

JEWISH DIVORCE LAW AND CONTEMPORARY SOCIETY

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Review Article

IN 1981, the fourth volume of *The Jewish Law Annual** appeared, affording an English-speaking public, for the first time, a clear and authoritative presentation of the main issues in Jewish divorce law and of the problems arising from the attempt to operate this system within the restraints imposed by a dominant western law system. As well as historical analysis, the volume considers the practical consequences, especially for those living in Britain, the United States, and Israel, of the refusal of the rabbinic courts to 'dissolve' marriages or to countenance divorce without the husband's formal authorization. What types of coercion are available within the different legal systems, and which would be acceptable in terms of Jewish law? Is any remedy available to the *agunah* — the 'chained' woman who cannot remarry so long as her husband refuses her a *get*?¹

It is deeply to be regretted that despite its timely appearance this volume remains virtually unknown to British lawyers. The victims of their ignorance are the many women who, on account of poor legal advice, have not taken advantage of the procedures which exist within the legal system of the United Kingdom to ensure that within the terms of their civil divorce their husbands would provide them with a *get* and so enable them to enter into another religious marriage. The present writer is personally acquainted with the problem of the Jewish lawyer whose antipathy to Jewish legal procedure (of which he is in any case woefully ignorant) outweighs his commitment to his client's interest; if she does dare to ask whether he can ensure that she receives a *get*, he airily dismisses her enquiry with some disparaging remark about 'mediaeval superstition' or the like. The Anglo-Jewish Divorce Project currently being conducted by the West-Central Jewish Community Development Centre has highlighted ignorance of Jewish law, not least by the legal profession, as a cause of much needless distress.

¹ Bernard S. Jackson, ed., *The Jewish Law Annual. Volume Four*, vii + 332 pp., published under the auspices of the International Association of Jewish Lawyers and Jurists and the Oxford Centre for Postgraduate Hebrew Studies by E. J. Brill, Leiden, 1981, 108 guilders.

NORMAN SOLOMON

The practising divorce lawyer who advises Jewish clients should turn at once to M. D. A. Freeman's succinct chapter on 'Jews and the Law of Divorce in England'.² Freeman has numerous suggestions as to how a *get* might be compelled by an English court, and one hopes that these possibilities will be explored. To date, however, the only method actually adopted by the courts has been that of oblique compulsion established in *Brett v. Brett*³ in 1969, where the court used a maintenance order to pressurise a recalcitrant husband to grant his wife a *get*. Freeman thinks that an English court would be unlikely to emulate the procedure used in some United States courts of ordering the specific performance of the *ketubah* (written marriage contract); he is probably right, though it is hard to see why it should be more difficult for an English court to overcome its scruples in regard to the unusual nature of the *ketubah* contract than for a United States court to come to terms with the First Amendment. At any rate, from the practical point of view it is important that solicitors should be familiar with *Brett v. Brett* and its consequences. From the London Beth Din or the Jewish Marriage Council they can, moreover, obtain up-to-date lists of court orders with respect to *gittin*, and with this information should be well armed to safeguard the interests of their female clients.

Let us turn now from the solicitor's office to consider more deeply the provisions of Jewish law with regard to divorce, and in particular the problem of the recalcitrant husband. *The Jewish Law Annual*, in 1979, set a competition for young authors on the theme 'The Wife Refused a *Get*. Towards a Solution', and in this volume Mark Washofsky's winning entry is published. Both Mark Washofsky, a graduate student at Hebrew Union College in Cincinnati, and the sponsors of the competition are to be congratulated on the production of this excellent essay, certainly the best English introduction of which I am aware to the intricacies of Jewish divorce law and the numerous traditional attempts made to alleviate the condition of the woman who becomes an *agunah* through her husband's refusal to grant a *get*. The roots of the problem, claims Washofsky, lie within biblical law (temper this to 'biblical law as interpreted by the rabbis' — it is not entirely clear that a woman in early biblical times could not one-sidedly terminate her marriage).⁴ The rabbis inferred from Deuteronomy 24. 1 that the husband's consent was an absolute prerequisite for divorce. This legal requirement conflicted with the generally humane attitude of the rabbis to women and with their concern for justice and fairness. Hence several remedies were in the course of time introduced to alleviate the *agunah's* predicament — for instance, the decision to accept the testimony of a single witness as to her husband's death, or the use of coercion to compel the husband to grant a *get*. Washofsky distinguishes between 'solutions' to the *agunah* problem and 'inducements'. The former are suggested means of terminating a marriage without the

JEWISH DIVORCE LAW

husband's consent; the latter are ways of ensuring his consent. Whereas the proposed 'solutions' are halakhically problematic, the 'inducements', halakhically more acceptable, do not solve the *moral* dilemma arising from the husband's ability, in principle, to inflict a cruel fate upon his innocent wife.

There are three types of 'solution'. Basing themselves on a ruling of Israel of Brunn (1400-1480), Eliezer Berkovitz⁵ and others have urged 'conditional' marriages, where the marriage itself would be invalidated retrospectively if some condition (for example, to grant a *get*) were not complied with. The Conservative Rabbinical Assembly in the United States wanted to adopt a second approach, worked out by Louis Epstein,⁶ following Rabbi Ben-Zion Alkalai of Algiers' 1912 proposal, whereby the husband, at the time of marriage, would make arrangements for the couple's divorce in appropriate circumstances.⁷ The third type of solution reverts to the mishnaic procedure, attributed to Rabban Gamaliel the Elder,⁸ of *hafka'at kiddushin*, annulment of marriage (betrothal). This last, the oldest and most radical of the procedures, amounts to granting the court power to annul marriages. So far, none of these procedures has been accepted for general use by the leading orthodox halakhic authorities, and their adoption would inevitably cause a serious rift, involving restraints on intermarriage, between the different groups of Jews. (See below the discussion of the Bleich and Novak proposals which are presented in this volume of *The Jewish Law Annual*.)

'Inducements' are less contentious halakhically, though not free from both halakhic and practical problems. Saul Lieberman's recommendation, adopted in 1948 by the Conservative Rabbinical Assembly, was for the insertion in the *ketubah* of a clause whereby bride and groom would be bound to accept the adjudication of the Assembly's Beth Din were they to encounter marital difficulties. If, for instance, the husband in such circumstances refused to grant a *get* the Assembly's Beth Din would impose terms of compensation which could then be enforced by American civil courts. However, not all American courts have been ready to intervene on this basis. Moreover, three halakhic objections have been raised: (i) the original commitment is vague (*asmakhta*); (ii) even if the civil courts were to enforce it, this might be regarded by Jewish law as illegal compulsion; and (iii) the procedure verges on 'conditional marriage', which is morally as well as halakhically open to objection. This said, 'inducement' of one sort or another is widely used even by orthodox Batei Din. Inducements range from the threat of imprisonment which the recalcitrant husband faces in Israel (no limits are placed by Jewish law on the coercive power of a Jewish court with regard to divorce) to the enforcement of maintenance orders by the civil courts, which most halakhic authorities would regard as legitimate compulsion where the granting of a *get* had been ordered by a Beth Din.

Washofsky, rightly in my view, argues strongly for 'solutions' rather than 'inducements', though he is well aware that a 'solution' not acceptable to the orthodox would result in the 'strict' authorities forbidding 'all intermarriage with Jews living in communities where the disputed reforms are in force, an action which would seriously impair the unity of world Jewry' (p. 157). His own hope for a 'solution' lies in the process he refers to as 'an essential *re-definition* of those fundamental principles which lie at the heart and base of the system of Jewish family law' (p. 159). He sees a model for this process in the attempt of the orthodox rabbi Yechiel Yaakov Weinberg (1885-1956) to re-define the concept of *zikkui ha-get*⁹ (writing a *get* on behalf of someone who has not expressed his consent but of whom the court declares that it is to his advantage to issue the *get*) and devotes the latter part of his essay to a careful analysis of Weinberg's extension, or redefinition, of the rabbinic rule of *zakin le'adam shelo befanav*¹⁰ — acting on a person's behalf without his consent on the basis that such action is to his advantage. Washofsky is convinced that it would be possible to re-define fundamental concepts of Jewish law in such a way as to *solve* definitively the problem of the recalcitrant husband. I would agree that this is possible, and even the right way to set about things. The real problem, however, is not that the *halakha* is inherently inflexible, for indeed it possesses great flexibility. The problem is not so much halakhic at all as *political*. It is not *can* the rabbis develop, or re-define, *halakha* in such a way as to solve the *agunah* problem, but *will* they? The bounds are set not by the logic of *halakha* (the rabbis of the Mishnah, as we saw above, actually *annulled* marriages where they saw fit) but by the nervousness of its practitioners, none of whom can dare to apply a 'solution' for fear that his colleagues will reject it and force him into a sectarian situation which would simply exacerbate the problem while helping no one. Central to this is the problem of authority in Jewish law; no one can *impose* a solution, and the consensus by which orthodoxy today maintains its identity is so fragile as not to admit of radical changes.

Is there, then, any possibility of change *within* the orthodox framework? J. David Bleich, who is Professor of Talmud at Yeshiva University in New York as well as Professor of Law at its Benjamin R. Cardozo School of Law, thinks that there is, and he proposes a remedy — still what Washofsky would call an 'inducement' — which he feels is sufficiently strongly grounded in *halakha* to commend itself to the orthodox. Bleich utilizes the institution of *tosefet mezonot*, of inserting in the *ketubah* a clause guaranteeing the bride maintenance beyond the statutory minimum set by the rabbis. Such a provision is well-attested by both law and custom, and is sufficiently definite in its nature to escape the charge of being *asmakhta*, an ill-defined contract. The daily sum stipulated should be significantly higher than any alimony award

JEWISH DIVORCE LAW

likely to be made by a civil court. The husband could only be released from this obligation if and when the marriage was terminated in accordance with Jewish law, and would thus be induced by the hope of escaping the hefty maintenance provision to grant the *get*. Bleich considers in meticulous detail the formulation of this provision in the *ketubah* and sees the now rarely used *Tenaim Aharonim* (Final Articles of Engagement) document as a model of unquestionable authority (once again it is the problem of *authority* which lies at the heart of things). It remains to be seen whether Bleich's suggestion (a) meets with the approval of his orthodox colleagues, (b) is implemented by them, and (c) proves to be enforceable in the American courts. Certainly there is no indication that English courts would at present be ready to take into consideration provisions incorporated in the *ketubah*.

David Novak, like Washofsky, sees 'solution' as the aim — solution, moreover, within the terms of Jewish law, not by the invocation of civil authority. Novak gives a perceptive analysis of the annulment of marriage in Jewish law, and explores the possibility of using this in lieu of divorce to solve *agunah* problems. He sums up the present situation in Jewish law as enabling 'a lawless person, the husband, to use a specific law to reject the authority of the Law in general and to fulfill his avaricious or sadistic designs against his wife' (p. 192). He acknowledges a debt to his late teacher, the talmudist and philosopher Samuel Atlas (d. 1977), for emphasizing the essentially social nature of the institution of marriage as conceived in the Talmud. Any individual freedom, argues Novak — such as in this case the freedom to divorce one's wife or not — is not a right prior to the Law but, rather, a personal prerogative which is allowed by the Law when it is consistent with the purposes of the Law (see p. 190). In several cases where a marriage was improperly though validly initiated we find rabbis, even in the Middle Ages, annulling it; the Talmud has instances of annulment even where the marriage was not improperly initiated. Novak cogently argues that annulment is the proper mode of operation today, for 'without the practical power to annul such marriages the law is in effect encouraging immoral blackmail and vengeance' (p. 206). Novak is ready to endorse the annulment procedure despite the fact that he knows it will not command universal consent. To him, a moral evil at the heart of *halakha* and contrary to its true intentions cannot be countenanced even in the interest of maintaining communal unity.

In the contrast between Bleich and Novak we see the difference in the Orthodox and Conservative approaches to *halakha*. Both groups regard the *halakha* as of the essence of Torah and as binding upon all Jews. Both groups regard themselves as firmly in the tradition of the rabbis. The Orthodox, however, though recognising the demands of morality and compassion and indeed seeing them as principles of Torah, are reluctant to invoke them to develop given rules in ways not clearly

NORMAN SOLOMON

stated by earlier rabbis; the Conservatives are ready to accept responsibility for development along what they perceive as philosophically justifiable paths of interpretation. Clearly, the issue between them is one of *authority* rather than of law or morality.

In recent years, English divorce law has moved further and further away from involving itself in marriage. Of course, it still regulates the *consequences* of marriage and divorce by a variety of administrative procedures. Since the 1969 Divorce Reform Act, however, it can hardly be said to regulate divorce itself, for divorce is now available, subject to the lapse of an appropriate period of time, on demand. There are of course many important consequences which flow from a legally enacted marriage and which are not applicable to a couple merely 'living together', but even here there is a noticeable tendency to granting rights to those who have not been through the formalities. It seems to be the case that marriage and divorce are coming to be regarded as in themselves personal matters, their consequences rather than they themselves being the area of operation of the law. There are well-known social reasons for this development, but one of its consequences is that lawyers in England today have to be much more sensitive to the purely personal aspects of marriage and divorce. The religious affiliation, if any, of the parties, becomes important, and thus it is that so many important cases recently have hinged on the cognizance to be taken by the law of, for instance, Hindu and Muslim, as well as Jewish, marriage and divorce regulations; it is a reflection of the pluralistic and doctrinally uncommitted nature of our society, and of the consequent recognition that the law should interfere as little as possible with the right of the individual to follow his or her own preferences in regard to the establishment or discontinuance of the marriage relationship. Paradoxically, now that the law itself is not determined by the dominant religion of the country, it has become more rather than less important to have regard to the religious commitment, if any, of the matrimonial pair themselves. Not that the law itself is interested in the religion of the parties — as a matter of principle, it is *not* interested. But precisely *because* it is not interested, precisely *because* it leaves it to the parties to choose or reject any religious beliefs they wish, it has to recognize that parties *do* in fact choose beliefs, and marry or divorce in accordance with those beliefs. I would argue that, subject to such measures as are necessary to protect basic rights of the individual, the task of the law is not to make or break marriages, but to *register* them as having taken place or as having been dissolved, and to *regulate* the consequences. Historically, it is likely that this was for a time the case with regard to Jewish marriages in this country. There were probably not many Jewish divorces in nineteenth-century England; it would seem, however, that prior to the 1857 Matrimonial Causes Act the Jewish ecclesiastical authorities themselves exercised

JEWISH DIVORCE LAW

the power of granting divorce on the grounds established by Jewish law. This is most reasonable. A couple who, at the time of their marriage, commit themselves to a particular type of jurisdiction by virtue of their choice of religious ceremony should be understood as committed to the same jurisdiction in the case of divorce, subject to (a) regulation of the *consequences* of that divorce by the dominant jurisdiction and (b) provision for appeal to the dominant jurisdiction in the case of manifest inequity. Jewish law undoubtedly has its problems, as in the case of the recalcitrant husband. Much of the difficulty is, however, only apparent, and stems not from Jewish law itself but from the rabbis' lack of power to put the law into effect. Many of these difficulties, not least that of the recalcitrant husband, could be mitigated if religious divorce were accorded a status similar to that of religious marriage.

Such a proposal may seem radical to some. In effect, what it does is to remove the last vestiges of Lord Hardwicke's Marriage Act of 1753 which provided, for the first time, that no marriages other than those publicly solemnized in the Church of England should be recognized as valid. Lord Hardwicke's Act, contentious even in its own time as an attempt to rob Roman Catholics and Dissenters of the right to celebrate their own marriages, has of course been whittled away in the course of the last two centuries so that we are close to the pre-1753 situation where common law marriage was a valid form; that is, where marriage — as apart from its *consequences* — was not normally within the range of statutory law. But this is a perfectly natural development in a society in which the Church of England can in no way claim a monopoly of marriage regulation. It is similar to the situation in those overseas territories, such as India, where in imperial times the regulation of marriage — and in Muslim areas, divorce — was within the local religious jurisdiction.

It is interesting to note that talmudic law treats marriage and divorce as private arrangements not requiring the specific sanction of an authorised rabbi, though of course subject to procedures and limitations imposed by rabbinic law. There were many Jewish Lord Hardwicke¹¹ in the Middle Ages who attempted to invalidate marriages contracted without the specific approval of the local rabbi or worthies, notwithstanding their clear validity in talmudic law. Their rulings might even be cited (many will dispute this) as a precedent for the dissolution by a Beth Din of a validly contracted marriage.

An important point overlooked when proposals are made for enforcement of the performance of a *get* is the status of coercion in rabbinic law. Basically, coercion is acceptable when exerted on behalf of a validly constituted Beth Din, but not when exerted on behalf of a non-Jewish court unless that court is urging compliance with a ruling of the Beth Din. If the English courts were to accept the jurisdiction of the

Beth Din in Jewish divorces all coercive action to secure compliance would clearly be acceptable in terms of Jewish law, even though actually carried out by officers of the state. But I very much doubt whether such a proposal as that of Eleanor Platt Q.C.¹² would meet this requirement. Miss Platt suggests 'an agreement under seal between bride and groom that in the event of a decree absolute in the civil Court, if the husband then refused to give a Get or the wife refused to receive one, the injured party would be liable to be paid liquidated damages . . . by the other for breach of that contract.' Miss Platt thinks such an arrangement would be enforceable by an English civil Court. It does not seem to me clear that a *get*, if enforced in such a manner, would be valid in Jewish law. Perhaps this difficulty could be overcome by specifying in the original agreement that the *get* is to be given if and as directed by the Beth Din (one foresees problems as to the identity of 'the Beth Din'). Miss Platt notes, by way of precedent, that 'the failure to provide a dowry in accordance with the marriage contract has been upheld in the English civil law as breach of contract in relation to a polygamous Mohammedan marriage'.¹³

Not only the practising lawyer but equally the historian of law and society will learn much from the volume under review. Rabbinic law is set in perspective in relation to (a) its historical antecedents both in the Bible and in the ancient Near East (Lipinski, Zakovitch, Piatelli); (b) its contemporary setting, as reflected in the New Testament (Lövestam) and the Roman Empire (Rabello); and (c) the wife's right to divorce in Muslim and Hindu law (David Pearl, J. Duncan M. Derrett). Mordechai Friedman, utilizing material from the Cairo Geniza, has some interesting observations on divorce on the wife's demand in the Gaonic period and late medieval Egypt, and Shmuel Shilo writes on the treatment by the *rishonim* (rabbis of the twelfth to fifteenth centuries) of impotence as a ground for divorce.

The volume is highly recommended to all who wish to gain an insight into Jewish law at a point at which it has maximum impact on the lives of twentieth-century Jews. For practising divorce lawyers in any country where there are substantial numbers of Jews, it is compulsory reading.

NOTES

¹ A *get* is a bill of divorcement. An *agunah* is also a woman whose husband's death is strongly suspected but not proved to the satisfaction of the Beth Din and who cannot remarry; or a childless widow whose deceased husband's brother cannot be reached so that he may ritually release her (or who refuses to release her) and who cannot remarry until he does so.

² Pp. 276-88. On pp. 250-71, Bernard J. Meislin writes on the 'Pursuit of the Wife's Right to a "Get" in United States and Canadian Courts'. In this latter

connection, the reader should also pay special attention to the text of the judgment of Justice of the Supreme Court Gerald S. Held in the important case of *Stern v. Stern*. Freeman thinks that an English court, unlike Judge Held, would not compel a *get* by ordering the specific performance of a *ketubah*. See my remarks below on Eleanor Platt Q.C.'s proposal and the precedent she offers (*Shahnaz v. Rizwan* [1965] 1 Queen's Bench 390). Freeman, at any rate, does not think that *Shahnaz v. Rizwan* would be sufficient basis for action on the basis of a *ketubah* — but Platt's proposal involves using an agreement separate from the *ketubah* and would certainly be worth testing in court.

³ [1969] *All England Review*, p. 1007.

⁴ Yair Zakovitch suggests (p. 46), but with little supporting evidence, that in some biblical periods, at least, a wife had 'certain rights to divorce her husband when her basic needs are not supplied or when she is deserted . . .'. I can find not the slightest indication, in the texts he cites, that a wife was able to issue a bill of divorcement to her husband. Indeed, throughout most of the biblical period and for the majority of people, things were certainly not as well regulated and documented as Deuteronomy might have wished.

⁵ Eliezer Berkowitz, *Tenai Benisuin Uv'Get*, Mosad Harav Kook, Jerusalem, 1967.

⁶ Louis Epstein, *Lish'elat Ha-Agunot*, New York, 1940.

⁷ In Malay Muslim marriages, the husband usually utters a formula (which is duly registered in the marriage certificate as a *ta'alik* clause) by which he binds himself that his wife will be divorced if he fails to maintain her for a specified period of time, usually three months. If she can satisfy a kathi or a Muslim court that he has not maintained her, the divorce is registered with or without the husband's consent, since he has already pronounced a conditional divorce formula (a *ta'alik*) at the time of the marriage. See Chapter 2 on *Ta'alik* in Judith Djamour, *The Muslim Matrimonial Court in Singapore*, London, 1966, pp. 38–76.

⁸ Mark Washofsky (p. 150, n. 34) cites *Mishnah Gittin* 4:1,2. The Mishnah does not state the principle of *hafka'at kiddushin*. This is given in R. Gamaliel's rationale in *B. Gittin* 33a in a pericope which I would hesitate to date earlier than the fourth century. However, there is no doubt that the principle is widely accepted in the Talmud. It was certainly regarded by the later authorities as authoritative, though they hotly disputed the range of its application.

⁹ J. J. Weinberg, *Seridei Esh* (Responsa), vol. 3, Mosad Harav Kook, Jerusalem, 1969.

¹⁰ Cf. *Mishnah Erwin* 7:11 and, for its application to divorce law, *Shulchan Aruch Even Ha-Ezer* 140.

¹¹ Joseph Colon (1420–1480), in a very colourful responsum (*Maharik* — Responsum no. 84) directed against Moses Capsali of Constantinople, ridicules the very notion that a marriage can be invalidated on the grounds that it contravened a local *herem* or *takkana*. But it is clear that Capsali thought otherwise.

¹² She has published her suggestion in *New London Forum* (the Journal of the New London Synagogue), vol. 1, no. 2, September 1983.

¹³ This (she cites no reference) is presumably her summary of *Shahnaz v. Rizwan*. See Note 2 above for Freeman's comment on the case.