

Problems Of A Forced Get

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In recent years, the Jewish community has become increasingly aware of what is aptly referred to as "the modern-day *Aguna* problem," the case of a woman living apart from her husband with no apparent hope of reconciliation, yet unable to remarry because her husband is holding back in granting a *get* (Jewish divorce), for purposes of revenge or blackmail (monetary or otherwise). There is no need to elaborate upon the dimensions of this tragedy, nor the pitfalls it presents in terms of human suffering, potential *Chilul Hashem* and violation of the prohibition of *Aishes Ish* (adultery). They are well known to all, layman and professional alike.

Many individuals are shocked to find Jewish marriage and divorce laws which they consider archaic, unfair and unreasonable. Drastic changes have been suggested, nay demanded, as the numbers grow of those who feel themselves "trapped" by technicalities. It is our intention here to examine the halachic issues and to seek to explicate the nature of the obstacles barring an easy solution. It is not indifference which has so far caused the solutions to be unavailable, but rather the unhappy realization that a solution might create a further problem, worse than the one it was intended to resolve.

Jewish law requires that a *get* can only be granted by the willing acquiescence of the husband (as will be discussed later).

Thus any *get* which is given against his will or under duress is potentially a worthless document, and if a woman remarries on the strength of such a questionable *get*, she may be committing adultery and her subsequent children may be *mamzerim*.

There is no one who would argue that a woman should not be released from an unhappy marriage — but it cannot be at the cost of creating thousands of questionable marriages and possibly myriads of *mamzerim*! If the cure is worse than the illness — it is not a cure.

Hopefully, the following study of the halachot will clarify the problem.

The underlying premise of the halacha is that the execution of a *get* demands the free will of the husband. The reasoning behind this is twofold; firstly, Rashbam¹ writes that *משמע ומתן* the directive of the Torah "he shall write and give (a *get*)" presupposes free will. In Jewish law, marriage is primarily not a religious ceremony, but rather a legal contract between a man and woman through which he acquires her as a wife, and in divorce he removes his claim upon the woman, thereby freeing her to remarry as she sees fit.² And, as Rabbi Chaim HaLevi writes³:

ובגויק צריך רעת בעלים על עצם הגירושין והקידושין ומשום דעיקר הקידושין והגירושין נעשה ע"י הבעלים, והם האוסרים והם המתירים, ועל כן צריך רעתם.

For in (cases of) marriage and divorce the will of the owners (husband) is necessary for the marriage and divorce itself, because the essence of marriage and divorce is effected by the owners (husband), and it is they who cause her to be forbidden, and it is they who cause her to be permitted, and as such their will is essential.

Secondly, as Rambam writes⁴:

1. כ"ב מה, א ד"ה וכן, ונע"ז דלמ"א גיטין פ"ח, ב', הובא בשו"ת ר"ב אשכנזי ס"ט"ז.
 2. רש"י קידושין ב, א ד"ה וקנה ושתי' רב"ז ח"ג סי' תר"ח.
 3. הל' יבום וחליצה פ"ד ה"ט"ז.
 4. הל' גירושין פ"א ה"א"ב, ב'.

עשרה דברים הן עיקר הגירושין מן התורה, ואלו הן: שלא יגרש איש אלא מרצונו כו' ומנין שעשרה דברים אלו מן התורה שנאמר והיה אם לא תמצא חן בעיניו כו' מלמד שאינו מגרש אלא ברצונו ואם נתגרשה שלא ברצונו אינה מגורשת.

Ten points constitute the essence of divorce according to Torah laws: 1) The husband must not be compelled to divorce against his will, etc. The source for these ten points is the Torah (Deut. 24:1). "And if it shall come to pass that she no longer finds favor in his eyes, he shall write for her a bill of divorce" etc. This teaches that he shall not divorce against his will, and if she was divorced against his will, she is not divorced.

Unlike other transactions (i.e. purchases and sales) which require only the free will of the concerned parties, divorce demands something more, will of the heart, *רצונו בלבו*. Not only must the man be intellectually prepared to divorce his wife, he must also come to terms on an emotional level with the significance of the act he is about to undertake.⁵

Despite these stringent prerequisites and perhaps because of them, the fate of the woman was not in every instance left to the whim of her husband. To prevent abuses of the system, safeguards had to be erected. Under certain circumstances, rabbinic intervention of one sort or the other was warranted; in extreme cases, even physical violence to the person of the husband was allowed.

In all probability, this provision for rabbinic intervention is based on Torah law, rather than a *Takanah* enacted by the rabbis of a later generation. *Torat Kohanim*⁶ comments: "וקדשתו" — וקדשתו, if a priest defiles his sanctity through marriage to an unfit woman (i.e. a divorcee) you shall sanctify him, even against his will; you shall coerce him into granting her a *get*." This

passage of *Torat Kohanim* is quoted in the Talmud⁷ as well as in a responsum from the geonic era⁸ and by Rashba,⁹ Ribash¹⁰ and Mabit.¹¹

Radak¹² asserts that Saul coerced David into granting his daughter Michal a *get* for fear lest he disappear and leave her an "Aguna." Therein lay the nub of their differences concerning her legal status: Saul deemed it legal coercion (עישוי כריון), and as such she was no longer the wife of David and he (Saul) was permitted to give her in marriage to Palti the son of La'ish. In the eyes of David, however, she was still wedded to him, for this was illegal coercion (עישוי שלא כריון).

Rashi¹³ makes passing reference to the practice during the First Temple era of incarcerating recalcitrant husbands until such time as they would grant their wives a *get* in compliance with the dictates of the rabbinic courts.

We thus find ourselves confronted with two apparently antithetical premises: on the one hand, the Torah tells us that a prerequisite for the execution of a *get* is genuine will of the heart (רצונו הלב). On the other hand, we are told בעל כרכו — וקדשתו, sanctify him, even against his will. How might we reconcile these seemingly contradictory laws? Some commentators¹⁴ explain simply that through legal coercion (עישוי כריון) a state of willingness is attained, for מצוה לשמוע דברי חכמים¹⁵ it is a mitzvah to obey the behest of the rabbis.

Other commentators¹⁶ reject this view. As they see it, although

7. יבמות פ"ה ב' (ע"י שו"ת ד"ר חיים חכם סופר ח"ו סי' ק"ב ורובב מירושלם ח"ב סי' מ"ה).

8. תשובת רב טורנאי גאון, הובא בב"י אה"ע סי' י' ואהרתי חיים הל' ביאות אסורות סי' ק"ג.

9. סי' אלף קפ"ז.

10. סי' שמ"ח.

11. קריית ספר הל' גירושין פ"ב ה"ב.

12. שמואל א' כ"ה מ"ג.

13. פסחים צ"ג א' ד"ה בית האסורין.

14. נתיבות המשפט סי' ר"ה סק"א וט' ושו"ת חכם סופר ח"א סי' ב"ה וקט"ו.

15. קידושין ג' א' ובי"ב מה"א.

16. הלקת יואב ר"נ אונס ענה ה' וחזו"א ח"א אה"ע סי' ע"ט סק"א. ובן רעמ מבי"ט בקריית

ספר הל' אישות פ"ב. ודאה באור שמה הל' גירושין פ"ב ה"ב ואמרו בינה ר"נ רי"ט סי' א'.

5. נתיבות המשפט סי' ר"ה סק"א.

6. וקרא כא' ח"ו.

we do accept the premise that legal coercion leads to emotional acceptance (ריצויו הלב) it is unlikely that he desires the *get* in its own right; rather, he has come to accept it as the means to fulfilling his innate wish to heed the words of the rabbis. Nevertheless, they conclude, in instances of כרין עישוי, such a level of emotional acceptance suffices.

The basic tenets of coercion to divorce (עישוי בגט) have been articulated by the *Tanna* in tractate *Gittin*:¹⁷

גט מעושה בישראל כשר ובנכרים פסול ובנכרים חובטין אותו ואומרין לו עשה מה שישאל אומרים לך.

A *get* given under compulsion by an Israelite court is valid, but by a Gentile court is invalid. A Gentile court may flog a man and say to him "Do what the Israelites command you" (and it is valid).

This is amplified somewhat by R. Nachman quoting Shmuel:¹⁸

גט המעושה בישראל כרין כשר שלא כרין פסול ופוסל ובנכרים כרין פסול ופוסל שלא כרין אפילו ריח הגט אין בו מה נפשך אי נכרים בני עישויי ניהו איחכשורי נמי ליתכשר אי לאו בני עישויי ניהו מיפסל לא ליפסל אמר רב משרשיא רבך תורה גט מעושה בנכרים כשר מה טעם אמרו פסול שלא תהא כל אחת ואחת הולכת וחולה עצמה כנכרים ומפקעת עצמה מיד בעלה א"ה שלא כרין אפילו ריח הגט אין בו ונהוי כשלא כרין בישראל ומיפסל נמי לפסול אלא הא דרב משרשיא ברותא היא וטעמא מאי כרין בכרין דישאל מיהלף שלא כרין בכרין וישאל לא מיהלף.

R. Nachman said in the name of Shmuel: A *Get* given under compulsion by an Israelite court with good legal ground is valid; if without sufficient legal ground it is invalid, but it still disqualifies the woman for a priest. If enforced by a Gentile court on legal grounds, it is invalid but disqualifies; if without sufficient legal ground there is no tincture of a *Get* to it.

If Gentile enforcement is valid, then the *get* should be considered valid; if Gentile enforcement is not

acceptable, then it should not be able to disqualify her? Rabbi M'sharshye said, according to the Torah, a *get* enforced by a Gentile court should be valid, and the Rabbis declared it invalid to prevent Jewish woman from attaching themselves to Gentiles, and thereby releasing themselves from their husbands. If so, why does a *Get* enforced by a Gentile court without sufficient legal ground have not even the tincture of a *Get*? Let it at least be on a par with a similar *Get* exacted by an Israelite court and disqualify the woman! The truth is that R. M'sharshye's explanation is erroneous, and what then is Shmuel's reasoning? A *Get* enforced by a Gentile court on good legal grounds is likely to be confused with one enforced by an Israelite court, but a *Get* enforced by a Gentile court without proper grounds will not be confused with one enforced by an Israelite court with legal grounds.

According to the majority of commentators¹⁹ this interpretation of R. Nachman in the name of Shmuel is the accepted halacha. A *get* enforced by Israelite court on good legal grounds is valid. *get* enforced by Israelite court on good legal grounds is valid. *get* without sufficient legal grounds in an Israelite court, but which the Gentile court forced him to give because there are sufficient grounds in their court, is null and void in the eyes of the Torah but within the framework of rabbinic law is considered a *get*, thereby disqualifying the woman from remarrying into a priestly family,²⁰ and, perhaps, necessitating that she receive a *get* from any man whom she might marry prior to receiving a second *get* from her first husband.²¹ But שלא כרין ובנכרים אפילו ריח הגט אין בו כרין, a *get* without proper grounds even in the Gentile court, such a *get* is null and void even within the framework of rabbinic law.

Rashbatz²² and Rashbash²³ derive the admissibility of *בגט (coercion) עישוי* from the verse לרצונו²⁴ just as Beth Din is

19. טור ובני אהיע סי קליד ש"וע סני היט.

20. רמב"ם הל' גירושין פ"י ה"א.

21. רש"י וד"ן בגיטין שם.

22. ח"ב סי' ג'.

23. סי' תצ"ח.

24. וקרא א. ג.

17. פה. ב.

18. פה. בגמרא.

obligated to coerce a person into bringing the sacrifices he has vowed to offer up,²⁵ so, too, are they to coerce a recalcitrant husband into granting a *get*. *Chelkat Yoav*²⁶ explains this in the following manner: צריך רק שיהיה נוטה לרצונו ולא רצון גמור – If he is leaning towards wanting the *get* that is sufficient, he need not will it totally.

All forms of coercion fall into one of two categories: כפי בשוטי literally, coercion through sticks, and כפי במילי, coercion through words.²⁷ In instances where coercion is called for by halacha, the intent is to physical coercion, for בדברים לא יוסר עבר, a slave is not chastised by harsh words alone. So, too, when the Talmud discusses the halachic ramifications of legal and illegal coercion (כפי בשוטי) it is in the context of (עישוי כדון ושלא כדון) Pressure brought to bear upon a recalcitrant husband through the כפי במילי process is not deemed sufficient to necessitate his categorization as one whose subsequent actions are the product of coercion.

What is meant by כפי בשוטי and what by כפי במילי? כפי בשוטי includes, obviously, all forms of physical violence to the person of the husband, even to the point of beating him until he is on the threshold of death,²⁸ incarceration,²⁹ and (according to the majority of *Poskim*³⁰) the imposition of a rabbinic ban (חרם), for חמירא שמתא מנגידא, a rabbinic ban is to be dreaded more than a

25. ערכין בא, א.

26. ריני אונג ענף ה', ובראי להעיר שכל זה כגט מעושה בדון, אבל בשלא כדון ברור שצריך רצון גמור. יש לתמוה, איפה, על הרב שלמה ריבובסקי מבייר הרבני כהל אב"יפ"ו שלא עמר על נקודה זאת במאמרו "בפית גט ע"י המלצמה לניכוי שלוש מאאסר" (תחומין חוברת א' הוצאת אריאל ירושלים חורף תשי"מ).

27. כתובות עו, א.

28. משלי כט, יט.

29. יגיון פח, כ ורש"י שם ד"ה מעשה. בחוקה.

30. ערכין בא, א. בופן אותו עד שיאמר רוצה אני, ובכתובות פו, א. כדון בופן על המנוח) מכן אותו עד שחצא נפשו.

31. רש"י פסחים צא, א. ר"ה בית האסורין שו"ת ריב"ש סי' קכ"ו ורש"י סי' א'.

32. תור מהרא"ש וכתוב סה, א. ותוספות הרי"ד כתובות עו, א. וע"י שו"ת בית מאיר סי' י"ד. שכן דעת הטור אה"ע סי' קנ"ד.

33. נסח"ס ג, א.

statutory beating.³⁴ Rashbatz³⁵ is uncertain as to whether coercion through the causing of monetary loss (אונוס ממון) is considered כפי במילי or כפי בשוטי. This question is dealt with at length in rabbinic literature.³⁶

כפי במילי encompasses all lesser forms of coercion; i.e. verbal abuse such as publicly labeling the husband transgressor³⁷, as well as a rabbinic decree initiated by Rabbeinu Tam calling upon members of the community to relate to the husband exactly as if the חרם ban had been imposed upon him, though in reality it has not. Ramo writes:

יכולין ליגזור על כל ישראל שלא לעשות לו שום טובה או לישא וליתן עמו או למול בניו או לקברם עד שיושר ובכל חומרא שירצו בי"ד יכולין להחמירן בכה"ג ובלבד שלא ינרו אותו.

The Beth Din may prohibit the entire community to render him any assistance in any form whatsoever, to have any business dealings with him, not to circumcise his children or bury them should they pass away, until he agrees to divorce. In general they may censure him in any manner they see fit short of actually pronouncing the *cherem* ban upon him.

Although the ruling of Rabbeinu Tam (הרחקה רד"ת) was initially well-accepted, it has not had an untroubled history. Many leading Rabbis have opposed using it and in practice it is not an option which is utilized.⁴⁰

34. סי' הושר לר"ת סי' ב"ד, מרדכי ריש פ' המרוי, שו"ת ריב"ש סי' קכ"ו, רש"י סי' א'.

35. סי' א'.

36. שו"ת ר"ב אשכנזי סי' ט"ו, ראני"ה סי' ט"ג, מבני"ה ח"ב סי' קל"ה, חורת גיטין סי' קל"ד. סי' ה', שו"ת אגרות משה ת' אה"ע א' סי' קל"ד ועוד.

37. תוס' כתובות ע, א. ויבמות ט, א. ר"ה וצוא, רמב"ם כתובות עו, א. מרדכי ריש פ' המרוי, רא"ש ויבמות ט, א. ש"ע אה"ע סי' קנ"ד סי' ב"א, ע"פ שבת מ, א.

38. סי' הושר סי' ב"ד, שו"ת ריב"ש סי' קכ"ו ומהרי"ק שרשים ביט, ק"ב וקל"ה. אה"ע סי' קנ"ד סי' ב"א, וע"פ בלבוש.

39. שו"ת מהר"י כ"ן לב ח"ב סי' י"ח, סי' גבורת אנושם להשי"ך סי' ע"ב, והובא בפתחי תשובה. אה"ע סי' קנ"ד סק"ל, חו"א אה"ע סי' ק"ח סק"ב ע"פ תשובת הרשב"א שבב"י

Other measures classified as כפי בימלי are coercion through an unrelated issue and withholding from him needed assistance (בפי על דבר אחר ומניעת הטבה). (According to *Seder Elishu Raba*,⁴¹ the הרחקה דרית is predicated on these principles.) Rabbenu Tam was the first to articulate these principles in a hallmark decision which has come down to us from several sources:⁴² If a man marries a woman and subsequently she finds him so repulsive that she is unable to live with him (מאסי עלי), it is forbidden to coerce him in any manner to grant her a *get*. The halachot of מורדת and עלי מאסי will be dealt with at length later in this article. However, if he has been imprisoned for failure to discharge his outstanding debts, the relatives of the woman are permitted to pay his debts and free him from prison on the condition that he divorce his wife. Since he has been incarcerated on a different matter, we do not view his imprisonment as coercion to divorce, despite the fact that in reality it is his desire for freedom which drives him to grant a *get*. (There is much discussion among later commentators as to the exact criteria for determining when the coercion is indeed on a side issue and when it is merely a subterfuge employed primarily to coerce him into granting the *get*.⁴³) Neither do we consider the refusal of the wife's family to assist him as illegal coercion even though they do so expressly to get him to acquiesce in their demands, for refraining from tendering aid is not classified as coercion; this is the rule even when they are commanded by the Torah to help him, as is the case here where he has been imprisoned by Gentiles.⁴⁴

When the decision to coerce a recalcitrant husband is taken,

אהיע סי קניד. אבל עי בשוית ריב אשכנו סי ויסי. מהרמס לובלן סי א וליס סי אליהו רבא סי ייג טסכנו על הרחקת דרית למעשה, ועי ערוך השלחן אהיע סי קניד סי ייג טסכנה להלכה.

41. סי ייד.

42. הגי מרדכי גיטין סי חסיט שוית ריביש סי קניד מהרמק שרש סי ייג ומבייט חיא סי ייג.

43. שוית ריביש סי קניד, רשבין סי א, ריב אשכנו סי טיז, דגניח סי ייג, מבייט חייב סי קליח, פני יהושע חייב סי עיח, חורת גיטין סי קליד סי ה, שוית אגרות משה ח' אהיע א סי קליד, ועוד.

44. שוית שארית יוספ סי טיז עיפ מהרמק שרש סי ייג.

what are the criteria upon which it is based? The Mishna tells us:⁴⁵

האי ש שנולדו בו מומין אין כופין אותו להוציא, אמר רשב"ג כדא כמומין הקטנים אבל כמומין הגדולים כופין אותו להוציא. ואילו שכופין אותו להוציא, מוכה שחין ובעל פוליסוס והמקמץ והמצרף נחושת והבורסקי בין שהיו עד שלא נישאו ובין משנשאו נולדו ועל כולן אמר רבי מאיר אע"פ שהתנה עמה יכולה היא שתאמר סבורה הייתי שאני יכולה לקבל ועבשו איני יכולה לקבל וחביא מקבלת היא על כרחא חוץ ממוכה שחין מפני שמקמתו מעשה בעידון כבורסקי אחר שמת והיה לו אח בורסקי אמרו בחבמים יכולה היא שתאמר לאחין הייתי יכולה לקבל ולך איני יכולה לקבל.

A man in whom bodily defects have arisen cannot be compelled to divorce his wife. R. Shimon ben Gamliel said: "This applies only to minor defects, but in respect to major defects he can be compelled to divorce her." The following are compelled to divorce their wives: A man who is afflicted with boils, or has a polypus, or gathers objectionable materials, or is a coppersmith or a tanner, whether they (the defects) arose before the marriage or after. And concerning all of the above, R. Meir said: "Although the man made a condition with her, she may plead, 'I thought I could endure him, but now I cannot.'" The Sages, however, said: "She must endure despite her wishes, the only exception being a man afflicted with boils, because she will enervate him." It once happened at Sidon that there died a tanner whose brother was also a tanner. The Sages ruled: "She may say 'I was able to endure your brother, but I cannot endure you.'"

The *Tanna* does not supply us with any broad guidelines; rather, he cites specific instances warranting rabbinic intervention. The recurrent theme in all of them is that a situation has arisen where even minimal requirements of a normal marital relationship

45. כתובות עז, א.

actuality this principle is seldom put into practice. In a decision quoted by Ramo,⁵³ Ribash⁵⁴ explains:

If the Beth Din were to address themselves to such matters of marriage, by coercing the parties according to the letter of the law, they would have to coerce them all ... and strife and arguments would abound. Therefore, throughout the generations the rabbis have closed their eyes and refrained from interceding in these matters. ... They are content to rule according to the strict halacha only in those instances when the husband and wife themselves disagree and bring the matter up before the Beth Din, then they will rule according to the Torah.

This sentiment is echoed by *Tshuvot Maimoni*⁵⁵ concerning a מורדת, a "recalcitrant wife."

נראה בעיני שכוּפין אותו להוציא כרי שיוכל לישא אחרת ולקיים פריה ורביה כו' וכן ניל מדין תורה אך שקשה דבר שא"ב עשינו חגה לפרוצות, ולכופה להנשא לו אינה חגה טובה דאין אדם דר עם נחש בכפיפה הילכך יעשו ביד כפי ראות עיניהם.

Being that in our times he is proscribed by the *takkanah* of Rabbenu Gershom from taking a second wife, and he has yet to fulfill the Torah's commandment of "be fruitful and multiply," it is my opinion that he should be forced to divorce so that he be able to remarry and beget children. So it appears to me according to the letter of the law, but this is a difficult matter, for by adopting this approach we would be aiding and abetting such scandalous behavior. Neither is it realistic to compel her to consummate the marriage, for a person cannot dwell

with a serpent in one abode (*Ketubot* 72a). Therefore, let the Beth Din do as they see fit.

In some instances,⁵⁶ the Mishna and Talmud are less explicit. We are told simply יוציא וייתן כתובה "he should divorce and pay the *Ketubah*." Rabbinic authorities differ as to the application of this directive. Rashi⁵⁷ and R. Yitzchak⁵⁸ are of the opinion that it means כּוּפין אותו עד שאמר רוצה אני he should be beaten until he agrees. Rabbenu Chananel,⁵⁹ however, basing his decision on a passage in the Talmud Yerushalmi, concludes that in such cases only non-physical coercion is acceptable.

Some of the instances included under the rubric "he should divorce her" are those of a husband who is either unwilling or unable to support his wife or to fulfill his conjugal duties towards her, an apostate, a dissipate, a wife-beater, and an epileptic.⁶⁰

In addition, although according to halacha *Ketubah* is payable upon divorce and not before, a special *takkanah* was enacted in such cases obligating him to pay it regardless of whether he divorces or not.⁶¹ There is no question of illegal coercion here, for since he will in any case have to pay the *Ketubah* it is clear that any subsequent decision he might take regarding a *get* will not have resulted from the coercion as to the *Ketubah*.

After a lengthy discussion of the matter, Tosafot⁶² conclude:

ומיהו אין לכוּף שום אדם לגרש ולעשות מעשה עד שנמצא ראה ברורה דהא אמרינן נגט מעושה בישראל שלא כרין פסול ואין להתיר אשת איש מספק.

It is important not to coerce anyone to divorce without conclusive proof of his obligation, for a *get* enforced without sufficient legal ground is invalid,

56. בהנך בכתובות ריש פ' המדיר.

57. נטין פס. ב ד"ה כרין.

58. תוס' יבמות סר. א ובכתובות ע, א ד"ה יוציא.

59. תוס' שם.

60. סוד ושוי'ע אהי'ע ס"י ע, ע"ז וקוד' סי' גבורת אנשים להשי'ך ועוד.

61. ריב"א נדרים סו, א שו"ת בית מאיר סי' ל"ט ואחרית דרע"א סי' ב.

62. כתובות ע, א ד"ה יוציא.

53. אהי'ע ס"י א' סע' ג וס"י קני'ר סע' ד.

54. ס"י ט"ו.

55. ספר נשים סי' ל"ד, ועי'ע שו"ת רמ"א סי' ל"ו וצ"ח. ר"י מסלוצק סי' פ, חטובות שבסוף.

56. ד"ה רע"א ח"א עמ' ק"י (צ"ב). ושו"ת עין יצחק ח' אהי'ע א' סי' ד' סק"י.

and a married woman cannot be released from her bonds when the validity of her divorce is under question.

This decision is quoted by R. Asher,⁶³ *Tur*,⁶⁴ and Ramo⁶⁵ as the final word in the matter, and has been accepted as such by rabbinic courts for generations. If a man is improperly forced to divorce his wife, when there are no clear cut grounds for it, the *get* is not valid.

In contrast to the cases discussed above where clearcut, specific grounds for coercion are to be found, is the halacha of the woman claiming that her husband is repugnant to her and she is unable to live with him. Above and beyond any particular problems which may or may not exist in the marriage, what concerns us here are the often purely subjective feelings of hatred and disgust that the woman entertains towards her husband. Rambam writes:⁶⁶

האשה שמנעה בעלה מתשמיש המטה היא הנקראת מורדת ושואלין אותה מפני מה מרדה אם אמרה מאסתיהו ואיני יכולה להבעל לו מדרתי כופין אותו לשעתו לגרשה לפי שאינה כשבויה שתבעל לשנוא לה.

A woman who refuses to allow her husband marital relations is called "*moredet*" – rebellious. They [Beth Din] ask her why she rebelled. If she said, "He disgusts me, I cannot have relations with him willingly," then they force him to divorce her, for she is not like a captive, to have to live with someone she hates.

According to this viewpoint shared by Rashi⁶⁷, Rashbam⁶⁸,

63. יבמות סד, א.

64. הדיע סי' קנ"ד.

65. שם סי' כ"א, ועיי' שו"ת עבודת הגהשוני סי' ל"ה.

66. הל' אישות פ"ד ה"ח.

67. כתובות סג, ב ד"ה לא כייפינן, עיי' בריטביא.

68. דעתו הובא בראשית כתובות סג, ב וסי' הישר לר"ת סי' ב"ד.

S'mag⁶⁹, Rabad⁷⁰ and Tosafot⁷¹ it is inconceivable that the Torah would obligate a woman to function as a wife when her feelings of ill will towards her husband have built up to such an extent as to render her utterly incapable of doing so on her own accord.

Other commentators,⁷² however, take issue with Rambam's thesis. Though they accept his reasoning as sound, they note that in practice it stands on shaky grounds, for there is always the fear that *אחר* her claim of "he disgusts me" is merely a subterfuge employed by her to gain the freedom to marry another man who has caught her fancy; alternatively, while she is not telling a cold-blooded lie, still her negative feelings may be generated not by an existing flaw she perceives in her husband, but rather by her interest in someone else.

R. Asher writes in a responsum⁷³

ומה נתינת טעם לכופו האיש לגרש ולהתיר אשת איש? לא תבעל לו ותצורר אלמנות חיות כל ימיה, הלא אינה מצווה בפרייה ורבייה? וכי בשביל שהיא הולכת אחרי שרירות לבה ונתנה עיניה באחר וחפצה בו יותר מבעל נעוריה נשלים תאונה וכופו האיש שהוא אורח אשת נעוריו שיגרשנה? חלילה וחס לשום ריין לרדן בן.

What manner of reason is this to force a husband to divorce and to release a married woman from her ties? Let her not have family relations with him and remain as a widow all her days, for she is not commanded to beget children! Just because she follows the fancy of her heart and casts her eyes

69. לאווין פ"א.

70. מגיר משנה ומשנה למלך הל' יזבוס והל"ה פ"ב ה"ט.

71. גטין פ"ד הל' ה"א.

72. ר"ת (סי' הישר סי' ב"ד), תוס' כתובות סג, ב ד"ה אבל, רא"ש מרכיז בעל המאור ירמב"ן, שם בכתובות, שו"ת רא"ש כ"ל מ"ג סי' ז', ט"ז, י"ג וי"ד שו"ת רש"י סי' אלף קצ"ב ור"ת, ח"ב סי' רע"ג, ח"ו סי' ע"ב ומיוחסות סי' קל"ד וקל"ח, טור ונ"י הדיע סי' ע"ז ורמ"א שם ע"ג.

73. ב"ל מ"ג סי' ח.

upon another, desiring him more than the husband of her youth, shall we bow to her desires and coerce the husband to divorce the wife of his youth whom he loves? Heaven forbid were any judge to rule thus!

Although Rambam's ruling was not accepted as a *carte blanche* permit for coercion in all instances of a woman's claiming "he disgusts me," neither was it totally rejected. Rabbinic literature is replete with incidents where the decision was reached requiring Beth Din to coerce the husband into granting a *get* on the grounds of מאיס עלי. In a ruling quoted by Ramo,⁷⁴ R. Asher⁷⁵ writes of the widow of a noted Talmudic scholar who accepted *Kiddushin* from her boarder, and then, with a claim of מאיס עלי, refused to consummate the marriage. After a lengthy discussion of whether or not the *Kiddushin* ceremony itself was valid, he concludes:

אמנם אם נראה לכם רבתי הקרובים אל הדבר שגם המקדש אינו אדם ראוי והגון לדבק בבת טובים ובנבל ובתרמית פתיה קרוב הרבר לדמותו לעובדא דנרש דגרסינן ביבמות בפרק ב"ש (ק"י א) משום שנעשה שלא כהוגן הפקיעו הקידושין גם זה שעשה שלא כהוגן נהי דקדושין לא נפקיע מי"מ יש לסמוך הגרון זה על דברי קצת רבוהינו שפסקו בדינא דמוררת רבופין אותו לגרשה אמנם יש לנסות אם יוכלו לפייסו בריצוי כסף ואם לא יאות אני נגרר אחריכם לכופו לגרשה.

However, if it appears to you, my rabbis who are dealing with this matter, that it is neither fitting nor proper for this man to marry such a fine woman, and that he persuaded her through chicanery and trickery, then this case closely resembles that which took place (in *Yevamot* 110a) where the marriage was annulled because it was performed improperly. Here, too, where he behaved improperly, though we will not annul the marriage, we will rely upon those

authorities who ruled that we may force the husband of a *moredet* to divorce her. Nevertheless, it is proper to persuade him to divorce her in exchange for monetary compensation, but should he refuse, then I concur with your decision to force him to grant a *get*.

In another responsum⁷⁶ (in fact, the very one in which he came out so strongly against the stand of Rambam), he nevertheless concludes:

אמנם בנדון זו ספר לי אחיה אמתלאות שנותנה למיריתה ואתה ריין ברבר הזה תחקור על הרבר אם יש בה ממש בדבריה. ואם רעתו לעגנה ראוי שתסמוך על מנהגכם בעת הזאת לכופו ליתן גט לזמן.

However, in this case her brother related to me her reasons for rebelling, and you as the judge in this matter must ascertain whether or not there is any substance to her claims. But if his intent is to leave her an *agunah*, then it is proper that you rely upon your custom and force him to give a *get*.

*Bet Yosef*⁷⁷ cites Rashbash:

אשה שטענה מאיס עלי שקודם נישואין היתה מאסה אותו ואמה השיאתה לו בע"כ נראה דאפילו לאומר שאין בופין לגרש בטענה מאיס עלי וידו בזה שמה שאמרו שלא לכוף משום דהיישנן שמה עיניה נתנה באחר אם הרבר מפורסם שבעל כרחא נשאת לו נסתלקה חששא זה רהא ה"ר מאיר כשהיתה נותנת האשה טענה ואמתלאה לדבריה למה הוא מאיס עליה היה כופה לגרשה עכ"ל.

Regarding the woman who claimed that even prior to her marriage her husband was repulsive to her, and her mother forced her to consummate the marriage against her will, it would appear that even those who

74. אה"ע סי' ע"ז סעי' ג. וע"ע שו"ת חתם סופר ח"י אה"ע א' סי' קט"ו.

75. כלל ל"ה סי' א.

76. כלל מ"ג סי' ח.

77. אה"ע סי' ע"ו.

generally stay away from coercion to divorce on grounds of **מאוס עלי** would agree here, for their reasoning is that we suspect that her fancy has been caught by another man, and this fear is inoperative where it is widely known that she married him contrary to her own wishes. By the way of proof, we may cite the custom of R. Meir of Rothenburg to coerce the husband of a woman who substantiated her claim of **מאוס עלי** with a convincing explanation.

The impression one receives from these and other responsa is that in principle, the rabbis accepted the rationale that "a Jewish woman is not like a captive, to have to live with someone she hates." What occasioned such strenuous objection was the indiscriminate fashion in which the principle was to be applied. Given the subjective criteria upon which it is based, it was felt that such legislation could not be implemented wholesale. Rather, it should be left to the discretion of the rabbis who would invoke it in limited instances only, and even then only when they were reasonably sure that it was not a claim arising out of the woman's desire to marry another man she had met.⁷⁸

A different aspect of the problem is illustrated through an oft-mentioned *takkanah* dating back to the geonic era, the *דינא דמתיבתא*.⁷⁹ According to the Talmud,⁸⁰ a woman who out of spite has rebelled against her husband and refuses to live with him is subjected to an elaborate process designed to persuade her to repent. She is kept in a state of limbo for twelve months, receiving neither financial support from her husband nor a *get*. Throughout this period, the Beth Din publicizes her shameful behavior on a regular basis, and applies punitive measures in the form of deducting from her *Ketubah*. In the days of the *Geonim*, an alarming trend began to develop. Rather than bear this twelve-

month waiting period and its accompanying hardships with fortitude, women would look elsewhere for salvation. In some instances, they would request of Gentiles that they come to their assistance by coercing their husbands into granting a *get*. In other instances, they would even go so far as to leave the fold of Judaism (ויצאו לתרבות רעה). For fear lest such practices become widespread, a series of far-reaching reforms were instituted by the *Geonim*. Amongst them was a provision calling upon the husband to grant a *get* quickly and, should the necessity arise, empowering the Beth Din to coerce him into doing so.

The legal grounds upon which the validity of such *gittin* are based is the subject of a disagreement between R. Yishaya HaZakain (ר' יושע הר"י) and R. Asher.⁸² R. Yishaya writes וכיון שנחרצה ליתן גט ע"י עישוי גטו גט דיש כאן מצוה לשמוע דברי חכמים, תקנות ב"ד הגדול to obey the Rabbis, the *get* is valid, for this principle is every bit as applicable here as in the cases enumerated by the Mishna. R. Asher, however, takes a different tack. According to him אמרו על זה כל המקדש אדעתא דרבנן מקדש והסכימה דעתם להפקיע דינא דמתיבתא. The *get* is predicated on the regulatory powers invested in the rabbis enabling them to annul a marriage that in their judgement warrants such measures.

The *דינא דמתיבתא* was employed on a regular basis for close to five centuries, up until the days of Rif.⁸³ But in subsequent generations in Europe, the practice fell into almost total disuse. Though significant exceptions are to be found, in the person of R. Yishaya Hazakain⁸⁴, R. Chaim Or Zarua,⁸⁴ and others,⁸⁵ the mainstream of *Rishonim* follow the lead of Rambam⁸⁶ and Rabbenu Tam⁸⁷ in rejecting the *takkanah* as a viable solution:

הובא באור זרוע סי' שמינר ושו"ת ר"ח או"ז סי' ס"ט וקב"ו, ועי' תוס' הר"י גיטין פה, ב.

82. שו"ת כלל מ"ג סי' ח"א.

83. רמב"ן מלחמת כחובות ס"ג, ב.

84. ע"י הערה 81.

85. ע"י קונטרס הברורים פ"א.

86. הל' אישות פ"ד ה"ד.

87. ס' הישר סי' ב"ד.

78. ע"י שו"ת רבינו יוסף מסלוצק סי' פ' שהאריך בביאור נקודה זאת.

79. הל' כחובות ס"ג, ב. רמב"ם הל' אישות פ"ד ה"ד, ריטב"א קידושין ג, א. ס' קורא ה"ה ופרק ראשון ד"ה וכתב עוד הגאון ועוד.

80. כחובות ס"ג, ב.

לא משטו אותן המנהגות ברוב ישראל ורבים וגדולים חולקים עליהם ברוב המקומות וכדון הגמרא ראוי לתפוס ולדון. Indeed, some *Rishonim* were not aware then of its exact nature. R. Zerachia HaLevi⁸⁸ and Rashba⁸⁹ wrote that the דינא דמתיבתא was an extraordinary measure (הוראת שעה) enacted by the rabbis for that generation alone, and not for later ones. According to Mordechai⁹⁰ and R. Asher⁹¹ quoting Rabbenu Tam, it did not include a provision for coercion at all, it merely permitted the husband to waive the twelve-month waiting period prescribed by the Talmud and to grant a *get* immediately.

This view of R. Asher is further complicated by a separate responsum⁹² written by him where he states clearly that under דינא דמתיבתא recalcitrant husbands were actually coerced into giving a *get*.⁹³



Let us now sum up the situation: For a Jewish divorce to be effective, the man must grant it willingly. What practical options are available in our time, and what steps can the Jewish community take to protect the family structure?

One suggestion that has arisen periodically is that perhaps the time is ripe to accept the ruling enunciated by Rambam that "he disgusts me" (מאסי עלי) is grounds for coercion; others suggest that the coercion clause of דינא דמתיבתא should be reinstated.⁹⁴ While there is little doubt that these suggestions are motivated by honorable intentions, they have been given short shrift by most responsible members of the Rabbinat throughout the world, and for reasons readily understandable.

The halachic objections to such a course are formidable.

88. בחובות טו. ב.

89. בחובות הני"ל הערה 72.

90. בחובות טו. ב.

91. שם.

92. מ"ג סי' ח'.

93. שו"ע שו"ת בחובות סי' ר"ל י"א.

94. A Problem In Jewish Divorce: An Analysis and Some Suggestions — Irwin H. Haut, Tradition.

Among the dissenters to these coercion devices are *Rishonim* (early commentators) who unquestionably stand in the ranks of our people's foremost halachic authorities (Rabbenu Tam, Rambam, Rashba, R. Asher, Tur, and Ramo). Students of *Choshen Mishpat* are well acquainted with the ruling of *Chavot Yair* (quoted by R. Yaakov of Lisa in his *Netivot HaMishpat*.⁹⁵) במקום שחטמו המחבר והרב בהג"ה ולא חלקו עליהם הסמיע והשיך אין יכול לומר "In an instance where both the *Shulchan Aruch* and Ramo adopted one opinion, and neither the *S'ma* or *Shach* disagreed, one may not say 'I wish to conduct myself in accordance with a variant opinion.'"

Barely a century ago, R. Yitzchak Elchanon Spector⁹⁶ articulated a similar sentiment in matters pertaining to *Even Haezer*. כלל מסור בדינו דרעת הפוסקים שלא הובא בש"ע כלל אף. בלשון יש אומרים דלא חיישינן להו כלל down to us from generation to generation that an opinion of the *Poskim* not mentioned at all in the *Shulchan Aruch*, even in the form of a variant opinion, is not to be taken into consideration at all."

In the case of דינא דמתיבתא, an additional problem exists, the opinion of R. Asher that it is predicated upon the principle of *מינה וקדישין* (the Rabbis may annul a marriage retroactively). There is much discussion in the responsa literature as to whether or not the present day Rabbinat is empowered to enact such a *takkanah* (or to re-vitalize a long dormant one).⁹⁷

Moreover, we must ask ourselves if such a course, even if permissible, is wise. Certainly, were such legislation initiated by the Rabbinat, it would not remain under their sole jurisdiction.

95. ר"ת תפילה כלל ב, י"ג ע"ע חומים ק"ח סוף סי' קמ"ד שהסכים להחזיר יאר, "יב הכל בבית מדר' ח' חשבול על דעת כי קושי' רבות שהקשו עליהם האחרונים וז"ל בדרך חזק' ועמוק כדמו כי כלל במתק וקוצר לשונם ד"נע הרבה ולאין ספק שלא כונו להכלל בו איך היה אפשר בו רק רוח' ח' נוספה בקרבם לחיות לשונם מכוון להלכה בלי כוונת הכותב והש"ח בידם הצלחת וע"ע שו"ת כרית אברהם בהקדמה.

96. שו"ת וצחק ח' אה"ע כ"י סי' נ"ג סק"ח, וע"ע ח' אה"ע א' סי' ד' סק"ה ומ"מ יש לדחות, שכתב משי"ב בכדי להקל ולא להחמיר.

97. אין תנאי כנשואין, שו"ת מהר"י ב"ל ח"א סי' קכ"ג, רבני משה אה"ע סי' ו' סק"ה, שו"ת מהר"ש"ם ח"ב סי' ק"י ושרירי וא"ח אה"ע סי' כ"ה מ"ג סק"י.

Irresponsible and unethical charlatans bearing the title "Rabbi" could easily apply it in totally unacceptable fashion.

In a speech before the Rabbinical Council of America, Harav HaGaon R. Yosef Dov HaLevi Soloveitchik שליט"א of the Yeshiva University addressed himself to just such a possibility.⁹⁸

I have to discharge a duty. Believe me, I do it with sadness in my heart. You know me; I never criticize anybody, I've never attacked anybody. I have never set myself up as a judge or arbiter who approves or disapproves of statements made by people. But today, כּלוּ כּל הַקּוּצִין, I feel it is my duty to make the following statement...

I also was told that it was recommended that the method of *אפקעיניהו רבנן לקידושין מיניה* be introduced [i.e. the Beth Din will be able to annul a marriage retroactively without consent of the parties]. If this recommendation were accepted – I hope it will not be accepted – then there'll be no need for a *get*. We'll be able to cross out the mishna of *עצמה בנט* *Kiddushin*. If Every Rabbi will be able to suspend *Kiddushin*. If such a privilege exists, why should it be monopolized by the Chief Rabbinate in Eretz Yisroel? Why shouldn't the Rabbinical Assembly [Conservative] do it as well as the Chief Rabbinate?

Do you expect to survive as Orthodox Rabbis, do you expect to carry on the *מסורה* under such circumstances? Chaos will replace the Torah.

I hope those gathered here will join me in objecting to such discussion and debates at a Rabbinical convention. I cannot imagine a Republican National Convention or Democratic National Convention where a symposium would be held as to whether communism should replace democracy in the United States.

To speak about changing *halochos* of *Chazal* is at least as nonsensical as discussing communism at a Republican National Convention. It is discussing methods of self-destruction and suicide.

Elsewhere in the same speech, HaRav Soloveitchik שליט"א discusses the words of Rambam: *הוא תורה שבעל פה*, והמכחיש מגידה כגון צדוק ובייתוס Sadducee." "whoever denies the authenticity of the Oral Torah is a Sadducee."

Why did he add *המכחיש מגידה*, whoever denies the authority of the scholars of the oral tradition? Under the category of *כופרים בתורה* (rejecting the Torah) are classified not only those who deny *תורה שבעל פה* (oral tradition) – there is no doubt about that – but even those who accept the truthfulness of *תורה שבעל פה* but are critical of *Chazal*. They find fault with *חכמי חז"ל*, faults in their character *ליצלן* or in their behavior, or that they had some prejudice. He is a *כופר*, for he denies the perfection and truthfulness of *Chazal*.

Let me add something very important. Not only the halachos, but also the *chazokos* [principles] *Chazal* introduced are indestructible. You must not tamper, not only with the halachos, but even with the *chazokos*. For the *chazokos Chazal* spoke of rest, not upon transient psychological behavioral patterns, but on permanent ontological principles rooted in the very depths of the metaphysical human personality which is as changeless as the heavens above.

If you should start modifying and reassessing the *Chazokos* upon which a multitude of halachos rest, you will destroy *Yahaduss!* Instead of philosophizing, let us take a match and set fire to the *Beth Yisrael*.

In view of the very real fear of *ענייה נתנה באחר* (she wants a divorce because she has her eye on another man) delineated by *Chazal* (one which existed in the days of the Mishna,⁹⁹ Rabbenu Tam,¹⁰⁰ R. Asher¹⁰¹ et al, as well as today), it is only natural to expect that were the principle of Rambam adopted forcing a

99. נדרים צ. ב.

ס' הישר סי' כ"ד.

101. גי' בלל מיג סי' סו.

98. Excerpted from: *Surrendering to the Almighty Light # 116, 17 Kislef 5736*.
 ת"ע חשבת הגאון ר' חיים ברלין זצ"ל (סי' הוכרזן להגרי' הוטנר זצ"ל עמי תרס"ח).

husband to divorce a woman who does not want to live with him, an unavoidable side effect of such a move would be an inordinate number of petitioners motivated (be it consciously or subconsciously) by עיניה שנתנו באחרים, a desire for some other man. Such a state of affairs would surely have an adverse effect on the sanctity and stability of marriage in the Jewish community. Given the already weakened position of marriage as an institution today, it is more than possible that this is too high a price to pay, even when what is at stake is alleviating the misery of the numerous individuals otherwise unable to easily obtain a *get*.

This principle, that our compassion for the plight of the individual is tempered by concern for the well-being of the community, is not new. אין פורין את השבויון יתר על כרי, ¹⁰² we do not redeem captives for more than their real value. Rambam¹⁰³ explains: שלא יהיו האויבים רורפין אחריהם לשובותם, care must be taken that our endeavors on the captive's behalf not serve as an impetus for even more abductions.¹⁰⁴

But above and beyond all these objections, there is the question of practicality. For such an undertaking to succeed, it would need the approval of world Jewry. Otherwise, in a very short time, we should be faced with the frightening specter of myriads of *gittin* deemed valid by some factions and invalid by others. Sadly, given the diverse and fragmented nature of the rabbinate, and indeed of orthodox Jewry itself, today it is difficult to envision such approval being readily forthcoming.

102. נטון מה, א.

103. הל' מתנות עניים פ"ח ח"ב, וצ"ע טור ושיע' וי"ד סי' רנ"ב ד"ר, ובפ"ח שם סק"ה. מהרד"ב: שגם כשפורים יתר על כרי דמי כגון כחלמוד הכס חייבים להסביר להשבאי שהוא מקרה כווד, ושברך כלל אין פורין את השבויון יתר על כרי דמיהו.

104. For further discussion of this halachic principle, see *Journal of Halacha and Contemporary Society*, Vol. VII, Spring, 1984 "On Maintaining a Professional Confidence," by Rabbi Alfred Cohen, p. 79.