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A PROBLEM IN JEWISH DIVORCE LAW: AN ANALYSIS AND SOME SUGGESTIONS

One of the most vexatious problems of our time in Jewish family law is the inability of an observant Jewess to obtain a *get* (religious divorce) following a civil divorce. This problem, which is an old one, has come to the forefront in recent years as a result of decisions of the Courts in New York,¹ Pennsylvania² and Canada.³ These cases highlight attempts by one spouse, usually but not invariably the wife, who brought suit in civil courts to obtain a *get*.

In recent years there has been a proliferation of suggested solutions to this problem.⁴ One authority had attempted to resolve this problem as of 1969, on the theory that it is only a very small minority of observant women who are affected, since the non-observant Jewish women, constituting by far the majority who obtain civil divorces, are unmindful of the need of obtaining a *get* and will remarry without one.⁵ Whatever validity such view may have had in the past, it is totally at variance with the modern situation involving Orthodox Jews, and such fact has been accorded judicial recognition.⁶

Though the rabbis have shown a sincere concern for the plight of the Jewish woman unable to remarry for failing to obtain a *get*⁷ the Orthodox rabbinate has been quick to criticize the recent attempts by the Conservative rabbinate to ameliorate this problem through the modification of the *ketubah*.⁸

Notwithstanding an optimistic attitude for a practical and halakhic solution,⁹ nothing has been forthcoming from the Orthodox rabbinate, either here or in Israel. It is therefore not surprising that religious Jews have enlisted the aid of the civil courts in attempting to force a recalcitrant spouse either to give or ac-

cept a *get*. To date, however, there have been but two instances of minimal success. In one case¹⁰ the wife sued upon an agreement prior to marriage which provided that in the event of a civil divorce the husband will grant the wife a *get*. The court, however, refused to enforce such agreement because it held that civil tribunals are without authority to order one to follow the practices of his faith. These matters were dependent solely upon conscience and religious belief.

On the other hand, in *Koeppel v. Koeppel*,¹¹ the parties in a pre-annulment agreement had agreed that the husband, upon the civil dissolution of the marriage, would do the necessary to give his wife a *get*. In a suit by the wife to compel the husband to comply with the agreement, the court upheld the validity of the agreement as against constitutional objections.¹² However, the agreement was ultimately held to be too indefinite and hence unenforceable by the courts.¹³

In *Pal v. Pal*,¹⁴ the parties had stipulated prior to the civil divorce that they would submit themselves to rabbinical arbitration on the question of whether the husband should give a *get*. They also agreed that if the parties could not agree on the third member of the arbitration panel the court could do so. In the absence of agreement by the parties, the trial court chose the third member of the panel and directed the parties to submit to arbitration pursuant to their agreement. The court, on appeal, held that the lower court had no authority to convene a Rabbinical Tribunal, relying on the prior decision in *Margulies v. Margulies*.¹⁵

In the *Margulies* case, the husband stipulated in open court, after a civil divorce, to appear before a rabbi to be designated for the purpose of giving a *get*. The husband thereafter refused. He was held in contempt and fined for refusing to abide by his agreement. The court did not jail the defendant for contempt of court for failure to honor the stipulation because it was without power to direct the defendant to participate in a religious divorce. The court also stated that under Jewish law any *get* so given would be a nullity, having been given under duress. The court did, however, permit the fine to stand, on procedural grounds.

In a Canadian case, astute counsel argued that the terms of

the *ketubah* afforded a basis for a civil court to compel a husband to give a *get* after the civil dissolution of a marriage.¹⁶ Thus, it was contended that as with any other contract, a *ketubah* could be enforced by the courts. The lower court held that the *ketubah* constituted an implied undertaking by the husband to give a *get* when a civil divorce had been granted.¹⁷ Unfortunately, however, the decision was reversed on appeal.¹⁸

However, a husband seeking to compel a wife to accept a *get*¹⁹ was successful where a separation agreement was executed which made support and alimony conditional upon the wife accepting a *get*. The court upheld the separation agreement and refused to enforce the support provisions until the *get* was accepted.

The failure to obtain the aid of civil courts in attempting to compel the granting or acceptance of a *get* is, perhaps, as it should be. It is unfair to ask the civil courts to fill a vacuum created by Jewish religious law. The rejoinder by the civil courts in these cases might with some degree of justification be that they should not be burdened with problems caused by peculiarities of Jewish religious law.²⁰ Furthermore, there remains the weighty problem as to whether any *get* "given" or "accepted" under court compulsion would indeed be valid under Jewish law, as adverted to by the Court in *Margulies*.²¹ Although the Court erred in assuming that a *get* given under compulsion would *always* be invalid,²² there is no question that a serious issue is raised under Jewish law as to whether a *get* given under compulsion of a civil court would be valid.²³

Rabbi J. David Bleich has recently suggested that the unfortunate results discussed above may be avoided by advising parties who are involved in divorce litigation to execute a Jewish religious divorce prior to the entry of a civil decree.²⁴ This will, of course, eliminate much of the problem where the spouse who desires the *get* has enough leverage or bargaining power to compel the other spouse either to give or accept the *get* as a condition of consenting to the civil divorce. But such is not always possible. Thus, in situations where a spouse does not have the leverage or bargaining power, he or she may be faced with the civil dissolution of the marriage without having had the same

terminated religiously pursuant to a *get*. It is thus apparent that such solution, though indeed a worthy one, is not always workable.

Another recent suggestion is that of a proposed amendment to the Domestic Relations Law of the State of New York, prepared by Rabbi Judah Dick, Esq. This proposal in substance provides that a civil court may stay the entry of a judgment of divorce or granting of other relief in civil divorce litigation,

in favor of a party who unreasonably refuses to cooperate in the effectuation of a religious dissolution of a marriage solemnized by a clergyman in accordance with a religious faith which does not consider a civil divorce sufficient to permit remarriage of the parties under the laws of such religious faith.

While such provision would certainly go a long way towards solving the problem under consideration, it remains to be seen whether such provision, if passed by the legislature, can withstand a constitutional attack on First Amendment grounds.²⁴ Only a radical new approach will do. Or, to put the matter another way, only radical *old* approaches, some as old as 1,500 years, yet new in spirit, will suffice.

Any analysis of law in this area must commence with the discussion in *Ketubot*, p. 125, et. seq., dealing with the concept of *moredet*.²⁵ The *Mishnah* states the applicable rule as follows:

One who rebels against her husband has her *ketubah* diminished 7 Dinarim per week; Rabbi Yehuda says 7 Tarpeiken. To what degree is the *ketubah* diminished? To the full value of her *ketubah*. Rabbi Yosi says there is a constant diminishing forever, so that even if she were to inherit property from another source, her husband has a claim against it . . .²⁷

The Talmud states that a change was made in the *mishnah* rule stated above to the effect that an announcement was made on four consecutive Sabbaths that she would thereafter immediately lose her entire *ketubah*, if she did not cease her rebellion. It was also stated²⁹ that she was not given a *get* until a year had passed.³⁰

The Gemara thereupon asks:

What type of woman is in the category of *moredet*? Amemar says, it is the woman who says, I want to remain married, but I am rebelling merely to spite my husband. However, if she says he is repulsive to me, we do not force her. Mar Zutra has we force her.³¹

The interpretation of the last mentioned controversy has engendered much difficulty. Thus, Rashi and others, including Maimonides,³² interpret the view of Amemar as holding that in cases of spitework we apply compulsion to the wife to desist by diminishing her *ketubah*. However, in the case of *Ma'os Alai*, "we do not force her to remain with him, but he gives her a *get* and she goes out without the *ketubah*."³³

Maimonides puts the matter as follows:

A woman who refuses to have family relations with her husband, is a *moredet*. (In such circumstances) we ask her why she is rebelling? If she says it is because "He is repulsive to me" (*maastihu*) and I am unwilling voluntarily to engage in family relationships with him, we force him to divorce her immediately, for she is not as a slave that she should be forced to have intercourse with one who is hateful to her. And she goes out without a *ketubah* . . .³⁴

It is clear that such an approach goes far in equalizing the position of women and men, which indeed was the purpose of an enactment by Rabbenu Gershom. Thus, under Torah law, only the husband could give a *get* and such could be done against the will of the wife.³⁵ However, under a *takanah* of Rabbenu Gershom, a husband was henceforth prohibited from divorcing a wife without her consent.³⁶ It was pointed out by Rabbenu Asher³⁷ that a primary purpose of that *takanah* was:

when he (Rabbenu Gershom) saw how the generation was abusive of Jewish daughters insofar as divorcing them under compulsion, he enacted that the rights of women be equal to those of men, and just as a man divorces only from his own will, so too a woman might henceforth be divorced only willingly . . . (emphasis supplied).

Admittedly, the view of Maimonides and of the other authorities referred to above went one step beyond Rabbenu Gershom. Thus, under the view of Maimonides there would now be almost

complete equality between the sexes with regards to a religious divorce. A woman could not be forced to accept a *get*; she could in a variety of circumstances compel her husband to give a *get*.

This approach would, of course, go a long way towards ameliorating the problem which presently concerns us. Thus, in situations involving a civil divorce obtained by either party, and where it is claimed by the wife that further family life with her husband is hateful to her (*Ma'os Alai*), the husband could be forced to give her a *get*.

Unfortunately, the view of Maimonides in this matter has been almost universally rejected. Rabbenu Asher points out that Rabbenu Tam and others disagreed with Maimonides and he adds:

and the views of Maimonides are even more perplexing . . . how can one justify forcing a husband to give a *get* and to set a married woman free (merely because she is not willing to have family relationships with her husband)? Let her not have relationships with him and let her remain an eternal widow, for she is not commanded to beget children and merely because she desires to follow the fancy of her heart and has cast her eyes upon another and desires him more than the husband of her youth shall we give in to her lusts, and force her husband who loves the wife of his youth to divorce her. God forbid.³⁸

Thus, some authorities, including Rabbenu Tam, maintain that a husband is never forced to give a *get* on the ground of *Ma'os Alai*.³⁹ Other authorities follow the view of Maimonides and require a husband to give a *get* where the wife is able to give adequate substantiation, *Amatta*, for her request for a *get* on this ground.⁴⁰

It would appear that in circumstances where it was the husband who sought and obtained a civil divorce and refused to give a *get* to his wife, that such would be a sufficient substantiation *Amatta*, to force him to give a *get* according to Maimonides and others referred to above.⁴¹ However, it is clear that even in such circumstances, Rabbenu Tam and his followers would not agree and would not force the husband to give a *get*.⁴²

Furthermore, if it were the wife who sought and obtained a civil divorce, her request for a *get*, would be suspect since there exists the possibility that she seeks the divorce, both civil

religious, merely because of her desire to loosen the shackles of her marriage in order to marry another. In such circumstances, there would be no adequate substantiation, *Amatta*, for any claim of *Ma'os Alai*. Thus, even under the views of those following Maimonides, she could not force her husband to give her a *get*, in the absence of other grounds justifying such compulsion.⁴³

In such circumstances the only solution for the plight of a wife must be for total acceptance of the view of Maimonides, even in the absence of any *Amatta* whatsoever, and regardless of whether the wife or the husband initiated the divorce proceedings. Thus, under any circumstances, where the parties are civilly divorced, and the marriage is in effect dead, the wife should be able to obtain a *get* on the ground of *Ma'os Alai*, in accordance with the view of Maimonides. It is the total acceptance of this view, even in the absence of *Amatta*, that will prevent injustice and present a viable solution to the problem under consideration.⁴⁴

However, even in the absence of such acceptance of Maimonides' view at the present time, there exists yet another viable alternative solution to this problem. It is most interesting to note in this regard that the precise problem of recourse by a wife to civil courts to compel the giving of a *get* by her husband may have been presented in Gaonic times, and may have been solved by them. In the Talmudic discussion relating to *moredet*,⁴⁵ it was concluded therein that in addition to proclaiming for four consecutive weeks regarding the loss of her *ketubah*,⁴⁶ a period of time was established of one year, during which the *moredet* was not given a *get*, in the hope that she would repent.⁴⁵

It was on the basis of this discussion that a *takanah* was enacted by the Gaonim, perhaps as early as the middle of the seventh century that where a wife refused to remain married to her husband, the husband would immediately be forced to give her a *get*.⁴⁶

Consider the following responsum of Sherira Gaon:⁴⁷

You have asked with respect to a woman who is living with her husband, but who states to him "I do not wish to live with you," is the

husband obligated to give her aught of her *ketubah*; is this within the category of *moredet*?

The Gaon answers:

We know that according to the established rule, a man is not forced to divorce his wife at the request of the latter except in those instances in which our rabbis decided that it was permissible so to do. Thereafter they enacted a *takanah* that it would be proclaimed for four consecutive weeks and she was warned through *Bet Din* that she would lose her entire *ketubah*, and it was then enacted that where she seeks a divorce that she be required to wait twelve months, perhaps she will relent, and if she does not so relent after twelve months, the husband is forced to give a *get*.⁵⁴

The Gaon continues:

But when the Rabbanan Savoraim (predecessors of the Gaonim—followers of the Amoraim 500 C.E.-689 C.E.?) saw that Jewish women go and attach themselves to the Gentiles, in attempting to force their husbands to give a *get* and sometimes the latter gave *Glittin* under duress and grave questions arose as to whether they are properly being forced to give a *get* or improperly, and dreadful consequences ensue, it was enacted by (earlier Gaonim) . . . that the husband is forced to give a *get* where the wife seeks a *get* . . . and we follow this *takanah* more than 300 years later, and you do the same.

In the various versions of the *takanah*, two reasons are ascribed therefor. One is that by Sherira, that Jewish women would enlist the aid of Gentiles to procure a *get*.⁵⁵ According to others, it was to prevent Jewish women from rebelling against Judaism, apparently both in terms of licentiousness and promiscuity, and also in terms of assimilation.⁵⁶

The concept of enlisting the aid of Gentiles in order to procure a *get*, has generated some controversy. One interpretation of such concept could be that, *as today*, Jewish women enlisted the aid of Gentile courts in an attempt to obtain redress and to force their husbands to give a *get*, thereby creating the grave halakhic problem of a *get* under compulsion, with respect to a *get* so obtained.⁵⁷ However, the generally accepted view is that what is intended was not recourse to Gentile courts, but to Gentile strong arm men, who forced the husband to give a *get*, with the afore

said halakhic problems regarding a *get* under compulsion thereby created.⁵² Of equal interest is the fact that such *takanah* was apparently widespread in Gaonic lands until the 12th century.⁵³ Among others it was accepted by Alfasi⁵⁴ and by Rabbenu Gershom.⁵⁵

The importance of this Gaonic *takanah* was that it created full equality between a husband and wife regarding the giving of a *get*. Thus, just as the husband, under Torah law, could divorce a wife *against her will*, so too under this *takanah*, a wife could force her husband to divorce her *against his will* under compulsion of rabbinic courts.

It must, in candor, be admitted that this *takanah* met with strenuous opposition especially on the European continent. However, it must also be noted that for the most part such opposition was predicated not upon any lack of power on the part of the Gaonim to enact such *takanah*, but rather upon whether it was wise, as a policy matter, so to do. Thus, the question was not the competency of the Gaonim in enacting such *takanah*, but of their wisdom in so doing.

The death knell of the *takanah* appears to have been finally rung by Rabbenu Tam, who declared that the Gaonim were without authority to enact it.⁵⁸ Thus, according to Rabbenu Tam, the power to terminate a valid marriage appertained only to the Talmudic sages; the Gaonim possessed no such power.⁵⁷

However, other giants of Torah, while disagreeing with the exercise of the Gaonic discretion in enacting this *takanah*, never doubted their power to do so. Thus, Nachmanides states:⁵⁸

. . . and God forbid were I to disagree with this *takanah* of the Gaonim, for who am I to validate and to change that which was practiced by the Gaonim of the *yeshivot* who were my rabbis. And not only that, I disagree strongly with those who say that it is not fitting to follow this *takanah* and to go only according to the Talmudic rule. No, it is right to listen to them and to follow their *takanah*, but he who exercises stringency in this matter, does not lose . . . And now it is proper to exercise discretion and not to follow this *takanah*, because it is invalid in view of the licentious nature of this generation.⁵⁹

Rabbenu Asher, as well, recognized the authority of the Ga-

onim to enact such a *takanah*, contrary to Rabbenu Tam, on the basis that all who marry do so in accordance with the will of the rabbis, and that the Gaonic rabbis acted within their power in annulling a marriage, where the wife wanted a divorce.⁶⁰ Rabbenu Asher acknowledged, however, the strenuous opposition of Rabbenu Tam and rejected such *takanah* on two grounds; although the circumstances in Gaonic times required such *takanah*, the *takanah* did not gain general acceptance elsewhere⁶¹ and that this *takanah* was enacted as an emergency measure for a finite period of time and not for future generations.⁶²

It is not and cannot be contended here, in view of its almost universal rejection that this *takanah* of the Gaonim has validity today. It is contended, however, that now is the time for the enactment of a similar *takanah* by our rabbis, in situations where the husband refuses to give a *get* to his wife after a civil divorce. Under such a *takanah* the husband would be compelled to give his wife a *get* notwithstanding who initiated the civil divorce proceedings.

It is suggested that *all* of the reasons which have been cited for the rejection of such type of *takanah* are no longer valid.

Turning first to the issue raised by Rabbenu Tam of the competency of present-day rabbis to enact such type of *takanah*, it must be noted that other Torah giants disagreed with him. They held it was within the rabbinic power—even after Talmudic times—to enact such type of *takanah*. In addition, the reason that Rabbenu Tam and others hesitated to legislate and enact *takanot* effecting the dissolution of a valid marriage may have been because of the breakdown of a central rabbinic authority, and the rise of scattered communities in the Diaspora, each with its own local rabbinic authority, unlike the situation prevailing in Gaonic lands. It follows that such breakdown of authority in connection with any such type of *takanah* leads to the horrid spectre that under the laws of one community a marriage might be deemed dissolved, but that under the laws of another community, not accepting such *takanah*, the marriage would be deemed to be in full force and effect.⁶³ However, if this condition is no longer prevalent then there is no reason for failing to enact a *takanah*. Thus, today in the State of Israel, with what can be

come a centralized Rabbinate for all *Klal Yisrael*, i.e., the Chief Rabbinate, any objection regarding the local nature of the *takanah* falls away.⁶⁴ Thus, in Gaonic lands, such *takanah* was in effect under a centralized rabbinate for hundreds of years without objection. So too, in our days, the enactment of such *takanah* by a centralized Rabbinate in Israel must similarly be without objection.

Furthermore, Rabbenu Tam's objection has no validity today. Thus, under Rabbenu Tam's view, the Jewish legal system exists today both in Israel and in the Diaspora under a rule of "no power" with respect to legislation in the area of marriage dissolution. It is submitted that such goes contrary to every notion underlying a viable legal system, i.e., that it has the inherent power to legislate and regulate every area within its concern. If the Jewish legal system has rules relating to marriage and divorce, and if that system gives the rabbis the right to legislate generally, *then it follows that they must have that right in areas of marriage annulment as well*. There is no rational reason whatsoever for granting the rabbis legislative power in some areas and depriving them of that power in others. It must therefore be concluded that such right of making a *takanah* of the type under discussion exists today.

The wisdom of making any such *takanah*, as is here discussed is, of course, another matter. It must be noted that the social conditions existing in the time of the Gaonim, which apparently made such *takanah* necessary, have their parallel today. There presently exists the grave problem resulting in assimilation, and licentiousness,^{64a} as in Gaonic times, arising from the inability of a woman to obtain a *get* after the civil termination of her marriage. This situation is prevalent both in America⁶⁵ and in Israel.⁶⁶

As pointed out by one author, the question is no longer so much one of *Agunah*, but rather the everyday matter of women so situated remarrying without obtaining a *get*. Consequently, far from decreasing the problem of illegitimacy, under the view of Rabbenu Tam and others who opposed the Gaonic *takanah*, the net result has been to increase illegitimacy.^{66a}

Secondly, who are these women who seek religious divorces?

Are they the ones referred to by Rabbenu Asher as being lustful and licentious and seeking to break the bonds of marriage "to the husband of their youth?" Or are they, for the most part today, observant, yeshiva educated women, who were unfortunate in having entered into an unhappy marriage?

The ends of justice cry out for the enactment of a *takanah* by the Chief Rabbinate of Israel along the lines already outlined by the Gaonim.⁶⁷

It is not contended that it is timely or proper to enact a *takanah* even as broad as that already long-enacted by the Gaonim, which would permit the court to compel the husband to give a *get* whenever so desired by the wife. It would seem that for present purposes it would be sufficient if such *takanah* merely enacted, as aforesaid, that in cases where a marriage has been civilly dissolved outside Israel, that the rabbinic court in Israel could force the husband to give a *get*, if it could acquire jurisdiction over him; and if the husband were outside Israel, or if while in Israel, he steadfastly refused to comply with an order declaring him obligated to give a *get*, as occurs even today in Israel,⁶⁸ that it could simply declare the marriage dissolved or annulled.⁶⁹

This would eliminate to a large extent in Israel and elsewhere the problems engendered by recalcitrant husbands who refuse to give a *get*. It would also materially aid the position of women caught in an unfortunate trap.

There is another compelling reason why such a *takanah* should be enacted. A husband who refuses to give a *get* after a civil divorce is usually motivated by ill-feeling and spite. There is no desire to rescue a marriage "to the beloved of his youth." *Such persons should not and must not be permitted unfairly to utilize the Halakhhah as a means for perpetuating such spite, and the ruination of the lives of their former wives.*

In conclusion, it must be admitted that the consequences of rabbinic inaction in this area have oft-times been tragic. The problem is a serious one, and it is to the resolution of the same by the duly constituted rabbinic authorities here and in Israel to which this article is respectfully dedicated.

APPENDIX

*A review of the decided cases in Israel reveals the necessity for some such liberalization of the Halakhhah as is here discussed, either by way of total acceptance of the view of Maimonides as to *Ma'os Alai* or, preferably, by way of enactment of a *takanah* as outlined above. The Gaonic *takanah* under discussion has no present day validity. As such it cannot be relied upon by the Israeli Rabbinical Courts to aid a wife to obtain a *get* from her recalcitrant husband.

The concept of *Ma'os Alai* has fared somewhat better in the Israeli Courts. However, even this approach, where accepted, is unavailing when the husband refuses to give a *get* despite rabbinic coercion.

There have been instances of persons spending years in jail rather than give a *get* (n. 62, *in/ra*). In one case, the husband, whose *get* was sought, was already in jail, serving a 14 year sentence on a charge of rape. Upon his wife's suit for a *get*, the husband was ordered to give a *get*, but refused. Upon the further petition of the wife, the court held that she was entitled to receive a *get* on the grounds of *Ma'os Alai*. There was clear substantiation (*Amatta*) that she had no ulterior motive for seeking a divorce. The court concluded that the use of physical force was in order to compel the giving of a *get*. However, under the law in Israel, the sole means of compulsion available to the court was to place the husband in jail until he consented to give the *get*. But since the husband was already in jail, such means of compulsion was inappropriate. In the absence of any other remedy for the wife, the court plaintively concluded:

And now we turn to those to whom this matter is under their jurisdiction, to change the rule of compulsion with regard to those already in jail, to permit corporal punishment as in the Talmud, or solitary confinement, or the like, so that the daughters of Israel not remain eternal widows.

8 *Piskei Din* 124, 128

(Tel Aviv-Jaffa, Rabbinical

District Court, 1970)

The Israeli Courts have unfortunately refused to apply the view of Maimonides as to *Ma'os Alai* where no clear substantiation or *Amatta* existed. 8 *Piskei Din* 124 (Tel Aviv-Jaffa Rabbinical District Court, 1970). On the other hand, the courts have sometimes used this ground together with other grounds to require a husband to give a *get*, especially where such *Amatta* exists. 3 *Piskei Din* 3 (Supreme Rabbinical Court, Jerusalem, 1955); 5 *Piskei Din* 154 (Haifa Rabbinical District Court, 1962); 8 *Piskei Din* 124, *supra*; 9 *Piskei Din* 171 (Tel Aviv-Jaffa Rabbinical District Court, 1973).

In this context, the courts have not limited the concept of *Ma'os Alai* to instances where the wife states that *marita'* relations with her husband are repugnant to her, as would appear necessary from the literal reading of Maimonides' view quoted above, but has deemed it sufficient if she indicates hatred or intense dislike of her husband. 9 *Piskei Din* 171, 182, *supra*; 5 *Piskei Din* 154, 157, *supra*; 8 *Piskei Din* 124, 126, *supra*. But for contrary view, see 9 *Piskei Din* 171, 181, *supra*.

This approach has been taken as to parties who are Yemenites, on the theory that the Yemenites generally follow the view of Maimonides on most matters, including this one. 9 *Piskei Din* 171, *supra*, and concurring opinion at 177, 184. Other courts, however, have disagreed and have ruled that under no circumstances will a husband be forced to give a *get* on the ground of *Ma'os Alai*.

See 9 *Piskei Din* 94 (Supreme Rabbinical Court, 1973), where husband was claimed to be impotent. This was denied by husband, and the wife claimed *Ma'os Alai*. Although the Court ordered the husband to give a *get*, it would not force him to do so; 7 *Piskei Din* 201 (Supreme Rabbinical Court, 1968), Yemenite couple, married in Yemen, husband married second wife, first wife wants *get*; Court held that husband is obligated to give *get*, but Court will not force him to do so.

It has also been stated that there may not even be an obligation so to do in such circumstances, but husband is merely advised to give a *get* where the wife claims *Ma'os Alai*, 7 *Piskei Din* 201, 204, *supra*, view of Rabbenu Tam and others; 7 *Piskei Din* 3 (Supreme Rabbinical Court, 1967).

Some courts have raised the question of whether even Yemenites follow Maimonides' view as to forcing a husband to give a *get* on the ground of *Ma'os Alai* in the absence of an *Amatala*. See 3 *Piskei Din* 201, 205-206 (Supreme Rabbinical Court, 1959). Similarly a court refused to force husband to give a *get* though the parties were Yemenites and were married in Yemen on ground of *Ma'os Alai*, where the Lower Court found no *Amatala* existed. The Court pointed out that even among Yemenites a dispute existed as to whether Maimonides' view was followed. See also 9 *Piskei Din* 171, 184, *supra*.

NOTES

1. *Rubin v. Rubin*, 75 Misc. 2d 776, 348 N.Y.S. 2d 61 (Family Ct., Bx. Co., 1973); *Koepffel v. Koepffel*, 138 N.Y.S. 2d 366 (Sup. Ct., Queens Co., 1954); *Pal v. Pal*, 45 A.D. 2d 738, 356 N.Y.S. 2d 672 (2nd Dept. 1974); *Margulies v. Margulies*, 42 A.D. 2d 517, 344 N.Y.S. 2d 482 (First Dept., 1973).

2. *Price v. Price*, 16 Pa. D. & C. 290 (1939).

3. *Morris v. Morris*, 36 D.L.R. 3d 447 (Manitoba, Q.B. 1973) *reversed*, 42 D.L.R. 3d 550 (Manitoba, Ct. App. 1973) *applic. lv. app. granted*, 51 D.L.R. 3d 77 (Manitoba, Ct. App. 1974).

4. See Falk, *The Divorce Action by the Wife in Jewish Law*, Chapter I (Institute for Legislative Research and Comparative Law, Jerusalem, Israel 1973) for extensive history of the various proposed solutions; See views of Rabbi Henkin, I Noam 70 (1958); Epstein, *L'Shialath Haagunah* (New York, 1940); Freiman, *Seder Kidushin Yenesuin* (Mosad Harav Kook, Jerusalem 1945); Berkovitz, *Tnai Benesuin Uveget* (Mosad Harav Kook, Jerusalem 1967).

5. See Kasher, "In the Matter of Tnai Benesuin," 12 Noam 339, 351 (1969). That authority takes comfort in the fact that "only a small percentage of women

remain agunot."

6. See *Rubin v. Rubin*, n. 1, *supra*, where the Court states: "With the sociological reality of a tremendously increased divorce rate upon us, a phenomenon which cuts across all levels of society, Orthodox Jews find themselves in matrimonial litigation more often and courts are called upon to weigh the impact of ecclesiastical laws which are often made crucial by contractual acts of the parties."

7. For fuller discussion see references at n. 4, *supra*.

8. Lamm, "Recent Additions to the *Ketubah*, A Halakhic Critique," *TRADITION*, Vol. 2, No. 1, Fall 1959, p. 93. For a serious legal criticism see Levin and Kramer, *New Provisions in the Ketubah, A Legal Opinion*, (Yesh. Univ., 1955).

9. Lamm, *ibid.*, p. 118, where that learned author states: "We can only hope that the apparent failure in practice of the Conservative venture will in some measure make up for the lack of foresight in initiating it. And at the same time, we earnestly pray 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." Apparently, it has not.

10. *Price v. Price*, *supra*, n. 2.

11. *Supra*, n. 1. See also *Waxstein v. Waxstein*, *New York Law Journal*, 8/24/76 (Sup. Ct. Kings County). Justice Heller granted specific performance of the provision in the separation agreement requiring the parties to obtain a *get*.

12. In so holding the Court stated: "Defendant has also contended that a decree of specific performance would interfere with his freedom of religion under the Constitution. Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence (paragraph Second of the complaint not denied in the answer). His appearance before the rabbinates to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.

"Defendant's statement that the ceremony before the rabbinates takes from two to two and one-half hours is not worthy of discussion. That is not much out of a lifetime, especially if it will bring peace of mind and conscience to one whom defendant must at one time have loved."

13. *Koepffel v. Koepffel*, 3 A.D. 2d 853, 161 N.Y.S. 2d 694 (2nd Dept. 1957).

14. *Supra*, n. 1.

15. *Ibid.*

16. *Supra*, n. 3.

17. See Falk, "Jewish Divorce in a Canadian Court," 9 *Israel Law Review* 440 (1974).

18. *Supra*, n. 3.

19. *Rubin v. Rubin*, *supra*, n. 1.

20. Of course it can and has been argued that the giving of a *get* is in a real sense a private civil act on the part of the husband and that it should not be

categorized as essentially religious in nature. Hence, as with any other contract which does not contravene public policy, it is entitled to enforcement in the courts, despite the constitutional arguments referred to in the text and cases. See Falk, n. 17 *supra*; Note, "Enforceability of Jewish Law in Secular Courts; It's Kosher But is it Constitutional," 71 *Mich. L.R.* 1641 (1973). It is suggested, however, that this does not detract from the underlying unfairness in requesting civil courts to solve the problems created by Jewish Law.

21. *Supra*, n. 1.

22. See *Rubin v. Rubin*, n. 1, where Judge Stanley Gartenstein, in a scholarly opinion, points out a variety of circumstances wherein a religious court could compel one party to "give" or "accept" a *get*.

23. See 5 *Encyclopedia Talmudith* 698, "Get Meusah" (1972). It is set forth that as a general rule a *get* given under compulsion of a Jewish Court is valid, if Jewish Law required the husband to give the *get*, (p. 698, n. 6) but if not so required by Jewish Law, the *get* may or may not be valid under the differing views of various authorities (p. 702, ns. 49-58). On the other hand, the general rule is also stated that if a Gentile forced a Jew to give a *get*, it is invalid, even if otherwise required by Jewish Law, but that it is disputed as to whether such invalidity is Toraitic or rabbinic in nature (p. 701, ns. 36-46). But if a Gentile court merely compels him to obey the commands of a Jewish court, and to give a *get* in accordance with the directives of a Jewish court, the *get* is valid according to some views and invalid according to others (p. 699-701, nn. 28-33). It therefore appears that grave problems as to the validity of the respective *gittin* are presented in each of the cases referred to above. Thus, in the types of cases exemplified by *Prince and Koepfel*, *supra*, it would surely appear that the validity of any *get* so given would be questionable since it is the Gentile court which is directly ordering the giving of a *get*. The same would apply perhaps to *Margulies* type situation where a husband had agreed in court proceedings to give a *get* and the court is requested to enforce that agreement. Somewhat better would be the case in a *Pal* type situation where the court is merely compelling the parties to submit to rabbinic arbitration and where ultimately if the latter body concluded that the husband give a *get* the civil court's function would be to merely enforce the decision of the rabbis. This is parallel to the case of a Gentile court requiring a husband to adhere to the command of a Jewish court, referred to above. But, as noted, the validity of the *get* even in this instance is not free from doubt. For further discussion of this matter see Rabinowitz-Teomim, 1 *Noam* 287 (1958).

24. *New York Law Journal*, July 5, 1974 (p. 4, col. 8).

25. Since under the proposed amendment there is no direct compulsion by the civil court upon either party, to "give" or "accept" a *get*, any pressure being at most indirect, it would appear that a *get* so "given" or "accepted" would not be invalid under the rules discussed in n. 23, *supra*.

26. The rebellious wife, see *Ketubot*, p. 125. Rav Huna says, she rebels by refusing to have normal family relations. Rabbi Yosi ben Rabbi Hanina says she rebels by refusing to work.

27. *Ibid*.

28. Instead of a gradual diminishment thereof as stated in the Mishnah, *Ketubot*, p. 126 and Rashi, *ibid*.

29. *Ketubot*, p. 127.

30. In the hope that she would cease her rebellion, Rashi, *ibid*.

31. *Ketubot*, p. 126.

32. Rashi, *ibid*; Maimonides, *Laws of Ishut*, chapter 14, sec. 8; Rashbam, quoted by *Shilay Hagiborim*, on *Alfasi, Ketubot*, p. 53 subd. a. See Zilberg, *Personal Status in Israel*, p. 110, n. 47 (Jerusalem, 1965).

33. Rashi, *Ketubot*, p. 126.

34. *Laws of Ishut*, chapter 14, sec. 8. See Appendix for view that Maimonides' ruling is not limited to abhorrence of sexual relations, but includes any instance where the wife indicates intense dislike or hatred of her husband.

35. *Baba Batra*, p. 333, and Rashbam, *ibid*, d.h. "We write a *get* for the husband."

36. Eidelberg, *Tshuvot Rabbeinu Gershom Meor Hagolah* (Yeshiva U., 1956), pp. 19-21.

37. *Responsa*, no. 42, subd. 1.

38. *Responsa*, no. 43, subd. 8.

39. Rabbenu Tam, *Sefer Hayashar*, sec. 599 (Shai Publications, 1959); *Tur, Even Ha'ezzer*, ch. 77, and Karo, *Bais Yosef, ibid*; *Schulchan Arukh, Even Ha'ezzer*, ch. 77, subds. 2-3 and view of Ramah subd. 3; see also Zilberg, n. 32 *supra*, pp. 112-117. For further discussion of view of Rabbenu Tam and manner in which he interprets dispute of Amemar and Mar Zutra regarding *Ma'os Alai*, see *Sefer Hayashar, ibid*, and Tosafot, *Ketubot*, pp. 126-127, d.h. "But if she says *Ma'os Alai*." For further discussion of this view see decisions of Israel Rabbinical Courts, Appendix, *infra*.

40. *Hagaot Maimonit*, Maimonides, *Laws of Ishut*, chapt. 14, sec. 8: "We don't accept her claim (of *Ma'os Alai*) unless she gives a substantiation to her claim, which appears plausible to the sages of the place as to why she is unable to stand him (*Ma'os Alai*), that she would otherwise remain with him except for this matter that she claims causes him to be repulsive to her."

The requirement that an adequate substantiation (*Amaita*) be furnished is clearly intended to eliminate the possibility raised by Rabbenu Asher that the wife seeks the divorce merely because she has fallen in love with another and is using the claim of *Ma'os Alai* as a pretext for so doing. In fact, he recognizes that in certain circumstances, an adequate substantiation will suffice. See *Responsa*, no. 43, subd. 8. See Zilberg *supra*, n. 32, pp. 116-117, who suggests that in essence the difference between Maimonides and Rabbenu Asher is one of degree, i.e., according to Maimonides we must take the woman's word that her husband is repulsive to her (*Ma'os Alai*) and according to Rabbenu Asher we are obligated in the first instance to ascertain that she is not acting from an ulterior motive, and is utilizing the claim of *Ma'os Alai* as a pretext to be rid of the husband of her youth. Zilberg thus concludes that where it is apparent that no such motives are present, both would hold that the wife is entitled to a *get* as a matter of right and that the husband may be forced to give

same, in accordance with Maimonides' views.

41. *Ibid.*

41a. This rule would apply where husband, despite civil divorce, still indicates desire to live with his wife. But when he refuses to continue the marital relationship, he can be forced to divorce her. See *Shulchan Arukh, Even Ha-ezer*, ch. 154, subd. 3.

41b. See Appendix.

42. See Appendix for discussion of cases indicating that even in Israel, which of course has an organized *Bet Din*, unlike America, similar problems exist. Thus, even in Israel, wives are often unable to obtain divorces on the ground of *Ma'os Alai* where no *Amatta* is shown, and even where such is shown, the courts still refuse to force the giving of a *get* in accordance with the view of Rabbenu Tam. Here in America, we are faced with the additional problem of the lack of an organized *Bet Din* with coercive powers. In addition there is also the problem of whether American secular courts could constitutionally enforce a rabbinic order to give a *get* and whether any *get* so given would be valid under Halakha. It is for these reasons that the suggestions made in text *infra*, regarding the use of the *takanah*-making power of the rabbis to alleviate this problem, merit serious consideration both here and in Israel.

43. *Supra*, n. 26 *et. seq.*

44. *Supra*, n. 28.

45. *Ketubot*, p. 127, and Rashi *ibid.* See Maimonides, *Laws of Ishut*, ch. 14, secs. 9-10. Maimonides applies this rule to *moredet* as opposed to *moredet* on ground of *Ma'os Alai*. See n. 48, *infra*.

46. For the various versions of this *takanah* see Tykocinski, C. *Takanoth Hagoanim*, chap. 1, (Sura, Jerusalem and Yeshiva U.—N. Y., 1960). That author concludes that the subject *takanah* may have been enacted as early as 651 C.E. but that in all probability its actual date of enactment was between 660-690 C.E. *Ibid.*, at p. 23.

47. Tykocinski, *ibid.*, at p. 15; Sherira was born 906 C.E. and died 1006 C.E.

48. It is apparent that the Gaonim construed the Talmudic discussion relating to the 12 month waiting period referred to in n. 45, and 29-30, *supra*, to mean that under the Talmudic view the husband was required to give a *get* after 12 months. Those authorities, referred to in n. 39 *supra*, who hold that a husband is never forced to give a *get* in these circumstances, consider the rule regarding the 12 month waiting period as applying only where the husband is desirous of giving a *get*. See *Chidushei Ramban*, attributed to Rashba in which he states that the Talmudic authorities never enacted or permitted such *takanah* regarding forcing the husband to give a *get* after the said 12 month period. *Ketubot*, p. 110, d.h. "And we find in *Jerushalmi*." Maimonides, similarly, did not follow the Gaonic view in this matter. Despite his liberal approach where the wife sought a divorce on the grounds of *Ma'os Alai*, where a divorce was sought by her out of spite, she would not be entitled to force her husband to give a *get*. In such latter circumstances, the 12 month period was merely to permit her an opportunity to relent, but did not afford her any rights to demand a *get*, unlike the views of the Gaonim. See Maimonides, *Laws of Ishut*,

ch. 14, sec. 10, and n. 45 *supra*. But see Tykocinski, p. 23, who points out that Sherira's interpretation of the 12 month period, and whether under Talmudic Law a husband was forced to give a *get* after such period, *must have been supported by tradition*.

49. Shades of today; the more things change, the more they remain the same.

50. See n. 46, *supra*.

51. See n. 23, *supra*.

52. See Tykocinski, pp. 25-26, n. 46, *supra*; Elon, 2 *Mishpat Ivri*, p. 542, n. 60.

This view is predicated on the ground that Mohammedan courts in the Gaonic period had no jurisdiction over Jewish divorce and would not have been in a position to force the giving of a *get*.

53. Tykocinski, n. 46, *supra*, p. 26.

54. *Ketubot*, p. 53. Alfasi states: "And we require her to wait 12 months for her *get* and during this period she receives no support from her husband. That is the Talmudic rule, but today *Bbai Dinah T'mituta* (for explanation of these terms see Assaf, *Tkufath Hagoanim*, Jerusalem 1955; *Sefer Meivot* was a Halakic work of the Gaonic period) this is the rule with respect to a *moredet*. If she says, 'I don't want this person, give me my *get*,' we give her a divorce immediately."

See Zilberg, n. 32, *supra*, at p. 111, who equates this view with that of Maimonides with regard to *Ma'os Alai*. It is suggested that such is an error since the view of Alfasi is broader in scope and is predicated on the Gaonic *takanah* whereas the view of Maimonides is based on his interpretation of the Talmudic text discussed in text at n. 32, *supra*. Maimonides apparently rejected this Gaonic *takanah*. See n. 61, *infra*. To the same effect see *Hagoth Hagrah, Shulchan Arukh, Even Ha-ezer*, sec. 77 subd. 32, and 9 *Piskei Din* 171, 182 (Tel Aviv-Jaffa Rabbinical District Court, 1973). For further discussion see I. Schipanski, "Tkufath Hagoanim," *Hadaron*, no. 24, p. 157, ns. 146-147 (Tishrei 1967). The view put forward by Rabbenu Tam in *Sefer Hayashar* sec. 599, that Alfasi never permitted the forcing of a husband to give a *get* but that the rule stated by him applies only where he does so from his own free will is questionable since it is clear that Alfasi is relying on the Gaonic *takanah* and was so understood by many others, including Nachmanides in *Milchemet*, on Alfasi, *Ketubot*, p. 53. See n. 59, *infra*.

55. *Hagoth Harosh, Ketubot*, sec. 35, p. 246; Eidelberg, *Tshuvot Rabbeinu Gershom*, sec. 40, pp. 110-112.

56. *Sefer Hayashar*, sec. 599.

57. *Ibid.*, "... but to permit (marriage on the basis of) an invalid *get*, we have no such power, from the days of Rav Ashi until the days of the *Mesilah*..."

58. *Chidushei Ramban*, attributed to Rashba, *Ketubot*, n. 48, *supra*.

59. See also *Milchemet*, n. 54, *supra*, to same effect. Nachmanides gives short shrift to the argument that this *takanah* was intended by the Gaonim who enacted same, only for their own generation, by pointing out that it was still in effect in the days of Alfasi, some 500 years later. Nachmanides states:

Thus, Rabbenu Hagadol (Alfasi) knew of this *takanat* Hagaonim more than all of us, and from his words it is apparent that for all generations it was enacted . . . But they in truth enacted same for future generations and it was followed until the days of Rabbenu (Alfasi) approximately 500 years, and this *takanah* remained in effect among them as is known from their Responsa and it is also found in the early halakhot of Rabbi Shimon Kiara, and in all the writings of the early Gaonim as well as the later ones. And they knew what they enacted. However, he who desires to be stringent in not forcing the giving of a *get* in accordance with the Talmudic rule will not lose, and a blessing will come on him."

For further discussion see Schipanski, n. 51, *supra*, pp. 154-157.

60. Responsa, no. 43, subd. 8. For further discussion of this concept in another context see Rothkoff, "Annulment of Marriage Within the Context of Cancellation of the *Get*," *TRADITION*, vol. 15, nos. 1-2, p. 173 (Spring-Summer 1975).

61. Responsa, *ibid.* See also Maimonides, *Laws of Ishut*, chapt. 14, sec. 14, who, in apparent reference to this *takanah* states:

"And the Gaonim stated that they had in Babylonia different customs regarding a *moredet*. But those customs did not gain wide acceptance in Israel, and many and great disagreed with them in most places. And in accordance with the Talmudic rule it is proper to judge and decide." See n. 54, *supra*.

62. Responsa, n. 60, *supra*. But see n. 59, *supra*, for contrasting view of Nachmanides. Rabbenu Asher states:

" . . . This *takanah* was only for that generation, for it appeared to them necessary in view of the condition of the Jewish women. But now it is just the opposite, the women in this generation are loose, and if a woman could escape her husband merely by saying 'I don't want him' there will not remain a daughter of Abraham who will remain married to her husband, but rather they will lust after another and will rebel against their husbands. It is therefore best to eliminate such compulsion."

63. For further discussion and analysis see Elon, *Encyclopedia Judaica*, "Takanot," vol. 15, pp. 722-728; Elon, 2 *Mishpat Ivri*, pp. 700-704.

64. See to same effect Elon, *Encyclopedia Judaica*, *ibid.*, pp. 727-728, *Mishpat Ivri*, *ibid.*, pp. 711-712.

64a. See Berkovits, n. 4, *supra*, pp. 1-2.

65. See n. 6, *supra*.

66. See Falk, n. 4, *supra*, p. 32. As pointed out by that author, Israeli Rabbinic courts have the power to compel the giving of a *get* by a recalcitrant husband when called for by law, by means of imprisonment or fine or both. Such means of compulsion are, of course, not equally available to Rabbinic courts in the Diaspora. However, even such means of compulsion are far from effective. See n. 68, *infra*, and Appendix.

66a. Berkovits, n. 4, *supra*, pp. 161-162.

67. This suggestion is far from novel. There have been such suggestions in Israel and elsewhere. See Falk, n. 4, *supra*, p. 32. For further discussion see Freiman, n. 4, *supra*, pp. 385-397, and Berkovits, n. 4, *supra*, ch. 4, and specifically pp. 141-164. Both authors point out that the variety of opinions in this

area itself supports the position that any such *takanah* can be fully justified by competent medieval rabbinic authority, if, in fact, any such justification is needed. It is the opinion of this writer that such justification on the basis of medieval authorities is not needed. The Gaonic *takanah* under discussion and its validity for 600 years and its acceptance in principle by Nachmanides and others provide sufficient authority for the enactment of such *takanah*. If no such authority existed could the Gaonim have enacted such *takanah*? On the other hand, the fact that they who were the first carriers of the post-Talmudic tradition so acted provides, in and of itself, and contrary to Rabbenu Tam, ample proof that the authority for so doing existed.

See Freiman, *ibid.*, further, for numerous other instances in which the medieval rabbis invalidated marriages. For further discussion of Gaonic *takanot*, including the one under discussion, see Schipanski, n. 54, *supra*, pp. 135-197.

68. See Falk, n. 4, *supra*, pp. 41-43, for further discussion of instances in Israel in which stubborn husbands have spent many years in jail rather than give a *get* to their wives. For further discussion of the situation in Israel see Falk, ch. 5, n. 66, *supra*, and Appendix.

69. It must be noted that, strictly speaking, the Gaonic *takanah* under discussion related only to forcing a recalcitrant husband to give a *get*. This of course presupposes that there is available to the court some means of compulsion of the husband, as by incarceration, fine, or otherwise, including corporal force. As indicated at n. 60 *supra*, the basis for such *takanah* was, according to Rabbenu Asher, the inherent right of the rabbis to invalidate a marriage, since all marriages are presumed to be predicated upon rabbinic will and consent. It follows therefore that, strictly speaking, a *get* should not be necessary where the rabbis have determined that a marriage should be invalidated, and that such marriage could hence be dissolved, as it were, by rabbinic decree alone. Thus, if the rabbinic court were unable to obtain compliance with its directive to the husband to give a *get* in the suggested circumstances, it could then proceed to invalidate or annul the marriage without a *get*. For further discussion of this principle see Berkovits, n. 4 *supra*, pp. 123-141, who points out that although there is a great variety of opinions on this point, there is yet extensive authority supporting the proposition that the invalidation or annulment of a marriage can be effected without the formal giving of a *get*. The problem is lessened where, as in Israel, there exists a viable rabbinic court, and where it is normally possible through fine or imprisonment to compel the giving of a *get*. In the latter instances one would not need to become involved in the question of whether the marriage can be terminated without the formal giving of a *get*. However, as noted at ns. 66 and 68 *supra*, and Appendix, such means of compulsion are not always effective even in Israel. It would appear therefore that even in Israel, under this approach, it would be sometimes appropriate for the court to annul or invalidate a marriage without the formal giving of a *get*.