Orthodox Objection to the Lieberman Clause

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Introduction

Rabbinic legislation has worked to alleviate the plight of the *agunah*, an idiom literally meaning a chained woman, for thousands of years. A classic *agunah* case addressed in early rabbinic literature is a case of a woman who suspected her husband's death but had no means of verification, and, absent proof, may not remarry for fear of entering what might be an adulterous relationship. Such a scenario would endanger not only the woman's status, but any children from this subsequent relationship are considered illegitimate, *mamzerim*, and are unable to marry other Jews according to Jewish law, if the first husband is alive. Though adultery is one of the gravest sins, the sages had great sympathy for an *agunah* and even relaxed standards of testimony to allow such a woman to remarry, assuming that no one would make light of the situation and risk the consequences of adultery, *mamzerut*, and a requirement to divorce both husbands should her first husband be found alive. One such allowance is the permission the sages of the Mishnah granted to rely on the testimony of one witness who reports the death of a potential *agunah*'s husband though Jewish law generally requires two witnesses (Mishnah Yevamot 10). From the perspective of Rabbinic legislation, the suffering of an *agunah* can be tremendous, and it is a moral imperative to assist them.

More sinister cases of *agunot* arise if a man intentionally keeps his wife from remarrying by withholding a *halakhic* divorce document (*get*), often for goals of extortion or abuse[1]. In such a scenario, a woman cannot explore new relationships as she is legally considered married until her husband grants her a *get*. There have been many attempts to resolve this form of abuse and the Lieberman clause of the mid-twentieth century was another

[1] Since the time of Rabbenu Gershom's decree, a man can face this risk as well if his wife would not accept the *get*, but since he would experience less severe prohibitions and this scenario is less common, this paper will focus on a woman chained to a dead marriage.

attempt to address this issue and protect each partner from spousal abuse. In the 1950s Rabbi Saul Lieberman composed this clause as an amendment to the *ketubah,* a document detailing the obligations of marriage, and planned to utilize a newly formed *beth din*, Jewish court, to determine issues of personal status. The clause was rejected by the Orthodox community, though there were moments where it seemed they might accept it. Certain Orthodox leaders were involved in conversations about adopting the addition to the *ketubah* and in joining in a national *beth din*. This paper seeks to explore factors that explain why the Modern Orthodox leadership rejected this clause.

A central part of understanding the Orthodox rejection depends on analyzing the involvement of Orthodox leaders with the Lieberman clause in its early stages, as well as exploring the solution that the Modern Orthodox community ultimately accepted, albeit several decades later. Relevant factors include *halakhic* and legal hesitations that questioned the legitimacy of the clause and its authority in court, as well as cultural questions that defined denominations. This paper will first discuss the creation of the clause and Orthodox interest in the effort, then the thematic connection between the clause and the *ketubah*. Next, this paper explores *halakhic* objections to the clause and presents a discussion of its validity in secular courts. The last stage of this inquiry looks at the Orthodox movements approach to the *agunah* crisis and themes that it shares with the Lieberman clause.

Development and Contents of the Clause

In order to understand Orthodox involvement with this amendment as a way of solving the *agunah* crisis, this article will first discuss the evolution of the clause within the Conservative movement. In recognition of the risk of women becoming trapped as *agunot* in the modern sense (that of a recalcitrant husband), the Conservative movement looked for

halakhic solutions. Lieberman drafted an amendment to the *ketubah* text that would require a couple going through dispute over divorce to come before a *beth din* that could ensure the issuance of a *get* and penalize the husband for recalcitrance. The suggestion for such a clause was initially proposed by Rabbi Max Arzt, vice chancellor of the Jewish Theological Seminary of America (JTS) in 1952. He proposed that the Rabbinical Assembly, the American body representing Conservative rabbis, would create a *beth din* that would protect *agunot* by using their power to procure a *get* via this additional clause. This suggestion was halted because of raging debate within the Conservative Rabbinate. Because of the diversity within the Rabbinical Assembly, and different approaches to the limits of *halakha*, no consensus was agreed upon at that time. In the wake of the dispute, Lieberman was approached to draft such an amendment.

Within the Conservative movement itself there was debate over using such a clause. A 2017 article by Benjamin Steiner chronicled some of the controversy within the Conservative movement (Steiner). He discusses voices in the Conservative movement that opposed the Lieberman clause on the grounds that it was too Orthodox and bound to the strictures of *halakha*. These Conservative rabbis felt that this approach to solving the *agunah* crisis challenged the mission of the Conservative movement which was supposed to "chart a new path" (Steiner 56). Once such figure was Rabbi Edward Tenenbaum, a man who left Yeshiva University to join JTS, who felt that Jewish law should be "sufficiently malleable to reshape all manifestations of injustice" and the RA should not need to constrain themselves to the laws of the *Shulhan Arukh* (Steiner 56). Other objectors viewed the reliance on secular courts to enforce the agreement as a weakness and failure of the rabbinic leadership to directly address the issue. Indeed, a more liberal Conservative rabbi, Rabbi William Greenfeld, attacked this

approach as showing that the Conservative movement has "almost arbitrarily given up, abdicated our domain and turned it over in a sense to the judgement of the civil courts" (Steiner 56). Though the Conservative movement did adopt the Lieberman clause, many saw it as "a means toward further reform" and just a stepping stone towards a more radical plan (Steiner 58).

Another consideration Lieberman tackled in writing the clause was the appropriateness of language of divorce and dispute in a document signed at entrance to marriage. Lieberman chose not to include explicit language of divorce because he was sensitive to the perspective that might take offence if they discussed divorce (Steiner 51). At the same time that Lieberman sought to aid *agunot* he was focussed on avoiding the mention of any discord, even though the clause is meant to address such cases.

Despite the concerns in writing such a clause, by the end of 1953 Lieberman had a draft of the clause that he presented at a joint conference of the JTS and the RA. The text went through numerous changes, and was widely publicized by the Conservative movement starting in 1954. This published version of the clause read as follows:

> "And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: As evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom attach our signatures to this *ketubah*, and hereby agree to recognize the *Beth Din* of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the

> party so requesting to live in accordance with the standard of Jewish law of marriage throughout his or her lifetime. We authorize the *Beth Din* to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision" (Steiner).

The hope in adopting this clause was for it to become widely accepted by couples so that cases of *agunot* would disappear. In an event that one partner sought to terminate the marriage and the other opposed, the partner would have an avenue with which to proceed.

While the early development of the clause happened within the Conservative movement, efforts to adopt the clause and a create a united *beth din* crossed denominational borders. Rabbi Wolfe Kelman, vice president of the Rabbinical Assembly, recalled in a 1987 letter that the Conservative movement agreed to delay the release of the clause "until efforts had first been made to reach some understanding with our Orthodox and Reform colleagues" (Kelman). The president of the RA, Rabbi Ira Eisenstein, and the president of the RCA, Rabbi Theodore Adams, met together along with other representatives from each group. Eventually, Rabbis Lieberman and Soloveitchik met to discuss the amendment and a potential joint *beth din*. The "impetus for negotiations" was the Conservative *ketubah* (Bernstein 147). During these meetings, they discussed the creation of a shared Orthodox and Conservative *beth din* that would address issues relating to family law and personal status (Rakeffet-Rothkoff). They agreed on a system for the *beth din* where Rabbi Soloveitchik and Professor Lieberman would appoint the inaugural judges, who would in turn appoint subsequent judges. This *beth din* would issue a new standard *ketubah* that would include an amendment designed to protect against potential *agunot*. It would require that in the event of conflict at the time of divorce, the couple agree to the arbitration of the *beth din* and to abide by decisions imposed. They

wanted to create this binding arbitration agreement that would give the *beth din* power to subpoena either party, and to hold them accountable according to secular law (Berman).

The plan for a united *beth din* that would introduce an *agunah*-saving clause failed, and the dissolution of this plan proved to be a watershed movement in defining the parameters of the Conservative movement (Bernstein). The exact circumstances and reasons for the collapse of negotiations are subject to "some dispute and considerable ambiguity" (Kelman). Whatever these considerations were, they outweighed the plight of the *agunah* and the individual tragedy that required religious reform. While there is no consensus on the cause for the end of negotiations, Kelman records a few factors that may have contributed to the dissolution of talks. One of the considerations he cites that may have terminated the discussions was "a request made by the Orthodox that the Conservatives consider applying sanctions against members of the Rabbinical Assembly who would perform a marriage where a *get* was needed and not obtained" (Kelman). As an eyewitness at this meeting, Kelman records that Lieberman's "spontaneous response" was that "Conservative Jews do not like inquisitions" (Kelman).

From the Orthodox side of negotiations, the dissolution of talks could be connected to the immense pressure Soloveitchik faced not to work with the Conservative movement which led him to decide that he would not facilitate a joint *beth din*. Kelman records that a letter produced by eleven prominent Orthodox leaders forbidding interdenominational work may have played a role in Soloveitchik's wariness. In 1956, then president of the Rabbinical Council of America (RCA) David Hollander inquired with a number of Orthodox leaders about the permissibility of the RCA becoming a member of inter-denominational groups. They wrote, "it has been ruled by the undersigned that it is forbidden by the law of our sacred Torah to be

a member of and to participate in such an organization… either as an individual or as an organized communal body" (Hutner and Feinstein). While Kelman acknowledges that "it is difficult to determine now whether there was any relationship between these two events," he recognizes that discussion ended following "a recurring campaign with pressure by the extremist Orthodox" (Kelman). He cites Rabbi Rackman, who wrote that failure of the plan can be attributed to "the unwillingness of the Orthodox to disavow their right-wing resistance to any kind of cooperation with the Conservative." He does not limit the blame to the Orthodox camp, but attributes "the unwillingness of the Conservative leadership to disavow their own liberal colleagues" as another contributing cause (Kelman).

When Rabbi Soloveitchik decided against a united *beth din* concluding that he could not support a joint court with the Conservative movement, he suggested an alternative plan. He proposed that the Orthodox movement could start a *beth din* which the Conservative movement could endorse, and they could effectively recreate the *beth din* under an Orthodox name (Berman). The Conservative movement did not agree to this, and instead formed their own *beth din* and instituted the Lieberman clause as standard in their *ketubot*.

Before rejecting the Lieberman clause, the Executive Committee of the Halacha Commission of the RCA held two meetings to discuss the proposition of a joint *beth din* and the potential distribution the new *ketubah.* At the first meeting, in July of 1955, they discussed "the question of the *Beth Din.*" According to the president of the RCA, Rabbi David Hollander, the meeting centered around the question of whether cooperation in the formation of the *beth din* would constitute "*shutfos*," or partnership, and whether it was a type of "*shutfos*" that may be permissible (Hollander). In the second meeting on January 18, 1956 they concluded with a 10-5 vote against the formation of a national *beth din* "in its present form" (Walkenfeld). The

minutes of this meeting describe three central points for the decision not to proceed with the interdenominational *beth din* and *ketubah*. The first concern is a "wide and unbridgeable" gap between the Orthodox and Conservative rabbinic associations, where "a cooperative effort in any area will be detrimental to our interests." In tandem with this concern was the hesitation of the RCA to recognize the RA as a legitimate rabbinic body, as such recognition would hurt the Orthodox community. In addition to this concern, they cite the two considerations that Kelman brought: the objection of the RA to discipline members who "flagrantly violate the basic laws of *Ishut"* and the opposition of other Orthodox groups (Walkenfeld). This marked the complete rejection by the Orthodox establishment to accept the Lieberman clause and form a joint *beth din*.

Public opposition from the Orthodox community to the Lieberman clause was impassioned and harsh. The New York Times reported the Orthodox opposition to the clause with quotes from a late 1954 conference of Orthodox Rabbis. At this conference, the Rabbinical Council, representing the more modern Orthodox Jews, together with the Rabbinical Alliance, determined that "no acts or decisions of the projected Beth Din of the Conservative rabbinate will be recognized as valid" and that "a religious divorce granted by this Beth Din will not be honored" (Spiegal). The gravity of these statements cannot be underestimated. Not only was there total rejection of the clause that could have protected *agunot*, but by delegitimizing the *beth din* so that any divorce they officiated would be invalid, mainstream Orthodoxy was "accentuating and clarifying the line of demarcation between the two groups" and deepening the wedge between the denominations (Bernstein 289).

The executive of this commission of the RCA focused on interdenominational politics and granted more significance to the lines between parties than to the substantive issues at

hand. While the ultimate rejection of the clause by Orthodox leadership shows the impact of denominational politics, there were also a variety of other claims against the amendment. Certain groups focussed their attack on the source of the clause, and used this as an opportunity to attack the Conservative movement and Lieberman himself. Other Orthodox rabbis attacked the contents of the clause, arguing that it is either ineffective or not *halakhically* permissible. Still others questioned its legal status in secular courts. Within the opposition some attacked its contents while others rejected it for political religious interests.

Flexibility of the *Ketubah* and its Relevance to Such a Clause

The Orthodox objection to the amended *ketubah* is not founded in opposition to the idea of changing the text itself, as Orthodox communities accept the malleability of the text of the *ketubah.* Since its inception, there has been no standard text of the ketubah. This document which is written just prior to marriage includes the obligation a husband has to his wife during their marriage as well as a designated payment should the marriage terminate with death of the husband or divorce. The *ketubah* serves to protect marriage and secure it by deterring divorce and obligating care. Throughout the centuries, different clauses were added and the text changed to reflect the needs of the community. Even in modern times, there is no one standard text accepted by all Jews, even within denominations and communities.

Historic and *halakhic* evidence show that there is no problem in amendments to the *ketubah*. Even Rabbi Norman Lamm, who forcefully objected to the *halakhic* integrity of the Lieberman clause wrote that he had "no objection to an amendment *per se*," rather his rejection focused on the substance of the clause (Lamm). Medieval commentators cited different versions of the *ketubah* and added in clauses they deemed relevant. The minutiae of the text are certainly not universal. Even more broadly, throughout the Middle Ages and on a smaller

scale even in the modern era, entire clauses have been negotiated between the families to include specific obligations. There is no universal standard of the text of the *ketubah,* and there is no legal objection to changing it, so any objection to the Lieberman clause is not that it is an amendment, but rather connected to the political climate or details of the clause.

Not only is there no objection to change the *ketubah*, but the focus of the *ketubah* is in protecting women, and it is thus fitting to add a clause to the *ketubah* that could protect women from becoming *agunot*. While both Conservative and Orthodox voices objected to the Lieberman clause addressing the notion of divorce and tension in marriage, this sentiment is overshadowed by the fact that both the Lieberman clause and the *ketubah* exist to protect women. The Gemara teaches that *ketubot* were instituted so that "it would not be light in his [the husband's] eyes to remove her" (Ketubot 39b). The goal of the *ketubah*, according to this passage, is to protect women from rash divorce, which is especially important since on a biblical level a woman can be divorced against her will. The specific goal of this protection is multifaceted. It is a financial disincentive for the husband to divorce his wife and can act to improve a woman's status and financial stability in her post-marriage life (Tosfot Gittin 49b). At least thematically, the *ketubah* and the Lieberman clause are an appropriate fit because of their common goal.

Halakhic **Objections**

Most of the Orthodox objections to the Lieberman clause had little to do with its contents. The failure of the Lieberman clause to be accepted across denominations reflected political and identity concerns. *Halakhic* questions were present, but had the conversations between Lieberman and Soloveitchik continued, they could have been ironed out. A notable exception to this pattern is Rabbi Norman Lamm's substantive critique that focussed almost

exclusively on *halakhic* considerations. He presented a *halakhic* critique of the Lieberman clause in the *Tradition Journal of Orthodox Jewish Thought* in 1959, after the Conservative movement published an updated version of the clause. Lamm questioned the *halakhic* validity of "the amendment proper" and focussed on these substantive issues. While not the focus of his critique, the denominational identity questions appear as he challenged the "competence of the proposed Beth Din" (Lamm 94). He used harsh language that questions the integrity of the Conservative movement, asking how "any intellectually honest person" could be "expected to recognize the authority of an ecclesiastical court which denies… the origin and hence the authenticity of the very Halakhah in whose name it presumes to speak and whose tenets it seeks to interpret" (Lamm 94). The critique that Lamm presents is a thorough presentation of legal considerations, though he also questions the authenticity of the Conservative movement.

Lamm addressed the three components of the amendment to the Conservative *ketubah* and demonstrated the *halakhic* problems he found with each. With regard to the first clause which stipulates that the couple allow each other to fulfill Jewish law, Lamm writes that it is "entirely superfluous" as well as self-defeating (Lamm 100). Since Jewish law views all laws as obligatory, he argues, and Jews are considered "as being under prior oath to observe all of the Torah" there is no need for a clause that promises the ability to follow Torah law (Lamm 100). In addition to the objection that this clause is superfluous, he argued that this clause weakens the *ketubah* because if included, failure to obey this clause would nullify the *ketubah*. He gives an example of a bride who mistakenly serves her new husband "a non-kosher dish" which would be sufficient grounds to consider her interfering with his religious observance and therefore would invalidate the *ketubah* (Lamm 100). Lamm argues that in such an event, the woman is not enabling her husband to observe *halakha* as this first clause stipulates, and

the husband would be able to exempt himself from the financial obligations of the *ketubah* claiming that she did not meet the conditions. Lamm makes no attempt to justify the clause, but rather calls this clause "somewhat amusing" (Lamm 100) and argues that it "is against the best interest of the non-observant Jewish wife, whose protection is the pretext for the Conservative action" (Lamm 102). In this way, Lamm disputes the inclusion of the first component of the Lieberman clause for being redundant and self-defeating.

In the continuation of his critique, Lamm argues that the second clause of the amendment, in which the couple grants authority and recognition to the *beth din*, bears no legal weight. He discusses the law that stipulates that only transactions and agreements over an "immediate, objective, physical reality" are binding (Lamm 103). This argument is founded on the principle of *kinyan devarim*, or a verbal transaction, that is considered unsubstantiated and therefore does not take effect. This principle is codified by Maimonides, who writes,

> "A kinyan is of no consequence with regard to statements that are of no substance. What is implied? If it is stated in a legal document... "...that they will form a craft partnership," "...that they will divide a field between themselves," or the like, this is considered a kinyan with regard to words, and it is of no consequence. The rationale is that the person did not transfer to his colleague a specific and known entity, neither the entity itself or the fruits of that known entity" (Maimonidies Mekhirah 5:14).

According to Lamm, this section of the Lieberman clause is invalid because there is no "legal procedure by which the binding is effected" (Lamm 104). Since this section of the Lieberman clause is asking couples to merely "recognize," without a more concrete action, it cannot be legally binding because of its abstract nature that does not take effect on any item of substance.

In his most persistent attack on the clause, Lamm rejects the third section of the amendment which allows the *beth din* to impose consequences as legally futile on the basis that it is considered an *asmachta*, where there was not full buy-in by one of the parties into the transaction. Lamm brings a series of legal approaches to understanding the scope of *asmachta*, a concept that "defies easy definition" (Lamm 106). The first definition he brings explains that *asmachta* is any transaction where there is no determined sum that is being agreed upon. In the case of the *ketubah* each spouse is agreeing that if the circumstances arise, they will pay whatever sum the *beth din* would impose on them. At the time that the couple accepts the *ketubah*, they do not know what sum they are agreeing to, resulting in an *asmachta* and void agreement. The fact that the couple is agreeing to a commitment of unspecified value that will potentially become relevant at an unknown time prevents full acceptance of the agreement. Lamm uses another possible definition of *asmachta* to invalidate this section. It could be that any agreement where someone accepts a penalty if they do not obey can be considered an *asmachta* either because the person is confident the circumstances where they would need to pay will not arise, or because they are agreeing only to reassure their partner. Since such a person is not fully accepting responsibility to penalty, the agreement is invalid. In this context where the agreement is signed at a wedding ceremony, the couple is presumably confident that their marriage will be secure, so they are unable to fully appreciate what they are agreeing to and the agreement would never take effect. The last possible approach of *asmachta* that Lamm brings to discredit this agreement is under circumstances where the outcome is partly, but not entirely, dependent on the obligating party. In such a case, an individual can assume some fiction about what will happen and not fully accept all potential outcomes, therefore impinging on a full commitment to pay. The *ketubah* is agreed to by both spouses, who both accept the

clause with a mentality that overemphasizes the controllable part and ignores the potential risk. This partial acceptance to the agreement invalidates the clause. Lamm is thorough in his critique of this clause using rigorous legal analysis to reject this portion of the clause on all accounts. Though Lamm's claims need to be contended with, they are surmountable issues, that could have been addressed if the Orthodox community wanted to adopt it.

Legality in Secular Courts

Another substantive objection to the Lieberman clause was raised by those concerned with its enforceability in secular courts. In 1955, at the request of Dr. Samuel Belkin, legal scholars Leo Levin and Mayer Kramer composed a lengthy analysis of the legal enforceability of the clause and its effectiveness in American court. Their analysis led them to posit that "the new provisions of the ketubah do not give rise to legal rights enforceable in secular courts" (Levin and Kramer 3). Under their analysis, the Lieberman clause would fail to allow a court to require a recalcitrant spouse to appear before *beth din* because the *ketubah* document does not constitute "a legally binding contract" (Levin and Kramer 3). Additionally, they believe that a secular court would not uphold a fine "in order to compel a religious divorce" (Levin and Kramer 3) since doing so would violate the constitutional separation between church and state. Another issues they raised was the style of language in the amendment. In the clause added to the *ketubah*, the language speaks of "emotional relationships" (Levin and Kramer 3) between the husband and wife, but fails to clearly establish a legal relationship with the *beth din*; it opts for abstract ideas instead of concrete legal language.

Levin and Kramer analyzed the amendment according to American legal practice and concluded that a court would not uphold it. The standard that American courts require for documents to be considered valid is that a "reasonable person would understand the word he

used as importing" a legally binding arrangement. Because the *ketubah* is a part of the marriage ceremony, particularly a religious ceremony where it is treated as a religious requirement and not as a contract, they believe that a reasonable person would not view it as a legally binding contract. They insist that a secular court would not uphold the *ketubah* because of interference in religion, even though the court is only asked to uphold the agreement that the two parties made (Levin and Kramer 17). Aside from substantive issues with the enforceability of the clause, the authors express wariness towards the use of an arbitration court under such circumstances. The expenses associated with an arbitration panel together with questionable "wisdom of assigning to strangers the right to inquire into the intimacies of one's life" (Levin and Kramer 28) and the fear the emotional and psychological pain that might result are in their view sufficient reason to avoid an arbitration panel (Levin and Kramer 28). In truth, however, these concerns about the arbitration court seem surmountable and do not appropriately address the urgency of being an *agunah*. Despite this, they conclude that not only will the clause be ineffective, but that a "prudent bride and groom" will decide against using it.

The debate over whether the Lieberman clause could be upheld in secular court did not remain theoretical for long. In the 1980s, the case *Avitzur v Avitzur* rose through the New York courts and tested the Lieberman clause. In 1978, this Jewish couple, who had signed the Lieberman clause as a part of their *ketubah* received a civil divorce. After the civil divorce was granted, the wife wanted a *get* to secure her religious divorce, but her husband refused and would not appear before *beth din*. The woman filed a suit with the New York courts requesting an order to compel the man to appear before *beth din*, as the amendment in their *ketubah* stipulated. The court granted this, viewing the issue as "a command upon the individual defendant to do what is alleged he agreed to do in advance" (Avitzur v. Aviztur). When the

husband's attempt to dismiss the suit failed, he appealed and the appellate court sided with him to dismiss the *ketubah* and not require him to appear before *beth din*. The appellate court argued that enforcing the *ketubah* by ordering him to appear before *beth din* would involve "an unconstitutional entanglement between church and State" (Avitzur v. Aviztur). They argued that from the state's perspective the couple is already divorced and any involvement at this point is about religious matters. Subsequently, the wife appealed this decision, and the Court of Appeals reversed the decision of the Appellate Division (Avitzur v. Avitzur), restoring the original upholding of the Lieberman clause. Instead of viewing the case as seeking court power to enforce a religious activity, they argued that she was not trying to require his appearance before the *beth din* "solely out of principles of religious law" but rather "she merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal" (Avitzur v. Avitzur). This ruling held that it is not a religious issue for the court to compel the man to go before the *beth din*, but a contractual one and is therefore valid. For this reason, the Court of Appeals upheld the wife's request to compel her husband to appear before the *beth din*.

In contrast to Levin and Kramer's analysis of the legal enforceability of the Conservative *ketubah*, the New York Court of Appeals upheld its viability. That said, this was not necessarily an obvious legal conclusion. The case reached the Court of Appeals, and in that stage and all the ones prior, there were judges who dissented to the final holding. The final decision determined that enforcing the Lieberman clause is not an entanglement of religion and therefore not a constitutional problem. As opposed to Levin and Kramer's argument, the court held that the *ketubah* can be considered a legally binding contract even though it is part of a religious ceremony. The fact that it speaks of love and emotional commitment does not

detract from its binding nature and the power granted to the *beth din*. *Avitzur v. Aviztur* demonstrated that the Lieberman clause carries legal backing and can be an effective means of ensuring a woman receives her *get*.

The Orthodox Movement's Solution

Ultimately, the Orthodox rejection of the Lieberman clause was absolute. Interdenominational politics played a large role and this issue helped define the border between the Orthodox and Conservative movements. While there were also *halakhic* and legal objections to the clause, the *halakhic* objections had the potential to be resolved through Soloveitchik's involvement and the legal concerns were dismissed in court.

While the amendment was rejected, the problem of *agunot* remained for the Orthodox community. As the Orthodox leadership grappled with this issue in the following decades, many similar arguments rose, this time intra-denominationally, as they looked for a solution. Eventually, the Modern Orthodox community proposed a prenuptial agreement that followed a similar model to the Lieberman clause. In understanding the Orthodox relationship to the Lieberman clause, it would be amiss to ignore the subsequent evolution where certain Orthodox rabbis accepted a prenuptial agreement to protect the woman and other segments of the Orthodox community rejected it. In later decades of the twentieth century, Orthodox luminaries supported a prenuptial agreement that looks very similar to the Lieberman clause.

Even while the Orthodox community rejected the Lieberman clause, they were cognizant of the importance of the issue it tried to resolve. At the close of Lamm's article attacking the Lieberman clause, he offers the prayer "that this attempt, ill-fated and ill-advised though it was, will cause our leading *halakhic* scholars to intensify their search for an authoritative remedy for this most distressing problem" (Lamm 118). Lamm, as well as many

of the other Orthodox voices against the Lieberman clause, did not view their objection to the clause as dismissive of the plight of the *agunah*. Instead, they viewed their objections as relating to their relationship with the Conservative movement and denominational borders, as well as the integrity of the clause. As the years of the Lieberman clause controversy passed, and the *agunah* problem remained, Orthodox rabbis looked to create an appropriate solution.

The concern to protect potential *agunot* was widespread. Dr. Rachel Levmore, an advocate for prenuptial agreements, published an article in *Tradition* in 2009 that highlights rabbinic support for a prenuptial agreement that will prevent the husband from withholding a *get* and the wife from refusing to accept (Levmore). Prominent support for such an agreement appears in Rabbi Moshe Feinstein's responsa. In a 1979 responsum, he endorses adding a clause to the *tenaim*, the agreement between the families of the bride and groom regarding financial support, that in an event that a marriage dissolves, the husband "will not withhold giving a writ of divorce, and she will not refuse to accept it, where the Beit Din has so ordered in this regard" (Feinstein)[2]. He adds that this addition does not interfere with the *halakhic* mandate that the *get* be given by the husband volitionally, and that if a *get* is given after such an agreement it is considered valid and not a *get me'useh*, a "coerced *get*." Interestingly, Feinstein limits the scope of such an amendment and says it should not be used as a new universal standard automatically. Ironically, he writes that if a *mesader kiddushin*, the person officiating the wedding, assesses that adding such a clause may cause tension between the couple, they should avoid using it. Feinstein suggests that this clause be added to the *tenaim* document, not in the *ketubah*, where the Lieberman clause was added, but it is a suggestion to the same effect.

[2] Translation by Rachel Levmore.

Feinstein's support for this addendum to the *tenaim* document is very similar to the idea of the Lieberman clause, though less formal. The difference in location of the two clauses shouldn't have any legal bearing; both the *ketubah* and the *tenaim* documents are legal documents surrounding religious events that detail varied obligations. Feinstein's endorsement came even closer to resembling the Lieberman clause when his son-in-law, Rabbi Moshe Tendler, sought to address the *agunah* problem by employing the *ketubah* in secular courts. The premise of his solution was the obligation a man has to support his wife, detailed in the *ketubah*, which lasts until the husband gives his wife a *get*. If a secular court would enforce these payments, the husband would be incentivized to give the *get* quickly (Levmore 34). Feinstein endorsed this position in 1983 when he wrote,

> "Concerning the drawing up of a document in English, detailing the husband's obligation to his wife – which are among the conditions of the *ketubah* that have prevailed among us for generations, in order that such a document should be accepted in [gentile] courts and assist, in some cases, of preventing a husband from leaving his wife with a civil divorce and chaining her without a *get*: it is worthy and proper to do so as an ideal preference" (Feinstein 90)[3].

The similarities between this plan and the Lieberman clause are striking. While following a similar model, the clearest distinction between Tendler's suggestion and the Lieberman clause is that Tendler did not add any amendment but wanted to utilize the mechanisms already in place.

Orthodox opinion began to support the creation and utilization of a prenuptial agreement. There was a transition from creating a solution of amendments attached to existing

[3] Translation by Rachel Levmore.

documents to attempting to create a new agreement that would guarantee a *get* at the time of divorce. Support for a prenuptial agreement was widespread across the modern Orthodox world, including endorsements from Rabbi Soloveitchik (Hamevaser), Yeshiva University (YU), the Rabbinical Council of America (RCA), and the Beth Din of America (BDA) (Levmore). In June 1993, at an RCA conference, a resolution was passed to encourage rabbis to use prenuptial agreements (Levmore 36). Six years later, the eleven *roshei yeshiva* of YU published a letter supporting the use of the prenuptial agreement (Levmore 36). The endorsed prenuptial agreement was drafted by Rabbi Mordechai Willig, *rosh yeshiva* at YU, and distributed by the BDA. In the agreement, the husband agrees "to pay maintenance to his wife" for the time that he refuses to grant her a *get* (Levmore 37).

To those Orthodox institutions accepting the prenuptial agreement, its significance was divorced from controversy over the Lieberman clause. Indeed, it is distinct from the Lieberman clause even if some of the mechanisms are similar. The prenuptial agreement supported by the RCA is a binding arbitration agreement that would require appearance before a designated arbitration panel if the need arose. It additionally requires that while separated by waiting for a *get*, the recalcitrant spouse owes the other a sum of money every day, meant to reflect their obligations to each other.

While modern Orthodox groups were comfortable endorsing the prenuptial agreement though they rejected the Lieberman clause, *Charedi* detractors compared the prenuptial agreement to the Lieberman clause. To these rabbis who opposed the prenuptial agreement, the agreement was an extension to the Conservative clause. Forty-four Israeli Rabbis issued a ruling (*psak*) against the prenuptial agreement supported by the RCA (YWN). In this *psak*, they strongly object to the prenuptial agreement, saying,

> "already in 1955 when Conservative "rabbis" began with this distorted idea, all of the great [rabbinic] leaders of America objected with barbs and spears… how can we see in our generation… that "rabbis" who call themselves Orthodox would incite [others] to the same idea which was already absolutely prohibited. And therefore, as messengers following those before us, we proclaim: to announce in the gates of the many that anyone who is called "rabbi" and incites [others] to organize agreements of this type, or arranges *huppah and kiddushin* with an agreement of this type, is not to be considered among the Orthodox rabbis, and one should not rely at all on his *halakhic* rulings and decisions" (Sternbuch)[4].

To these *charedi* rabbis, the BDA prenuptial agreement and the Lieberman clause are equally illegitimate and non-Orthodox. They raise issues of *asmachta* and *get meuseh*, issues that the writers of the BDA prenuptial agreement specifically dealt with. Like the Orthodox objection to the Lieberman clause which combined *halakhic* and political considerations, these *charedi* rabbis objected to the RCA's prenuptial agreement on political and legal grounds[5].

There were a number of grounds for criticism of the prenuptial agreement, some of which paralleled objections to the Lieberman clause. One of the most substantial criticisms raised was concern that using the prenuptial agreement would effectively make the *get* a coerced *get*, a *"get meuseh"* which would be invalid. Even though the couple willingly enters the agreement, it could later be considered duress and invalid[6] (Even Ha'ezer 134:4). To

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[4] See Appendix A. Translation mine.

[5] It is worth noting that in recent years certain *Charedi* leaders have begun to support versions of prenuptial agreements that look to help prevent *agunot*. See for example Rabbi Yaakov Forchheimer's letter from early 2019: http://www.yasharcoalition.org/docs/RabbiYaakovForchheimer.pdf

[6] The Rema cites a view that if a man obligates himself to pay a fine if he doesn't get the *get* the *get* would be considered voluntary and valid, since the man is not forced to give the *get*, and can choose not to pay the fines. If he gave the *get* under such circumstances, it would be

address this issue, the prenuptial agreement does not impose a penalty but asks that the husband pay living expenses that the *ketubah* obligates him in from the start of his marriage. Because the financial obligation is not a fine but the required expenses, the *get* can be considered conditional even if the couple signed a prenuptial agreement (Rosensweig).

Another issue raised with the prenuptial agreement that echoed a critique of the Lieberman clause is the fear that it could be considered an *asmachta.* The assumption is that while the couple signs the prenuptial agreement they may not be fully accepting its significance and are assuming it will never come to be. Lamm raised the issue of *asmachta* in the context of the Lieberman clause, and the RCA prenuptial agreement tries to address this concern in the language of the document that reflects full acceptance of the conditions of the document at the time of signing it.

In a similar fashion to criticism of the Lieberman clause for focussing on divorce at the time of marriage, critics of the prenuptial agreement claim that it is not the appropriate attitude to entrance into a marriage. A spokesperson for the Agudath Israel of America, Rabbi Avi Shafran, opposed the prenuptial agreement out of "a concern that introducing and focusing on the possible dissolution of a marriage when it is just beginning is not conducive to the health of the marriage" (Lavin). This sentiment parallels similar claims against the Lieberman clause, as discussed above. While elements in the Orthodox community who had rejected the Lieberman clause eventually endorsed a prenuptial agreement, *charedi* segments viewed each as problematic.

Concluding Thoughts

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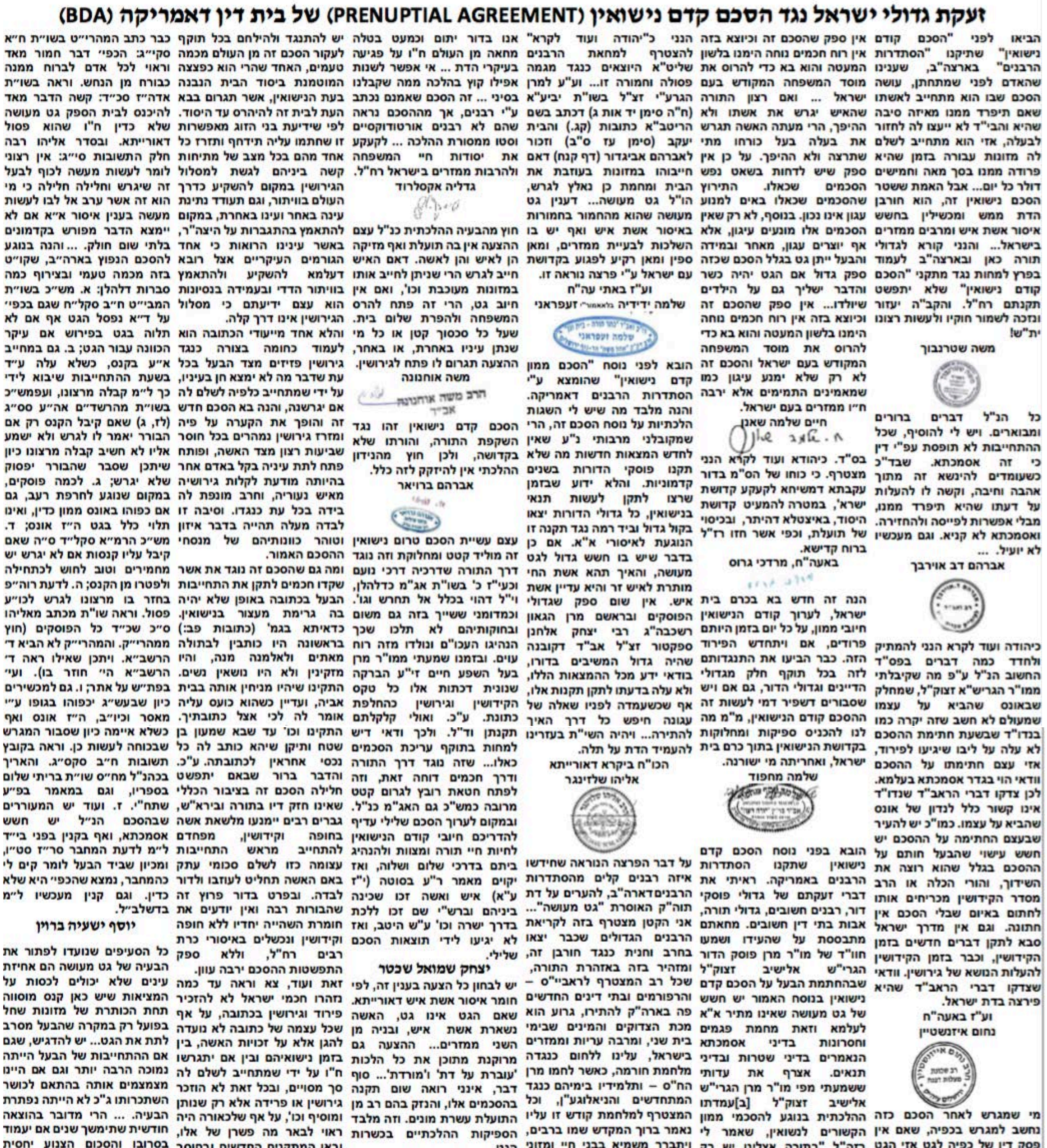
considered voluntary since the fines are an incentive external to the *get*. However, the Rema says it is better to be stringent and not accept this view.

From the mid-twentieth century to the present, the Conservative and Orthodox movements have tried to address the *agunah* problems with a *halakhic* solution. This paper discussed the conversations that happened between leaders of these two denominations and the potential that existed for a joint solution. As these conversations fell apart, the denominations drifted further apart until today, when it is almost hard to imagine that there was a chance of a joint *beth din* and *ketubah* amended to prevent *agunot.* The *agunah* threat was addressed by both denominations, but separately.

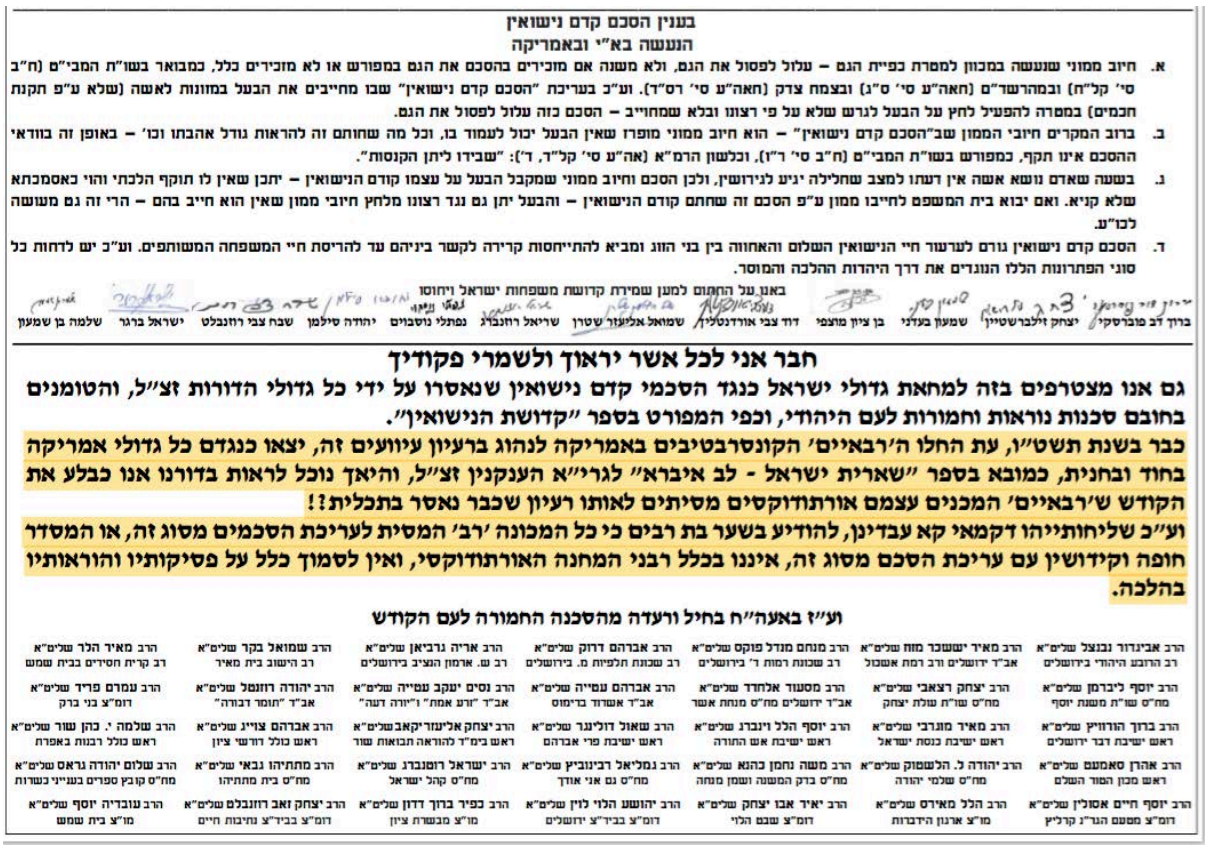
When I was first formulating my research study for this project, I expected to find a rich *halakhic* debate surrounding using the *ketubah* and Jewish contract law. While this conversation plays its part, the overwhelming majority of literature I found on the subject focussed on political considerations that shaped this story. Indeed, the questions of *ketubah* and *agunah* were overshadowed by questions of identity and values. There is an element of tragedy in this story and in the distance that grows between the Conservative and Orthodox movement. At the same time, it reveals some of the core concerns of each denomination and the values they hold dear.

Appendix A

Letter of Opposition Against the BDA Prenuptial Agreement



Letter of Opposition Against the BDA Prenuptial Agreement (cont.)



בענין הסכם קדם נישואין

הנעשה בא"י ובאמריקה

א. חיוב ממוני שנעשה במכוון למטרת כפיית הגט – עלול לפסול את הגט, ולא משנה אם מזכירים בהסכם את הגט במפורש או לא מזכירים כלל, כמבואר בשו"ת המבי"ם (ח"ב סי' קל"ח) ובמהרשד"ם (תאה"ע סי' ס"ג) ובצמח צדק (תאה"ע סי' רס"ד). וע"כ בעריכת "הסכם קדם נישואין" שבו מחייבים את הבעל במזונות לאשה (שלא ע"פ תקנת חכמים) במטרה להפעיל לחץ על הבעל לגרש שלא על פי רצונו ובלא שמחוייב – הסכם כזה עלול לפסול את הגט.

ב. ברוב המקרים חיובי הממון שב"הסכם קדם נישואין" – הוא חיוב ממוני מופרז שאין הבעל יכול לעמוד בו, וכל מה שחותם זה להראות גודל אהבתו וכו' – באופן זה בוודאי ההסכם אינו תקף, כמפורש בשו"ת המבי"ם (ח"ב סי' ר"ז), וכלשון הרמ"א (אה"ע סי' קל"ד, ד'): "שבידו ליתן הקנסות".

ג. בשעה שאדם נושא אשה אין דעתו למצב שחלילה יגיע לגירושין, ולכן הסכם וחיוב ממוני שמקבל הבעל על עצמו קודם הנישואין – יחכן שאין לו תוקף הלכתי והוי כאסמכתא שלא קניא. ואם יבוא בית המשפט לחייבו ממון ע"פ הסכם זה שחתם קודם הנישואין – והבעל יתן גם נגד רצונו מלחץ חיובי ממון שאין הוא חייב בהם – הרי זה גם מעושה לכו"ע.

ד. הסכם קדם נישואין גורם לערעור חיי הנישואין השלום והאחווה בין בני הזוג ומביא להתייחסות קרירה לקשר ביניהם עד להריסת חיי המשפחה המשותפים. וע"כ יש לדחות כל סוגי הפתרונות הללו הנוגדים את דרך ההידות ההלכה והמוסר.

באנו על החתום למען שמירת קדושת משפחות ישראל ויחוסו

ברוך דב פוברסקי | יצחק זילברשטיין | שמעון בעדני | בן ציון מוצפי | דוד צבי אורדנטליק | שמואל אליעזר שטרן | שריאל רוזנברג | נפתלי נוטבגוים | יהודה סילמן | שבח צבי רוזנבלט | ישראל ברגר | שלמה בן שמעון

חבר אני לכל אשר יראוך ולשמרי פקודיך

גם אנו מצטרפים בזה למחאת גדולי ישראל כנגד הסכמי קדם נישואין שנאסרו על ידי כל גדולי הדורות זצ"ל, והטומנים בחובם סכנות נוראות וחמורות לעם היהודי, וכפי המפורט בספר "קדושת הנישואין".

כבר בשנת תשט"ו, עת החלו ה'רבאיים' הקונסרבטיבים באמריקה לנהוג ברעיון עיוועים זה, יצאו כנגדם כל גדולי אמריקה בחוד ובחנית, כמובא בספר "שארית ישראל - לב איברא" לגרי"א הענקנין זצ"ל, והיאך נוכל לראות בדורנו אנו כבלע את הקודש ש'רבאיים' המכנים עצמם אורתודוקסים מסיתים לאותו רעיון שכבר נאסר בתכלית!!

וע"כ שליחותייהו דקמאי קא עבדינן, להודיע בשער בת רבים כי כל המכונה 'רב' המסית לעריכת הסכמים מסוג זה, או המסדר חופה וקידושין עם עריכת הסכם מסוג זה, איננו בכלל רבני המחנה האורתודוקסי, ואין לסמוך כלל על פסיקותיו והוראותיו בהלכה.

וע"ז באעה"ח בחיל וועדה מהסכנה החמורה לעם הקודש

הרב אביגדור נבונצל שליט"א רב הרובע היהודי בירושלים	הרב מאיר ישעשכר מזוז שליט"א אב"ד ירושלים ורב רמת אשכול	הרב מנחם מנדל פוקס שליט"א רב שכונת רמות ד' בירושלים	הרב אברהם דרוק שליט"א רב שכונת תלפיות מ. בירושלים	הרב אריה נרביאן שליט"א רב ש. ארמון הנציב בירושלים	הרב שמואל בקר שליט"א רב הישוב בית מאיר	הרב מאיר הלר שליט"א רב קרית חסידים בבית שמש
הרב יוסף ליברמן שליט"א מח"ס שו"ת משנת יוסף	הרב יצחק רצאבי שליט"א מח"ס שו"ת שולת יצחק	הרב מסעוד אלחדד שליט"א אב"ד ירושלים מח"ס מנחת אשר	הרב אברהם עפייה שליט"א אב"ד אשדוד ברימסוס	הרב נסים יעקב עפייה שליט"א אב"ד "זרע אמת" ו"יהוה דעה"	הרב יהודה רוזנטל שליט"א אב"ד "תומר דבורה"	הרב עמדם פריד שליט"א דומ"צ בני ברק
הרב ברוך הורוויץ שליט"א ראש ישיבת דבר ירושלים	הרב מאיר מזרבי שליט"א ראש ישיבת כנסת ישראל	הרב יוסף הלל וינברג שליט"א ראש ישיבת אש התורה	הרב שאול דוליגר שליט"א ראש ישיבת פרי אברהם	הרב יצחק אלישוזריקאבשטיין שליט"א ראש בית"ד להוראה תבואות שור	הרב אברהם צוייג שליט"א ראש כולל דורשי ציון	הרב שלמה י. כהן עזור שליט"א ראש כולל רבנות באפרת
הרב אהרן סאמעט שליט"א ראש מכון המור השלם	הרב יהודה ל. הלשטוק שליט"א מח"ס שלמי יהודה	הרב משה נחמן כהנא שליט"א מח"ס בדק המשנה ושמן מנחה	הרב נמליאל רבינוביץ שליט"א מח"ס גם אני אודך	הרב ישראל רוזנברג שליט"א מח"ס קהל ישראל	הרב מתתיהו נבאי שליט"א מח"ס בית מתתיהו	הרב שלום יהודה נראס שליט"א מח"ס קובץ ספרים בענייני כשרות
הרב יוסף חיים אסולין שליט"א דומ"צ מטעם הגר"נ קרליץ	הרב הלל מאירס שליט"א מו"צ ארגון הידברות	הרב יאיר אבו יצחק שליט"א דומ"צ שבט הלוי	הרב יהושע הלוי לוין שליט"א דומ"צ בבי"צ ירושלים	הרב כפיר ברוך דדון שליט"א מו"צ מבשרת ציון	הרב יצחק זאב רוזנבלם שליט"א דומ"צ בבי"צ נחליאל חיים	הרב עובדיה יוסף שליט"א מו"צ בית שמש

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