *Aḥiezer*.

Ultimately, the element of halakhic judgment in this case, which is debatable, is whether this case is urgent enough to combine previously independent rationales and arguments to reach this conclusion. In matters of *iggun* one should consider permitting such approaches, since the arguments are themselves reasonable and the situation is one of dire need. This is true even for unprecedented, but ostensibly correct, arguments. Others certainly disagree, but there is a firm tradition of working very hard to permit cases of *iggun* based on rationales that appear reasonable, even if they are not one hundred percent demonstrably correct.[32]

It is worth noting that Rabbi Yiẓḥak Yosef (the current Sephardic Chief Rabbi) seems to reach a similar analytical conclusion: in a case where a *get* would be a clear unmitigated benefit to a man in a PVS, such a *get*

---

30 See, for example, R. Ovadiah Yosef, *Yalkut Yosef*, *Yoreh De'ah* 328:17, who observes simply that "most authorities" reject the *Kezot*.

31 See, for example, *Ḥiddushei R. Shimon Shkop, Kiddushin* ch. 28.

32 One can add, as the opinion notes on page 76 (and as the *Gemara* itself considers in *Gittin* 38a) that long-term inability to marry should be resolved when possible in favor of allowing the woman to marry lest impropriety result.

could be given. He concludes (for reasons explained in the next section) that this particular *get* is not valid, as in fact no benefit was present to the husband in this case. But he supports the substantive understanding of *get zikkui* endorsed by this opinion.[33]

Part IV: Additional Issues and Facts

A. The Facts in this Case

The harder issue is the facts of this case. Would this man, if he were aware of this reality, want to give a *get* or is this *get,* objectively, in the best interests of this or any man in a PVS such that his authorization can be assumed?[34] Indeed, there is no evidence to substantiate that most Jewish

---

[33] R. Yiẓḥak Yosef's *teshuvah* is quite complex in its holding, and it is reasonable to argue (see the large and bold words beginning on the bottom of page 11 of the *teshuvah*, quoted below) that Chief Rabbi Yosef does accept that basic rule of the rabbinical court here that when there is a concrete benefit to the husband, a *get* given is valid even when the man is in a PVS and did not authorize it. R. Yosef writes:

> מכל הלין טעמי נראה שעיקר היסוד שעליו בנו הבנין, אינו מבוסס כלל, ואין לנו שום בירור וראיה שנידון זה הוי כזכות לבעל. וממילא אין כאן דין זכין מאדם שלא בפניו. וכ"ז מלבד מה שנראה שלדעת כמה פוס' אליבא דהרמב"ם, לא אמרי' דין זכין בגט, וצריך ידיעה של רצון גמור וציווי לתת גט לאשתו, ולא הוי כשאר קניינים.
>
> For all of these reasons it appears that the fundamental principle upon which this opinion is built is inapplicable. And there is no reason or proof that in this case there is benefit to the husband. Thus, there is no *zakhin me-adam she-lo be-fanav*. All of this is on top of the view of some *posekim* in the name of the Rambam who claim we do not say *zakhin* in divorce matters, and divorce needs real consent and commandment from the husband to divorce his wife, which is not like other transactions.

These are the only large or bold words in the document. In this case, he merely argues with the facts of this case and not the halakhic rule, and the view of some in the name of the Rambam that invalidates the *get* even when divorce is a benefit is a secondary factor.

[34] This note addresses if the determination of the person's will in such a case is really objective or subjective. A number of the arguments in this opinion seem to assume that what the rabbinical court is trying to determine is what the PVS husband would say if he could he wake up for a moment and address this issue or maybe what he would have said are his preferences if we asked him the question just before becoming incapacitated (as is the case in the *Aḥiezer*). One could argue that a PVS husband no longer has any subjective preferences (just like a dead man) and the notion of determining what he would say if he could answer is then counter-factual: it's not just that he can't talk or isn't available, it's that he truly has no subjective preferences at all anymore. Maybe in such a case, the

men would authorize a *get* if they were asked, "If you were to go into a PVS tomorrow, would you authorize a *get* today?" an assertion that is the basic predicate of this opinion. One could think of many factual reasons that someone in America might not want to do so. For example:

- Having someone help with one's care is valuable, and chaining one's wife might provide this benefit (albeit unbecoming) to some extent. (On the other hand, leaving one's health care decisions in the hands of someone who is involuntarily "chained" and who achieves freedom only when that person dies might be unwise.)
- There might be financial reasons—including access to the wife's health insurance policy—that might make divorce unwise. (On the other hand, it might be financially wiser to eliminate the Jewish-law support obligation from a dead marriage.)
- There might be tax or other financial considerations, especially relating to any children (or there might not).

These are facts that need to be determined on a case-specific basis.

Finally, it is now clear there is an entire spectrum of vegetative states, and some people diagnosed as in a PVS are more conscious than commonly thought.[35] Indeed, there are some very recent data about people in

---

question of *zakhin* moves to a purely objective measure of what should a person in that situation objectively prefer. Indeed, the basic claim of the Rashba and *Kezot* cited in notes 26 and 27 above is that such is true for *zakhin le-adam*. This strikes one as problematic conceptually in cases of *zakhin me-adam*, as explained in section III:D (as the objective data work only to receive and not to give) and also not dramatically important factually. In my view two things are correct: (1) absent any data about this specific person, it is logical for halakhah to infer that people want to do the right thing, and that this is both subjectively and objectively correct, as this opinion notes. (2) the objective instruction can never take the place of the known subjective instruction in cases of *zakhin me-adam*. If a man left clear instructions to give (or not to give) his wife a *get* when he is in a PVS, that subjective directive has to triumph over the objective truth. That is the case of the *Ahiezer*, and seems extremely logical. If so, the subjective or objective conversation is moot in this case. (Thank you to Steven S. Weiner Esq. who helped formulate this insight.)

35 There is quite a bit of literature—in scientific journals such as *PLoS ONE*, *Advances in Experimental Medicine and Biology*, and JAMA Neurology—indicating that people in a PVS show more awareness than was once thought and maybe even have hearing function. News reports of these discoveries include Ellie Zolfagharifard, "People in Vegetative States DO Recognise Friends and Family: Brain Scans Reveal Patients React Emotionally to Familiar Faces," Daily Mail (U.K.), December 18, 2013, <http://www.dailymail.co.uk/ sciencetech/article-

PVS that indicate these patients can "communicate" as seen through reading functional MRI scans. As a recent article entitled "Functional MRI Helps Nonresponsive Patients 'Talk'"[36] notes, there are patients in a PVS who show brain function when looked at through an MRI and can respond to questions by stimulating a specific region of their brain. Such a person, one could claim, can authorize (or decline to authorize) a *get*. If this is correct, the underlying halakhic issue in the validity of this *get* changes in significant ways in that a man in a PVS is like a person who is not incapacitated, but merely cannot communicate.[37]

2525721/Can-people-vegetative-state-recognise-friends-family-Patients-shown-react-emotionally-photo-familiar-faces.html>. See, for example, Haggai Sharon et al., "Emotional Processing of Personally Familiar Faces in the Vegetative State," PLoS ONE 8(9): e74711. doi:10.1371/journal.pone.0074711, September 25, 2013, available at <http:// www.plosone.org/article/info%3Adoi%2F10>. 1371%2Fjournal.pone.0074711>, as well as an older paper, Steven Laureys, et al., "Brain Function in the Vegetative State," Advances in Experimental Medicine and Biology, 550 (2004) 229–38, available at <http://dev.ulb.ac.be/ur2nf/reprints/Laureys_AdvExpMed-Biol_550()04.pdf>. The evolving consensus is that some people in a PVS are aware of what is around them but simply cannot communicate. See John Whyte, MD, PhD, Editorial, "Disorders of Consciousness: The Changing Landscape of Treatment," Neurology 82:1106-1107 (April 1, 2014) at <http://www.neurology .org/content/82/13/ 1106.long>.

36 Megan Brooks, "Functional MRI Helps Nonresponsive Patients 'Talk,'" *Medscape*, August 20, 2013, <http://www.medscape.com/viewarticle/ 809666>. Lorina Naci, PhD and Adrian M. Owen, PhD, "Making Every Word Count for Nonresponsive Patients," JAMA Neurology 2013; 70(10):1235–1241.

37 This is extremely halakhically important, but not discussed by the rabbinical court factually. One of the significant halakhic issues in this opinion is about whether an insane man can ever have things done for him that are based on agency. If most people in PVS can actually communicate when connected to an fMRI, then this whole issue actually disappears, since this is a person who has thoughts, but just cannot express them. That then returns this issue to a more standard halakhic conversation, and it might well be that many more authorities would approve of this *get* when it is a clear and unmitigated benefit to him. On the other hand, one could also see such a factual scenario being more complex, as others would say that halakhah compels one in that case to actually communicate with this person through the fMRI so as to discern his will. One could respond to that by arguing exactly that those authorities who permit *zakhin me-adam sh-elo be-fanav* and think that a *get* here is a *zekhut* exactly argue that this is not required since it is an unmitigated good for the person. The crucial change that the MRI communication provides is that it might take this person out of the context of a *shoteh* or a *ḥeresh* and into the status of one who is an uncommunicative *pikei'aḥ*.

But, as the opinion itself notes (pages 74–79), even with a person in a deep and completely uncommunicative PVS, there is a reasonable halakhic foundation for claiming that—in the absence of any other information to the contrary—a person should prefer to do that which is religiously proper and which does him no harm at all. This is reasonably true for a person who is insane and also true in this case. The conclusion (p. 79) that

> מכל האמור עולה, שזכות רוחנית מספיקה להיות בסיס ראוי לזכין לאדם שלא בפניו.
>
> From all this, we can conclude that a religious benefit is sufficient to form the foundation for *zakhin le-adam she-lo be-fanav*.

seems to be not only reasonable but well-grounded in the halakhic tradition.

On the other hand, the basic approach of Rabbi Yiẓḥak Yosef (page 11) is understandable when he insists:

> ולאחר העיון, ברור הדבר שבנידון דידן אין כל זכות לבעל שוטה,... והנה בשוטה, לכאורה לא שייך בו עניין זכות כלל שהרי אין לו דעת והבנה שמקבל איזה דבר להנאתו ...ומעתה לפי"ז נראה שמלבד זכות ממונית עבור צרכי גופו, אין כל זכות אחרת שניתן לזכות עבורו.
>
> After study, it is clear that in this case there is no benefit at all to the insane husband [in a PVS] . . . With an insane husband, there is no matter of benefit to him since he has no state of mind to accept matters to his benefit. . . . Accordingly, other than financial benefit for the sake of his physical health, there is no other benefit that can accrue to him.

as arguing that religious benefit is not enough, a view that is also reasonable. It seems possible to argue that even if this is correct, divorce might be of actual financial benefit and perhaps even physical benefit to the man as well, to meet the approach of R. Yosef, in two ways. First, divorce might well relieve the husband of the financial obligation to support his wife in a marriage that no longer provides any benefits at all to him, but yet he has to support his wife as a matter of Jewish law (which is enforceable in Israel). Even more importantly, divorce might actually increase his life span, as is clear from the closing section of R. Yosef's *teshuvah* itself. R. Yosef proposes (on page 12 of his *teshuva*), as a way to free the wife from this situation of *iggun*, that steps be taken to cease medical treatment of the husband in order to allow him to die and then allow her to remarry. R. Yosef notes also that people should pray for this man's death, which would also end the marriage. The physical benefit to the husband not to have either of these done in order to free his wife from the category of

being an *agunah* provides actual and real benefit to him and may provide sufficient benefit to validate the *get*. [38]

Allow me to add something jurisprudential and jurisdictional: it would seem reasonable to defer as a matter of halakhah to the determination of the facts in this case made by this rabbinical court authorized by the government to adjudicate the case.[39] As is correctly noted in its *mikhtav galui*, others should not rush to second-guess the facts of this case.[40] This is even more so true in this particular case where the man's guardian—a neutral lawyer apparently appointed to consider this man's best interests—agrees with the result.

It is important to add, as noted in the ruling, that although one might suggest that if one were able to give a *get zikkui* when the husband is in a PVS, then one should also be able to do so when the husband is simply withholding a *get*, this is simply not logically so as a matter of halakhah.

> בשום פנים ואופן אין ללמוד מכאן לנידון אחר שהבעל נתבע להתגרש ומסרב לתת גט, גם אם ללא ספק הגירושין הן זכות עבורו, וכמו ששללו בתוקף בספר שרידי אש ח"ג סי' כה הנזכר ובספר בעקבי הצאן הנזכר (בסוף סי' ל') זיכוי גט בנסיבות אלו, וקבעו שאין בו ממש.
>
> In no circumstances should [anyone] extrapolate from here and apply it to a case where the husband is a defendant in a divorce and is withholding a *get*. This is true even if there is no doubt that the divorce is beneficial to him. This comparison has been vehemently dismissed in *Seridei Eish* 3:25 as noted, and in the work *be-Ikvei ha-Ẓon* as noted (end of 30), that authorizing a *get* under the clause of *zikkui* in these situations is baseless.

It is important to realize that *get zikkui* works only when either the husband has indicated that he wishes to be divorced or the husband's wishes are unknown and must be determined (by the rabbinical court) as

---

38 Rabbi Yosef's *teshuvah* is quite complex in its holding; see text accompanying note 33 for a further explanation. Since R. Yosef insists that actual physical or financial benefit needs to be present, it is worth noting that avoiding R. Yosef's suggestion that withholding of treatment be employed to "solve" this case of *iggun*, itself provides the benefit to allow a *get* to be given. (More generally, divorce reduces the risks that anyone who sympathizes with the plight of the wife will undertake to free her of this marriage by ending his life. Nor does this raise problems of *get me'useh*, as what is discussed is a withholding of a benefit, rather than duress.)

39 This is a classical application of *beit din aḥar bet din lo dayyeki* since the rabbinical court here had exclusive jurisdiction as a matter of law, and unique access to the facts of this case. See *Piṯhei Teshuvah* 19:2-3 as well as many other sources.

40 < http://www.daat.ac.il/daat/psk/psk.asp?id=1069>.

to what he would want absent an expression of his will. When the husband's wishes are clearly known and articulated, even if society believes that they are wrong and sinful, a *get zikkui* is not possible as noted in this opinion.

This reflects a basic, very important point: the mechanism of a *get zikkui* is grounded not in the substitute judgment of the rabbinical court for either party, but in the surrogate judgment. The rabbinical court can ask only "What does this man or woman actually want" and not "what should this man or woman actually want"? Consider, for example, the case discussed by R. Moshe Feinstein in *Iggerot Mosheh, Even ha-Ezer* 4:8 concerning whether a rabbinical court can use the *get zikkui* process to divorce a woman who is living in an adulterous relationship but who has explicitly stated that she does not want a Jewish divorce (even as she would benefit from one). He states:

> ולענין אשה האומרת שאינה רוצית בגט, אף שבעצם הוא זכות גדול אף למרשעת ... מ"מ כיון שעכ"פ אינה רוצה הרי אינו שלוחה, אבל בסתמא יש לנו להחשיב לזכות מאחר דהאמת הוא שזכות היותר גדול הוא לה, ואף המרשיעות יש לתלות שרוצות בגט כדי שגם לדיני התורה תהא מגורשת ותוכל לינשא גם למי שלא ירצו לישא אלא בדיני התורה, ...ויש לסתם אינשי שאין מכירים אותה לומר שתהא שמחה בזיכוי הגט לה. אבל אם העדים מכירין אותה שהיא מרשעת כזו דלא תרצה בזיכוי גט שהיא מומרת להכעיס לא יהיה כלום הזיכוי.
>
> In the matter of a woman who says she does not want the *get* even as it is a great benefit to her even as she is sinful… nonetheless, since she certainly does not want it, we are not her agent. Ordinarily, though, we should assume it is of benefit since in truth it is of greater benefit to her. Even if she is sinful, we can assume that she wishes to be divorced in order that even according to Torah law she should be divorced and marry one who wants to marry only according to Jewish law… Thus normal people who do not recognize her will say that she is happy with this *get zikkui*. But if the witnesses who know her and say that she is an evildoer like that who does not want a *get zikkui* since she is a willful sinner, then there is no value in this process.[41]

We can assume in certain cases that a *get zikkui* is wanted, but we can never give such a divorce when the person whose will we are substituting

---

[41] See for example, R. Yeḥiel Mikhel Epstein, *Arukh Hashulḥan, Yoreh De'ah* 328:7 who notes a similar rule for *ḥallah*. The explicit direction not to do that which is of benefit eliminates the possible reasoning of benefit.

for has clearly told us it is not wanted.[42]

B. Is *Get Zikkui* A Gender-Neutral Concept?

Historically, *get zikkui* was not employed when the woman was insane and the husband wanted to be divorced: the mechanism of *heter me'ah rabbanim* was employed, to allow this husband to marry another while staying nominally married to the first wife (without permitting any ongoing functional marriage with the insane spouse). This was done for a few reasons, the most important being that it was actually not to the benefit of an insane woman to be divorced and without any means of support. But, as the opinion notes on page 30:

> על כל פנים, היה פשוט לפוסקים ההנזכרים, שזיכוי גט לאשה שוטה יועיל מהתורה לדונה כגרושה. וגם החולקים לא חלקו אלא מפני שפקפקו ביחס לקביעה שזו זכות עבורה להתגרש...
>
> Nonetheless, it was obvious to the *posekim* mentioned above that a *get zikkui* works for an insane woman to consider her divorced. And those who argue did so only because they did not think divorce was of benefit for her…

Here this opinion makes a very important factual point: halakhah could permit a *get zikkui* to be given to an insane woman when it benefited her, but it generally withheld permission so as to make sure that someone would take care of this woman.

This leads to an important conceptual insight. Just as cases of error or fraud upon entry into marriage (*kiddushei ta'ut*) started as something invoked by a husband to annul the marriage,[43] and yet over time we recognized that the theory is reciprocal and women could annul their marriages through this theory, the same might be true for a *get zikkui*. Even though the historical applications of *get zikkui* were only when the woman

---

[42] As an astute reader might notice, there is some tension between this *Iggerot Mosheh* and the *Kezot*, who, based on the *Rashba*, *Kiddushin* 23a, might permit such a *get zikkui* to a woman when it is objectively in her best interests. That same *Kezot*, however, would never permit a *get zikkui me-ha-ba'al*, which is why this opinion noted that such is inconceivable, as neither theory permits such. What is not addressed here, but has been addressed in much of the halakhic literature, is why judicial coercion is considered a proper change of one's will in divorce matters. See commentaries on Rambam, *Hil. Gerushin* 2:20 and many other places.

[43] Although the cases of "error" or "fraud" in the *Shulhan Arukh, Even ha-Ezer* 39, are about defects in a woman, the authorities of the last centuries have insisted that the logic is reciprocal, and *kiddushei ta'ut* can be applied to either spouse.

is absent and the divorce is to her benefit, it would seem that there is no logical reason that it cannot apply to a man as well when the divorce is to his benefit.

Perhaps it was simply the reality of yesteryear that, for a woman at least, almost any marriage was better than no marriage. Nowadays, however, one sees many more cases of both men and women wanting to be divorced. While it is true that it wasn't until the 20th century that *get zikkui* from the husband made an appearance, the logic of *get zikkui* is genderless—a *get* may be given or received when it is obvious that it is beneficial for the spouse who is not present, and on whose behalf the rabbinical court is acting. This is agreed to as a matter of principle by many halakhic authorities, and this opinion—while historically unprecedented—was years in the making and driven by this analysis.[44]

Conclusion

This article notes that the opening argument of the opinion that the development of a defect during the marriage can invalidate the marriage is wrong, and the halakhah is not in accordance with this view. This article further notes that the argument concerning a *get zikkui* from a man in a PVS appears correct, but it does not provide precedent for many other cases of *iggun*. Although one could have some questions about the facts of this case, it is reasonable to accept the factual determinations of the bet din that is authorized to decide this matter, particularly since the man's guardian also agreed.

As such, the approach taken by R. Zalman Neḥemiah Goldberg in his approbation of the ruling seems correct:

> אחר שקראתי מה שכתב והאריך הגאון ר' אוריאל לביא ודבריו נכונים מאוד ואני מצטרף לדעתו להתיר במקרה המיוחד שלפנינו. זלמן נחמיה גודלברג.
> After I read what Rabbi Uriel Lavi wrote at great length, his words are very correct, and I join in his reasoning to permit this woman [to remarry] in this unique case before us. Zalman Neḥemia Goldberg.[45]

---

44 See for example, R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer* 4:83, who seems to note that perhaps the changing status of a woman can impact these decisions. (This, of course, assumes that the *Kezot* is not correct.)

45 There are newspaper accounts that R. Goldberg retracted his endorsement (and even a posted letter not written by him, but apparently signed by him), but even the latter statement indicates that R. Goldberg was comfortable with the logic of this opinion. Even in this "retraction" he notes that he considers the opinion to identify the halakhah correctly. One could readily question if this "retraction" is grounded in any change in his halakhic mind.

The *get zikkui* reasoning (while novel and original in application) seems logical and is well based on combining precedents from a few different sources and seems logical. As the ruling notes, there are ample grounds to be strict in this case, but there is also a solid rabbinic tradition of being as lenient as possible in situations of *iggun*, and this is such a case. Therefore, in a case where the husband is in a PVS, and the authorized rabbinical court determines that he would have authorized a *get* if he could have and the *get* is given, I believe that the *get* is valid and the woman is divorced as Rabbi Zalman Neḥemiah Goldberg ruled.

Postscript: A Different Problem in the Ruling: Rabbinic Authority as the Key?

Rabbi Moshe Mordekhai Farbstein, Head of *Yeshivat Ḥevron* in Jerusalem (and himself a former *dayyan*), raises a different problem in the ruling that is worthy of consideration. As he asks in an open letter to the *dayyanim* who wrote this ruling:

> נראה כי לא הבנתם את מטרת גילוי הדעת שלי: מטרתו לא היתה להכנס לדיון הלכתי, אלא להביע את זעקתי ומחאתי על העוול הנורא של שלושה דיינים, שאינם מזקני תלמידי חכמים שבדור, שהעזו לסמוך על עצמם לעשות מעשה להתיר אשת איש באופן שלא עשו רבותינו, ולפרסם את הדבר רק לאחר מעשה. הלא תראו, שאפילו גדולי הדורות, כר' עקיבא איגר ודומיו, לא סמכו על עצמם והתנו את התריהם בתנאי שלפני ההיתר למעשה יצטרפו אליהם עוד מגדולי הדור, ואתם, היה לכם קודם שעשיתם את הגט, לשלוח את מסקנתכם עם נימוקיה ולבקש שיצטרפו אליה בכתב כמה וכמה מגדולי הפוסקים שבדורנו.
>
> It appears that you did not understand the purpose of my public statement on this matter. The intent was not to discuss the halakhic details with you but to express my anguish and protest on the great wrong of the three rabbinical court judges who are not among the leading scholars of our generation and arrogantly decided to rely on their own judgment to permit a married woman [to marry another man] in a way that none of our great rabbis have ever done, and to publicize the matter only after the fact. Realize that even great leaders of the generation, like R. Akiva Eiger, and others, did not rely on themselves—they made their rulings conditional on the approval of other Torah authorities. Before you actually issued the *get,* you should have written your conclusions and reasoning, and sent them to some of the leading halakhic authorities of the generation for approval.[46]

[46] Of course, R. Farbstein's criticism presumes that R. Zalman Nehemiah Goldberg's approbation was inauthentic. But if R. Goldberg's approval was in fact

The questions of how one should channel new insights into rabbinic tradition, and whether one who is not a leader in the field of Jewish law should implement his own views as *halakhah le-ma'aseh*—particularly in a case of *iggun* that can lead to *mamzerut*—are both very important but beyond the scope of this article.

But it is clear that R. Farbstein's view is not the only view on such serious questions, and that R. Moshe Feinstein adopted a more liberal view of who is qualified to voice an opinion as a matter of normative halakhah in cases of *iggun*. In an early *responsum*, Rabbi Feinstein—writing before his fortieth birthday in 1934 in Luban, Belarus—takes the view that in cases of *iggun* and other serious matters even lesser Torah scholars should act. He states:[47]

> ומש"כ ידידי איך רשאים אנו לסמוך על חדושים כאלו שבארתי למעשה ובפרט שהוא נגד איזה אחרו' הנה אני אומר וכי כבר נעשה קץ וגבול לתורה ח"ו שנפסוק רק מה שנמצא בספרים וכשיזדמנו שאלות שלא נמצאים בספרים לא נכריע אותם אף כשיש בידנו להכריע, ודאי לע"ד אסור לומר כן דודאי עוד יגדיל תורה גם עתה בזמננו ומחוייב כל מי שבידו להכריע כל דין שיבא לידו כפי האפשר לו בחקירה ודרישה היטב בש"ס ופוסקים בהבנה ישרה ובראיות נכונות אף שהוא דין חדש שלא דברו אודותו /אודותיו/ בספרים. ... אבל במקום צורך גדול וכ"ש במקום עיגון כעובדא זו ודאי מחוייבין גם אנחנו להורות אם רק נראה לנו להתיר ואסור לנו להיות מהענוים ולעגן בת ישראל…
>
> And that which my dear correspondent wrote asking how we are permitted to rely in practice on such innovative insights as those I have presented, particularly when such a view contradicts the position of some latter-day authorities, I say: Has there already been an end or boundary set for Torah study, God forbid, that we should rule only according to what is found in existing works, but when questions arise that have not been posed in our traditional works we will not decisively resolve them even when we are able?! Certainly, in my humble opinion, it is forbidden to say this, as certainly Torah study will continue to flourish now in our time; therefore, everyone who is able must rule decisively on each halakhic question posed to him, to the best of his ability, with diligent investigation in the Talmudic sources and the works of halakhic decisors, with a clear understanding and valid proof, even if it is a new application of the halakhah that has not been discussed in our Jewish law works… but in cases of great need, and certainly in cases of chaining a Jewish

validly given (or not completely retracted; see previous note), then criticism of the judges for failing to consult with any *gedolim* is inapt.

47 *Iggerot Mosheh, Yoreh De'ah* 1:101.

> woman, we are certainly obligated to rule [leniently], even if we merely deem it plausible to be lenient…[48]

This matter of rabbinic authority requires much more analysis than possible here,[49] and it needs to be understood in the context of the fact that the Israeli Rabbinical Court in Safed has exclusive legal (and halakhic) jurisdiction over matters of personal status in the State of Israel. This, one could claim, gives them a different halakhic status than simply a random rabbinical court selected by one side or the other on a matter. ☙

---

48 What I think Rabbi Feinstein means by this is that even if one is not completely certain that one's innovative understanding of the halakhah is indisputably correct, still one must assert it as normative Jewish law for the public to follow in cases of great need or import. For more on this, see my post at <http://hirhurim.blogspot.com/2008/08/role-of-chiddush.html>.

49 It raises issues related to questions of the role of *dayyanim*, *gedolim*, *morei hora'ah* and the like that are not well categorized in Jewish law. See a forthcoming article by Michael Broyde and Mark Goldfeder, "The Behavior of Jewish Judges: A Theoretical Study of Religious Decision-making," in *Bekhol Derakhekha Daehu: Journal of Torah and Scholarship* (BDD) of Bar Ilan University.