

ENFORCEMENT OF DIVORCE JUDGMENTS BY  
IMPRISONMENT: PRINCIPLES OF JEWISH LAW

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- 1 *Introduction*

Individual liberty and human dignity are important values in the eyes of both halakhic scholars<sup>1</sup> and many philosophers.<sup>2</sup> According to the Sages, man does not enjoy absolute liberty, being subject to the commandments of the Creator. However, it is inappropriate for him to subjugate himself

- 1 See Genesis 1:27; Leviticus 25:55; mAvot 4:1; 4:12; M. Elon, *Freedom of the Debtor's Person in Jewish Law* (Hebrew), (Jerusalem: 1964), 1–2, 16–37, 255–64 [henceforth *Freedom*]; idem, *Human Dignity and Freedom in the Methods of Enforcement of Judgments: The Values of a Jewish and Democratic State* (Hebrew), (Jerusalem: 1999), 1–2, 16–37, 255–64; S. Warhaftig, *Jewish Labor Law* (Hebrew), (Tel Aviv: 1969), 2–3; C. Povarsky, “Fundamental Notions in the Jewish Law of Obligation: An Analytical Jurisprudential Examination of the Personal Obligation and the Lien on Property in the Halakha” (Hebrew), (PhD Dissertation, Tel Aviv University, 1985), 23–47; H.C. of Justice 5304/92 *Perah 1922 Aid to Victims of Laws and Regulations for a Different Israel — Amutah v. Minister of Justice* (1993) P.D. 47 (4) 734–37, 742–43; M. Elon, “Human dignity and freedom in the Jewish tradition” (Hebrew), 12 *Mahanaim* (1996), 19–29; M. Elon, “Criminal law in a Jewish and democratic state” (Hebrew), 13 *Bar-Ilan Law Studies* (1996), 47–48.
- 2 Philosophers generally emphasize that the right to liberty is a basic right in human society. See J.S. Mill, *On Liberty* (Cambridge: 1989), 1–17; T. Hobbes, *Leviathan* (Oxford: 1960), 84, 136–45. Isaiah Berlin writes: “I am normally said to be free to the degree to which no man or body of men interferes with my activity. . . . If I am prevented by others from doing what I could otherwise do, I am to that degree unfree” (I. Berlin, *Four Essays on Liberty* [London: 1969], 122).

to his fellow man.<sup>3</sup> The biblical verse, “For unto me the children of Israel are servants”<sup>4</sup> is interpreted in a manner that reflects displeasure with one who sells himself into slavery: “‘For unto me the children of Israel are servants’ — and not servants to servants.”<sup>5</sup> In keeping with this general outlook, the medieval halakhic authorities maintained that one is forbidden to subjugate the “body” of another.<sup>6</sup> Therefore, it is forbidden to force him to work in order to repay a debt. This recognition of the value of individual liberty and human dignity also led these scholars to view imprisonment in general,<sup>7</sup> and the physical subjugation of debtors by way of imprisonment in particular,<sup>8</sup> as undesirable.

Nevertheless, when there was no other choice, and the needs of society required the implementation of harsh measures, imprisonment was at times imposed.<sup>9</sup> Individual liberty and other important values,

3 Tosefta (Zuckerman ed.), Baba Kama 7:5, 358. See also bKidushin 22b; E.E. Urbach, *The Sages: Their Concepts and Beliefs* (Jerusalem: 1969), 365–66; idem, “The *halakhot* regarding slavery as a source for the social history of the Second Temple and the talmudic period” (Hebrew), in Urbach, *The World of the Sages* (Hebrew), (Jerusalem: 1988), 184–185.

4 Leviticus 25:55.

5 See jBaba Metzia 6:2 (25b); bKidushin 22b; bBaba Kama 116b; bBaba Metzia 10a; bBaba Batra 10a. The medieval halakhic authorities, however, maintained that one is permitted to hire himself out to serve another, because his master has no ownership rights over him. A Hebrew slave, on the other hand, is enslaved to his master; he cannot retract his consent to the agreement, nor is he set free before the end of the term of his bondage, unless his master writes him a deed of release. See *Tosafot*, bBaba Metzia 10a s.v. *ki li bnei yisrael avadim*; *Responsa Mahariaz Anzil*, #15, s.v. *omnam ma shehiksha*; Warhaftig, n. 1 above, 88.

6 See *Responsa Rosh*, 78, #2; Warhaftig, *ibid.*, 89; *Freedom*, n. 1 above, 140–47.

7 See Elon, *ibid.*, 16–19; 265–69; H.D. Halevi, *Devar Hamishpat* (Tel Aviv: 1963), vol. 1, 185–86; idem, *Ase Lekha Rav* (Tel Aviv: 1979), vol. 3, #57, 302–03; idem, *Mayim Hayim* (Tel Aviv: 1995), vol. 2, #78, 263; M. Elon, “Constitution by legislation: the values of a Jewish and democratic state in light of the *Basic Law: Human Dignity and Personal Freedom*” (Hebrew), 17 *Tel-Aviv University Law Review* (1993), 659, 679–81; “Criminal law,” n. 1 above, 27, 35.

8 See Urbach, “*Halakhot* regarding slavery,” n. 3 above, 180–81; B. Cohen, “Civil bondage in Jewish and Roman law,” *Louis Ginzberg Jubilee Volume* (NY: 1945), 113ff.; M. Elon, *Jewish Law: History, Sources, Principles* (Hebrew), (Jerusalem: 1988), 535–36 [henceforth *Jewish Law*].

9 See Elon, *ibid.*, 10–11, 26, 535 n. 35, 575–76, 664–65, 828 n. 87, 1370–75.

it was understood, had to be balanced against societal needs, and therefore limits sometimes had to be placed on individual liberty. Were everyone free to act as he pleased, chaos would reign, force would be used to acquire rights, and basic human needs would go unmet. Because the legal system must grant due weight to objectives other than individual liberty, such as justice, security, and equality, imposition of limits on individual liberty is justified where appropriate.<sup>10</sup>

A similar balance must also be found, from the perspective of halakhic scholars, in the context of rulings concerning enforcement of divorce judgments. Their point of view differs from that of the aforementioned liberal philosophers. With regard to the refusal to grant a writ of divorce (*get*), two evils clash: the evil of depriving an individual of certain rights when coercion is used to enforce divorce judgments, and the evil inherent in the plight of a husband whose wife refuses to accept a *get* or a wife whose husband refuses to grant a *get*, both of whom are unable to actualize their desire to be divorced from their spouse. The refused party is not free, but forced to spend the rest of his or her life bound to a spouse by an undesired marriage. The woman who is refused a *get* may be childless and approaching the end of her childbearing years. If so, her husband's refusal to release her from her marital bond may interfere with her right to become a parent. Enforcement of divorce judgments by imprisonment deprives the individual in question of his or her liberty. On the other hand, depriving someone of the right to choose how and with whom to spend their life is also a significant infringement of their basic freedom.

In this chapter we will begin by considering the fundamental concepts of Jewish divorce law, including *get meuse*, an enforced *get*, and Rabbenu Tam's *harhakot*, isolating measures. We will attempt to draw conclusions from this discussion as to the position of Jewish law vis-à-vis sanctions that may be imposed, in general, on a spouse who refuses to divorce, and in particular, imprisonment of a recalcitrant spouse. This will be followed by a discussion of the principles of Israeli law with respect to these issues. Our analysis will lead to the conclusion that

10 "Freedom for the wolves has often meant death to the sheep. The blood-stained story of economic individualism and unrestrained capitalist competition does not, I should have thought, today need stressing.... Legal liberties are compatible with extremes of exploitation, brutality, and injustice. The case for intervention, by the state or other effective agencies, to secure conditions for both positive, and at least a minimum degree of negative, liberty for individuals, is overwhelmingly strong" (Berlin, n. 2 above, xlv–xlvi).

imprisonment of a recalcitrant spouse must be a last resort, recourse to which must be carefully limited and controlled. At the same time, we will argue that the need to ameliorate, as much as possible, the plight of the refused spouse — especially women who are refused a *get* — obligates the halakhic authorities to consider making greater use of sanctions that entail a lesser infringement of the recalcitrant spouse's free will and human rights.

## 2 *Enforced Get (Get Meuse) in Jewish Law*

### a Compelling the Husband to Give a *Get* when there are Grounds for Divorce that Justify Compulsion

In Jewish law, divorce does not follow merely from a decision by the court. Early sources of Jewish law indicate that originally, a woman could be divorced against her will. At that time, a court decision in favor of divorce did not suffice on its own, and the husband's cooperation was required as well.<sup>11</sup> After the husband agreed of his own free

11 Some maintain that originally, during the biblical period, the husband could divorce his wife against her will, and had absolute power with regard to divorce. See E.G. Elinson, "Talmudic restrictions in divorce — their nature and validity" (Hebrew), 5 *Dine Israel* (1974), 37 n. 1 [henceforth Elinson, "Restrictions"].

According to the medieval authorities, the biblical wording implies that the husband must divorce his wife of his own free will. Deuteronomy 24:1 reads: "And if it shall come to pass that she find no favor in his eyes, because he has found some unseemliness in her, then let him write her a bill of divorce, and give it in her hand, and send her out of his house." R. Samuel b. Meir (Rashbam), in his commentary on bBaba Batra 48a s.v. *vekhen ata omer*, explains that the Mishnaic principle (see the following paragraph) is derived from the word *venatan* ("and give it") in the verse cited above: "'And give it' — this implies, of his own free will." R. Moses b. Maimon (Rambam), in his codification of Jewish law, the *Mishne Torah* (henceforth, *Code*), Laws concerning Divorce 1:2, explains that the principle is derived from the words "*im lo timtza hen beeinav*" (if she find no favor in his eyes): "'if she find no favor in his eyes' — this teaches that he only divorces of his own free will."

The principle that the husband can give his wife a *get* when he wishes to give it, of his own free will, but the wife must accept the *get* "of her own free will or against her will," is mentioned in the early halakhic literature, in the Mishnah, Tosefta and Talmud: mJebamot 14:1; Tosefta, Ketubot 12:3; bJebamot 113b; bGitin 88b. See also M.A. Friedman, *Jewish Marriage in Palestine* (Tel Aviv: 1980), vol. 1, 312–13 [henceforth *Jewish*

will to divorce his wife, and gave her a writ of divorce — a *get* — the woman was divorced.

Later, a change occurred with respect to the wife's consent to receive a *get*. Sources from a later period indicate that, in those Jewish communities where a husband was prohibited from divorcing his wife against her will, the cooperation of both the husband and the wife was required, and without it the *get* was invalid.<sup>12</sup>

According to sources from the Mishnaic and talmudic periods, the gap between the capacities of the husband and the wife to sever their marital bond is narrowed by the halakhic principle that de facto entitles a woman to receive a *get* against the will of her husband, who in prescribed circumstances may be "compelled" (*kofin*) to give his wife a *get*.<sup>13</sup> The cooperation that is required is sometimes obtained by way

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*Marriage*]. A similar principle is mentioned in Sifre Deuteronomy (Finkelstein ed.), (NY: 1969), sec. 269, p. 290. See also bGitin 77a; bBaba Metzia 10b, 56b.

During this period, the gap between the husband and the wife in the area of divorce was narrowed in part by limits set by the Sages regarding the circumstances that justify divorce. Beit Shammai maintained that divorce is only justified if the husband discovers something improper with regard to the marital relationship (*ervaat davar*), that is, if the wife committed adultery, or according to a different interpretation, if she was guilty of immodest behavior. Beit Hillel maintained that divorce was permitted even if the woman merely burned her husband's food; see mGitin 9:10. See also "Restrictions," 38–40. The Talmud mentions a limitation set by the Amoraim: they had reservations about one's divorcing his first wife. See bGitin 90b; bSanhedrin 22a. See also "Restrictions," 40–45.

In part because of the limitations placed on the husband's prerogative to divorce his wife, relatively few cases of divorce are mentioned in the Mishnah and Talmud. See T. Ilan, "The Jewish Woman in Palestine in the Hellenistic–Roman Period (332 BCE–200 CE)" (Hebrew), (PhD Dissertation, Hebrew University of Jerusalem, 1991), 235–36.

12 See Elinson, *ibid.*, 37 n. 2. R. Bleich explains: "In Judaism both the establishment of the matrimonial bond and its dissolution through divorce have always been seen as flowing from the acts of the parties and not from rabbinic judicial authority" — J.D. Bleich, "Jewish divorce: judicial misconceptions and possible means of enforcement," 16 *Connecticut Law Review* (1984), 219. And see the beginning of section 2b below, and nn. 39–42.

13 mKetubot 7:9–10 states: "A man in whom defects arose, we do not compel him to divorce [his wife]. Rabban Shimon b. Gamaliel said: When is this the case? When they are minor. But in the case of major defects, we compel him to divorce [her]. And these are [the defects] for which we compel [a man] to divorce [his wife]: one who is afflicted with skin-sores, and one who has a polyp, and one who collects excrement, and the

of pressure put on the recalcitrant spouse. Not every coercive measure applied to the husband to persuade him to give a *get* is considered unlawful duress that invalidates the *get*. The Mishnah and Talmud state that where there are valid grounds for divorce, coercive measures may be exercised against the husband to persuade him to give a *get*. In such situations, the husband is in practice compelled to divorce his wife against his will.<sup>14</sup> The cases in which the husband is forced to

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copper smelter, and the tanner, and so on." It follows from the Mishnah that the husband does not always divorce his wife "of his own free will." Under certain circumstances he may be forced to divorce her against his will, e.g., when he suffers from a major defect, such as skin sores, or works in a profession that involves handling repulsive foul-smelling materials. See also mGittin 9:8.

The Talmud mentioned other grounds for compelling the husband to divorce his wife against his will. In addition to defects, illnesses, and problematic professions, certain types of improper conduct justify divorce against the husband's will, see mKetubot 7:1 (regarding a husband who made a vow forbidding his wife to derive any benefit from him) and bKetubot 70a. See also mKidushin 2:5.

- 14 In addition to the sources referred to in the previous note, the Mishnah also states:

Three women are divorced [against their husband's will] and receive their *ketuba*: (1) One who says: 'I am defiled to you' [the wife of a priest who claims she was raped and is therefore forbidden to live with her husband]; (2) [One who says:] 'Heaven is between you and me' [a woman who claims that it is the husband's fault that they do not have children, or according to another explanation, a woman who claims that her husband does not cohabit with her]; (3) [One who says:] 'I have been taken away from Jewish men' [a woman who took a vow not to have sexual relations with any Jew, including her husband]. (mNedarim 11:12)

However, it is stated at the end of that Mishnah that the Sages later greatly reduced a woman's ability to initiate divorce proceedings against her husband with such claims.

Elsewhere, the Mishnah mentions other circumstances in which the husband is compelled to divorce his wife against his will: when she is prohibited to him (mJebamot 3:5; 10:1, mEduyot 4:9, and elsewhere), and when the couple have not had a child after ten years of marriage (mJebamot 6:6). The Babylonian Talmud mentions other cases in which the husband is forced to divorce his wife against his will, including: when he is not ready to maintain his wife, according to the Amora Rav (bKetubot 63a, 77a), or, according to the Amora R. Ami, when he takes a second wife (bJebamot 65a). Sometimes the wife's conduct justifies forcing the husband to divorce her against his will, e.g., when rumors that she is promiscuous abound, and in other cases mentioned in mJebamot 2:8 and bJebamot 24b.

divorce his wife are the exception to the rule that a man must divorce his wife of his free will. The court's recognition of the existence of certain legitimate grounds for divorce makes it possible to force the husband to give a *get* against his will.

In light of the manner in which the principles mentioned in the Mishnah and the Talmud were interpreted in the medieval halakhic literature, a connection exists between certain circumstances or behaviors defined as constituting grounds for divorce (as well as, according to certain halakhic authorities, who will be mentioned below, other grounds for divorce that can be derived by way of the various rules of analogy, such as *kal vahomer* or *hekesh*, from identical or similar halakhic rationales) and a court ruling "compelling" divorce. When the circumstances or the husband's conduct are such that they meet the criteria for a ruling that divorce is compulsory, the court will rule that the husband is "compelled" to divorce his wife, and it will exercise harsh coercive measures, such as flogging, to persuade the recalcitrant husband to give a *get*.<sup>15</sup> The practical result of these harsh coercive

15 A distinct category of cases in which divorce is "compelled" first appears in a clearly-defined fashion in the commentaries of the medieval authorities, e.g., *Commentary of Rashbam*, bBaba Batra 48a s.v. *vekhen ata omer begitei nashim*; *Tosafot*, bKetubot 70a s.v. *yotzi*; *Responsa Or Zarua*, #760; *Piskei Rosh*, Jebamot 6:11; *Responsa Rosh*, 43, #4; *Hidushei Haritba*, bBaba Batra 48a s.v. *vekhen*. The existence of this distinct category is implied by the wording used in Maimonides, *Code*, Laws concerning Divorce 2:20: "Someone who by law is **compelled** to divorce his wife."

This special category is mentioned several times in the writings of R. Menahem b. Solomon Hameiri. See the following passages in *Beit Habehira*: bKidushin 50a s.v. *mi*: "In the matter of divorce, **regarding all those about whom they said: 'They compel them to divorce'** — they compel him until he says: 'I agree'"; bBaba Batra 40b s.v. *get*: "If they forced him in a lawful manner, it is a *get* enforced by Jews in a lawful manner, which is valid, as for example, **those whom they compel to divorce**"; bBaba Batra 47b s.v. *hasikrikon*: "Regarding a *get*, **those whom they compel to divorce**, they compel until he says: 'I agree'"; bBaba Batra 48a s.v. *get*: "A *get* enforced by Jews in a lawful manner — for example, **where the law states that he is to be compelled** — is valid, even when it was granted after coercion or beating, and even beating by Gentiles, if they forced him to do whatever the Jews tell him, for wherever there is an element of *mitzva*, he gives his consent through the coercion." (emphasis added) See also *Responsa Rashba*, 1, #1192;5, #205; 7, #414; *Responsa Rosh*, 43, #4; *Responsa Maharam Halawa*, #53; *Responsa Hakhmei Provence*, #48, #76–78; *Responsa Maharik Hahadashot*, #29; *Tashbetz*, 2, #68, #256; *Responsa Yakhin Uboaz*, 1, #130; 2, #21.

measures is that the husband does not divorce his wife purely of his own free will. It can be assumed that the Sages of this period — the Tannaim and Amoraim — were well aware that when the husband is “compelled” to grant a divorce, he may in the end divorce her unwillingly, under the influence of the coercive measures exercised against him.

In this context, great importance is ascribed to the discretion of the court. Even when grounds exist for “compelling” divorce, flogging and other harsh coercive measures are only permitted after a rabbinical court rules that the husband is “compelled” to give a *get*. A *get* that was given after the exercise of a coercive measure of this sort, without an explicit judicial ruling that grounds exist for “compelling” divorce, is considered an unlawfully (*shelo kadin*) enforced *get* (*get meuse*).<sup>16</sup>

At some point in the Middle Ages, however, it seems that, according to certain eminent halakhic authorities, the rigid framework of well-defined grounds for “compelled” divorce, grounds that were limited to specific circumstances, no longer existed in practice, because the rabbinic authorities were recognizing a subjective ground for “compelled” divorce, applicable to any woman, namely, the claim that “my husband is repulsive to me” (*mais alai*).

According to the Babylonian Geonim, the talmudic discussion regarding a rebellious wife who refuses to cohabit with her husband implies that a husband whose wife claims that she finds her spouse repulsive is not “compelled” to divorce her. They were apparently

16 If Gentiles use coercive measures to force a husband to give his wife a *get*, in circumstances where there are lawful grounds for compelling the husband to divorce his wife, but a rabbinical court never actually issued a ruling to that effect, the *get* is deemed improper (but not altogether invalid, for it disqualifies the woman who received it from marrying a priest). But if the Gentiles acted as agents of a rabbinical court that had ruled that there were lawful grounds to compel a divorce, the *get* is enforced (*meuse*), but the enforcement is lawful, and the *get* is valid: “An enforced *get*, through Jews — is valid; through Gentiles — is invalid; regarding Gentiles, if they beat him and tell him: ‘Do what the Jews tell you,’ it is valid” (mGitin 9:8). Cf. Mekhilta deRabbi Yishmael (Horowitz-Rabin ed.), Mishpatim, sec. 1, pp. 21, 246; bBaba Batra 48a; bJebamot 106a; bGitin 88b; jGitin 9:10. For commentary on these sources, see: *Code*, Laws concerning Divorce 2:20; *Responsa Yakhin Uboaz*, 2, #21; *Responsa Rashbash*, #339; A. Cohen, “The question of R. Zalman Katz (Maharzakh) and R. Jacob Weil regarding an enforced *get*” (Hebrew), *Moriah* 6 (1975), 11–12; “The responsa of R. Nathan Igra,” 12–13; “The responsa of R. Abraham Hakohen (Maharakh),” 13–14.

aware that had the Talmud recognized this subjective claim, expressing the wife's feelings, namely, rejection of and revulsion toward her husband, as grounds for "compelling" the husband to grant a divorce, the floodgates would be opened, and coercive measures would all too easily be exercised against husbands, many of whom would then state that in practice they were divorcing their wives not of their own free will.

After the period of the Mishnah and the Talmud, however, during the period of the Geonim, in response to the needs of the hour, an enactment referred to as "the enactment of the yeshiva" (*takana demetivta*), was passed.<sup>17</sup> During this period, Jewish women had been turning, in contravention of the halakha, to the non-Jewish authorities for assistance in obtaining a divorce from their husbands, assistance rendered by the authorities in question by means of sanctions imposed on the husbands. This troubling phenomenon raised serious concern that any *get* given after the exercise of such sanctions should be considered an unlawfully enforced *get*. If a woman remarried after receiving such a *get*, her marriage would be invalid, with two dire results: she herself would be living in sin, and the offspring of the union would be considered *mamzerim*.

The Geonim therefore issued an enactment that when a woman put forward the subjective claim of *mais alai*, her husband would be compelled to grant her a divorce. In this way, Jewish women would apply to a Jewish court, present the *mais alai* claim, and, as a result of the new legislation, the court would be able to offer them relief without diminishing the validity of the *get*.<sup>18</sup>

17 See M. Schapiro, "Divorce on grounds of revulsion" (Hebrew), 2 *Dine Israel* (1970), 117–23. Y. Weinrot, "The Law of the Rebellious Wife" (Hebrew), (PhD Dissertation, Tel Aviv University, 1981), 25–27; A. Beeri, "The Husband's Obligation to Support his Wife in Israeli Law: the Rebellious Wife and her Right to Maintenance" (Hebrew), (PhD Dissertation, Bar-Ilan University, 1982), [henceforth *Obligation*], 6–31; *Jewish Marriage*, n. 11 above, 323–24; S. Riskin, "The 'Moredet': A Study of the Rebellious Wife and her Status in Initiating Divorce in Jewish Law" (PhD Dissertation, New York University, 1982); idem, *Women and Jewish Divorce* (Hoboken, NJ: 1989), 47–54 [henceforth *Women*].

18 See *Geonic Responsa, Shaarei Tzedek*, part 4, gate 4, #15; *Geonic Responsa, Hemda Genuza*, #89, #140; *Otzar Hageonim*, Ketubot, p. 191, #478; H. Tykocinski, *The Geonic Ordinances* (Hebrew), (Tel Aviv: 1959), 11–29; Schapiro, *ibid.*, 124–30; *Obligation*, *ibid.*, 31–34, 224–28; *Jewish Marriage*, *ibid.*, 324–26; Weinrot, *ibid.*, 32–33; *Women*, *ibid.*, 47–78; *Jewish Law*, n. 8 above, 541–46; A. Rosen-Zvi, *Israeli Family Law — the Sacred and the Secular* (Hebrew), (Tel Aviv: 1990), 257–60.

In addition to the Geonic enactment, there was another medieval halakhic opinion contending that a husband whose wife claimed she found him repulsive might indeed be “compelled” to grant a divorce. Maimonides wrote that the husband may be “compelled” to give his wife a *get* on the basis of the principle, found in talmudic law, that a woman can only cohabit with her husband of her own free will. If she claims that she finds him repulsive and no longer desires to cohabit with him, her feelings must be respected. The appropriate solution for such a woman is the ruling that her husband is “compelled” to divorce her. Maimonides states: “A woman who refuses to have sexual relations with her husband is called a ‘rebellious wife.’ And they [the court] ask her why she is rebelling. If she says, ‘I find him repulsive, and I cannot willingly engage in sexual relations with him,’ they compel him to divorce her immediately, because she is not like a captive who must have sexual relations with a person whom she hates.”<sup>19</sup>

The Geonic enactment — legislation that changed the halakhic situation that existed during the talmudic period — and Maimonides’ interpretation of the talmudic law, created a new ground for divorce, a ground that was subjective and readily available. It sufficed for a woman to express feelings of rejection of, and revulsion toward, her husband, claiming “my husband is repulsive to me,” and she would attain her goal — imposition of strong sanctions against her husband, implemented in cases where he is “compelled” to give a divorce. The notion of a subjective ground for divorce that was available to many women was a revolutionary development that contravened the prevailing medieval halakhic doctrine of Jewish divorce law, namely, a circumscribed list of grounds for divorce that exist only in specific, well-defined, circumstances.<sup>20</sup>

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Yerahmiel Brody argued that the essence of the Geonic enactment was that a rebellious wife should not be made to wait a year as was required by talmudic law, but that she should receive a *get* immediately. In Brody’s opinion, the Geonic enactment did not relate directly to the issue of coercion, but directed that the woman be given her *get* immediately. The implication is that for this purpose, immediate use may be made of the means which, according to talmudic law, may be used after a year has elapsed. See Y. Brody, “Were the Geonim legislators?” (Hebrew), 11–12 *Shenaton Hamishpat Haivri* (1984/6), 299–300.

19 *Code*, Laws concerning Marriage 14:8.

20 Rosen-Zvi, among others, has noted that it might be possible to utilize the position that a husband whose wife claims she finds her husband repulsive is “compelled” to divorce her to ameliorate the plight of women who are refused a *get* in our day. See Rosen-Zvi, n. 18 above, 257, 267–68.

The opposition of the twelfth-century northern French sage, Rabbenu Tam (R. Jacob b. Meir), to compelling a *get* when a woman claimed her husband was repulsive to her, was significant. The prevailing opinion among many medieval authorities who followed Rabbenu Tam was that divorce is not to be compelled when a woman claims she finds her husband repulsive.<sup>21</sup> As for the Geonic enactment, the prevailing opinion, from the time of Rabbenu Tam onwards, was that it was enacted in response to social realities that had existed in the Geonic period, when Jewish women acted in an improper manner and resorted to the assistance of non-Jewish authorities in an attempt to obtain their *get*. Hence, it was no longer applicable in the medieval reality, when that phenomenon did not exist. The enactment had indeed been valid when the special circumstance of the Geonic period justified it. However, circumstances had changed, and it had therefore ceased to have any force.<sup>22</sup> These authorities ruled that the husband was only compelled to divorce his wife when in addition to the subjective claim that she found her spouse repulsive, she presented to the court

21 See *Responsa Rashba*, 1, #573, #1192, #1235, and the parallel responsum, *Responsa Rashba attributed to Nachmanides*, #134.

R. Asher b. Yehiel (Rosh) considered the possibility that the *mais alai* plea might be used in an improper and manipulative manner: "For on account of our sins, Jewish women of our day are immodest, and there is reason to be apprehensive that she may have set her eyes on another man" (*Responsa Rosh*, 43, #6); "The Jewish women of our generation are vain" (43, #8). See also *Responsa Rosh*, 43, #13; 43, #9, and the parallel source (7, #6), as well as what R. Jacob b. Asher wrote in the name of his father in *Tur*, EH 154. See also *Women*, n. 17 above, 84–134; E. Westreich, "Judicial decisions of R. Asher b. Yehiel in Spain" (Hebrew), in M. Beer (ed.), *Studies in Halakha and Jewish Thought Presented to Professor Emanuel Rackman* (Ramat Gan: 1994), 162–68 [henceforth "Judicial"].

22 See *Responsa Rosh*, 43, #8; *Responsa Hakhmei Provence*, #73–74, #79; *Responsa Rashba*, 1, #573, #1192; 5, #95. See also Weinrot, n. 17 above, 308–10; *Obligation*, n. 17 above, 241–43; Westreich, *ibid.*, 162–68; B. Schereschewsky, *Family Law in Israel* (Hebrew), (Jerusalem: 1993), 201–02, and n. 72; *Jewish Law*, n. 8 above, 544–45; Rosen-Zvi, n. 18 above, 257; H. Isirer, "The obligation to give a *get* and maintenance to a rebellious wife who claims 'my husband is repulsive to me'" (Hebrew), 2 *Shurat Hadin* (1994), 64, 78.

convincing evidence that there were objective grounds for her statement that her husband was repulsive to her.<sup>23</sup>

Maimonides' ruling that a *get* may be compelled in cases when a woman claimed her husband was repulsive to her was not accepted by the major halakhic scholars of later generations.<sup>24</sup> Rabbenu Tam's

- 23 R. Solomon b. Adret (Rashba) explains in one of his responsa: "They only 'compel' divorce when she comes with a claim, and makes it explicitly . . . but if not [i.e. if she does not explicitly claim that there are grounds for compelled divorce], they do not" — *Responsa Rashba*, 1, #1192. In another responsum, he deals with the matter of a woman who does not present a claim that justifies compelled divorce, but merely says: "I do not want him." He therefore rules: "I do not think that the husband, for this reason alone, is liable for flogging or *nidui* [being put under a ban as a sanction that will extract his consent to give a *get*]." But he adds: "But I saw that in the letter of *nidui* it was written: 'And because of other things related to his behavior, wherein he did not act in a proper manner.' I do not know about those things, but perhaps, in imposing a ban on him, they relied on them" — *Responsa Rashba*, 5, #95.

The medieval halakhic literature mentions other grounds for compelled divorce that are based on claims made by the wife, in addition to the claim of *mais alai*. Some examples: when the woman claims that her husband does not provide her with maintenance, see *Tashbetz*, 2, #8, *Responsa Mabit*, 1, #76; when the husband has not fulfilled his obligation to procreate, and the woman claims that she wants to have children [to help her] in her old age, see *Responsa Hakhmei Provence*, #76, #78; when the husband develops physical defects, and the wife claims she cannot bear them, see *Responsa Hakhmei Provence*, #76.

One of the authorities of southern France, R. Shimon b. Oshaya b. Joseph, writes that when a woman puts forward the subjective claim of *mais alai*, without claiming that grounds for compelling divorce exist, the husband may only be compelled with words. In his opinion, only when there is a claim that objective grounds justifying a ruling that divorce is to be compelled indeed exist, may use be made of sanctions that are permitted when divorce can be "compelled"; see *Responsa Hakhmei Provence*, Gitin, #77.

- 24 See *Responsa Rosh*, 43, #6, 8; *Responsa Rashba*, 1, #573, #1192; 7, #414; *Responsa Maharik*, #63; *Beit Yosef*, EH 77. In his responsum, R. Asher b. Yehiel attests: "I see that in these countries [i.e. Spain], most of their studies rest on the writings of R. Alfasi . . . and they are accustomed to act in that manner."

R. Solomon b. Adret maintains that if the custom in a certain place is in accordance with the view of Maimonides, namely, that the husband is compelled to divorce his wife when she claims *mais alai*, "we do not have the authority to disagree with them or disregard what they had to say," for the authorities in the Geonic period also issued an enactment that the husband is compelled to grant a divorce in such a case — *Responsa Rashba*, 2, #276.

apprehension<sup>25</sup> about compelling a *get* in situations where compulsion is not mentioned explicitly in the Mishnah or Talmud was shared by many other halakhic authorities.<sup>26</sup> Rabbenu Tam was concerned that in such situations, there was no justification, under the principles of Jewish law, for compelling divorce. Consequently, a *get* given in such circumstances, even if it followed a court ruling authorizing compulsion, was not free of halakhic uncertainties. There was even apprehension that the *get* might be viewed as having been unlawfully enforced, given that the coercive measures exercised to induce the husband to grant it — for example, flogging — were measures that are only to be used when the **objective** circumstances justify a ruling that divorce may be compelled.<sup>27</sup> According to Rabbenu Tam, we must, therefore, be apprehensive that the woman might mistakenly believe that with the exercise of the coercive measures and the resultant granting of the *get*, she was without a doubt lawfully divorced. If she then remarried, the question of whether the children of her second marriage should be considered *mamzerim* could arise in its most acute form, as well as the question of whether she should be deemed to be living in sin with her second husband, and therefore liable to severe punishment.<sup>28</sup>

In similar fashion, R. Isaac Or Zarua rejected, in the end, what would have been a significant expansion of the possibility of divorce, namely, addition of a new cause for “compelling” divorce — the husband’s not yet having fulfilled his obligation to beget children. He too feared that recognizing such circumstances as grounds for compelling

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See also *Responsa Radbaz*, 2, #700; R. Samuel Halevi Wozner, *Responsa Shevet Halevi*, #27; R.I.H. Herzog, “Apprehensions about an enforced *get*” (Hebrew), 1 *Hadarom* (1957), 4, and his *Responsa Heikhal Yitzhak*, EH 1, #3; Weinrot, n. 17 above, 335–36.

25 See *Sefer Hayashar*, Novellae, #4, *Responsa*, #24; *Tosafot*, bKetubot 63b s.v. *aval*; *Piskei Harosh*, Ketubot 5:34. See also *Jewish Law*, n. 8 above, 543–44.

26 See *Responsa Rosh*, 17, #6, and the parallel source: *Responsa Rosh*, 43, #9 (first one); *Piskei Harosh*, Jebamot 6:11; *Responsa Hakhmei Provence*, #79; *Responsa Rashba*, 1, #1192; *Responsa Mahari Bruna*, #211.

27 See *Gourat Anashim*, #72.

28 See *Sefer Hayashar*, *Responsa*, #24. Regarding the concerns that arise when divorce is “compelled” under such circumstances, see also *Responsa Hakhmei Provence*, #75, #78–79; *Tashbetz*, 2, #256; *Responsa Rosh*, 43, #6, #8.

divorce would open the floodgates that prevented the easy, and at times unjustified, dissolution of the family.<sup>29</sup>

In conclusion, many medieval authorities regarded the list of cases of “compelled” divorce in the Tannaitic and Amoraic literature as

29 The thirteenth-century authority, R. Isaac Or Zarua, suggested initially that even in situations where other grounds for compelling divorce have not been demonstrated, if the husband has not yet fulfilled his obligation to procreate, he may be “compelled” to divorce his wife, “so that he be able to marry another woman and have children.” A *get* was necessary because, due to the enactment forbidding polygamy that had been widely accepted in the Ashkenazic (northern French and German) communities of his day, the husband could not marry another woman and fulfill his obligation of procreation before divorcing his first wife. He concludes, however, that while this may be right according to the basic principles of Jewish law, it would be difficult to issue such a ruling in practice, because “if so, we have created a formula for licentious women.” The apprehension is that in a situation where it is relatively easy to obtain a divorce even without demonstrating that other accepted grounds for divorce do indeed obtain, any woman who does not wish to remain with her husband, and who might have set her eyes on another man, will petition for a divorce even in the absence of recognized grounds for “compelling” divorce. Such false representations of their real motives on the part of certain wives seeking divorce might upset the safeguards against overly easy, and possibly unjustified, dissolution of the family. See *Responsa Maimoniot*, Nashim, #34. See also *Responsa Rema*, #36 (responsum of R. Barukh Uziel Hezekiah).

In another responsum, R. Moses Isserles (Rema) attaches importance to the fact that in the end R. Isaac Or Zarua left the matter to the discretion of the court. He writes:

What is there to delegate to the court, given that creating a remedy for licentious women is undesirable? Rather, it is clear that he delegated to the court [the task of] ascertaining whether, from her words, there is fear of licentiousness, and if not, they should compel him [to give a writ of divorce] on account of procreation. It would appear from all this, that wherever we see from her words that there need be no apprehension about licentiousness, and there are grounds to compel him in terms of his legal rights [to be able to meet his obligations], such as the right to fulfill the commandment of procreation — we compel him. (responsum #96 [responsum of R. Eliezer Ashkenazi])

On compelling someone to fulfill his obligation to procreate, see *Sefer Or Zarua*, 1, Laws of Levirate Marriage, #653. See also E. Westreich, “Grounds for the relaxation of the Rabbenu Gershom ban during the later Middle Ages” (Hebrew), 16 *Dine Israel* (1991/2), 41–52.

basically closed.<sup>30</sup> This list consists primarily of cases of “compelled” *get* mentioned in the Mishnah in the seventh chapter of tractate Ketubot, and other cases regarding which the early sources state explicitly that compulsion may be exercised.<sup>31</sup> Yet the legitimacy of drawing inferences by way of analogy, and applying the rule of the “compelled” *get* to cases more severe than those explicitly mentioned in the Tannaitic and Amoraic literature, was also assumed.<sup>32</sup> The list of cases of “compelled” divorce was expanded to include other cases that shared a halakhic rationale identical or similar to the grounds for divorce mentioned in the early halakhic literature.<sup>33</sup> However, this was

30 See *Responsa Rashba*, 1, #1192; #573; 5, #95; *Responsa Baalei Hatosafot*, #75; *Responsa Rosh*, 17, #6, and the parallel source, *Responsa Rosh*, 43, #3; 43, #9 (the first one); *Tur*, EH 154; *Responsa Hakhmei Provence*, #48; #72–75; #78; *New Responsa Maharik*, #24, #29; Cohen, n. 16 above, 11–12; 12–13; *Tashbetz*, 2, #22.

31 See *Responsa Yakhin Uboaz*, 1, #130; 2, #21.

32 See *Piskei Rosh*, Ketubot 5:34; *Responsa Rosh*, 43, #6; *Piskei Rosh*, Ketubot 4:3; *Tur*, EH 9; *Beit Yosef*, ad loc. s.v. *uma shekatav beshem*; *Responsa Ribash*, #241; *New Responsa Maharik*, #2, p. 12; #29; *Tashbetz*, 2, #8; *Responsa Maharam Alashkar*, #73. See also Z. Warhaftig, “Coercion to grant a divorce in theory and in practice” (Hebrew), 3–4 *Shenaton Hamishpat Haivri* (1976/7), 153, 178–83 [= Z. Warhaftig, *Studies in Jewish Law* (Hebrew), (Ramat Gan: 1985), 148, 171–77] [henceforth “Coercion”]; E. Shochetman, “Women’s status in marriage and divorce law” (Hebrew), in F. Raday, C. Shalev, M. Liban-Kooby (eds.), *Women’s Status in Israeli Law and Society* (Hebrew), (Tel Aviv: 1995), 380, 417–20 [henceforth “Women’s status”]; idem, “AIDS as grounds for divorce in Jewish law” (Hebrew), 25 *Mishpatim* (1995), 25–28 [henceforth “AIDS”].

33 See *Tashbetz*, 2, #8; *New Responsa Maharik*, #2, p. 12; *Responsa Rosh*, 43, #13; *Tur*, EH 154; *Responsa Rashbash*, #383 (first one). See also “Women’s status,” *ibid.*

Z. Warhaftig (“Coercion,” *ibid.*, 179–94) lists the grounds for “compelled” divorce that were derived from grounds explicitly mentioned in ancient sources from the period of the Mishnah and the Talmud. These include, among others, the following: a husband who is seriously ill, and endangers the health of his wife and children (*Responsa Rosh*, 42, #1); a wife-beater, who ought to be treated more severely than someone who beats another person, in part because of the analogy to the law regarding someone who forbids his wife by a vow from deriving benefit from him (*Responsa Maharam b. Barukh* [Prague], #907); a prisoner, who is unable to fulfill his conjugal obligations, and is regarded as one who forbids his wife by a vow from cohabiting with him and deriving other benefits (*Tashbetz*, 2, #68); a couple who disagree on where to live, and there are grounds for

not done as a manner of course. In many cases, the halakhic authorities refrained from ruling in favor of “compelling” divorce because they hesitated to rule against those who maintained that the list of cases where a *get* may be coerced should not be expanded.<sup>34</sup> Even in cases where opinions differed, many refrained from relying on those who ruled in favor of compulsion.<sup>35</sup>

The extent to which this halakhic reality provides a satisfactory answer to the plight of women denied a *get* in all cases must be carefully examined. In this context, it should be mentioned that according

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compelling divorce due to certain relevant factors: the priority given to Jerusalem and the land of Israel over other places, the couple’s prior agreement on where to live and the circumstances that existed before they married (mKetubot 13:11, and elsewhere); the *mais alai* plea, according to Maimonides (*Code*, Laws concerning Marriage 14:8); absence of domestic harmony (*Responsa Hahayim Vehashalom*, 2, #35; *Responsa Yabia Omer*, 3, EH #18), though in recent generations, when this argument was the sole ground for divorce, it was not accepted as a decisive factor justifying a compelled *get*. See *Responsa Divrei Shmuel*, 3, #145.

This list, however, is not closed. For example, divorce is “compelled” when there is a factual or legal doubt regarding the validity of the betrothal, such as when the couple married in secret, as a joke, under duress, or in certain other problematic circumstances. See the sources cited in P. Shifman, *Doubtful Marriage in Israel* (Hebrew), (Jerusalem: 1975), 59–98. Similarly, a husband who committed adultery may be compelled to divorce his wife, based on, among other things, a *kal vahomer* argument (application of a rule in cases more severe than those explicitly mentioned) with respect to compelled divorce in the Talmud. See R. Halperin, “Husband’s adultery as a ground for divorce” (Hebrew), 7 *Bar-Ilan Law Studies* (1989), 304–05; “AIDS,” n. 32 above, 42 (in light of assertions in *Sefer Haaguda*, Jebamot, 77; *Hagahot Harema*, SA, EH 154:1). So too in a case where a husband has run away, and there is real concern that his wife might become an *aguna*, the authorities are inclined to rule in favor of “compelled” divorce, or at least to apply certain restraining measures against him. See *Responsa Maharsham* 8, #282. Regarding the derivation of new grounds for “compelling” divorce by way of *kal vahomer*, see “AIDS,” n. 32 above, 19; “Women’s status,” n. 32 above, 380.

<sup>34</sup> See *Responsa Ribash*, #241.

<sup>35</sup> See *Responsa Rosh*, 42, #1; *Tur*, EH 154, 5; *New Responsa Maharik*, #24; *Responsa Maharit*, 1, #113; *Responsa Hatam Sofer*, EH 1, #116; *Responsa Hatan Sofer*, #59. The rule is: “The matter is in doubt, and in cases of doubt, they do not compel” — *Responsa Ribash*, #242. See also SA, EH 11:8, and *Beit Shmuel* ad loc., #18. Regarding the principle that there is no compulsion in cases of doubt, see also *Hidushei Harashba*, bKetubot 72b s.v. *veasikna*.

to R.I.H. Herzog, the common denominator in all cases of “compelled” divorce is “the injustice done to the woman.”<sup>36</sup> When grounds for “compelled” divorce have been clearly demonstrated, and in other cases, when in appropriate circumstances, the rationale of “injustice done to the woman” is relevant, there should be no hesitation about exercising severe sanctions against the recalcitrant husband.<sup>37</sup> However, most of the *dayanim* in Israel’s rabbinical courts do not share this point of view.

b Divorcing a Woman Against her Will when there are  
Grounds for Divorce that Justify Compulsion

In the Middle Ages, some Jewish communities<sup>38</sup> accepted an enactment known as *herem derabenu gershom*, which prohibits a husband from

36 See *Responsa Heikhal Yitzhak*, EH 1, #1.

37 See *Tosafot*, bKetubot 70a s.v. *hakha*. R. Herzog writes: “Now *Tosafot* warn there not to compel a person to divorce his wife or take action until clear proof is found. . . . Their intention was to issue a severe warning not to rely on our own judgment, without clear proof from the Talmud” (Herzog, *ibid.*). Yet R. Herzog was not always very strict about proof from the Talmud. He permitted a financial penalty to be imposed upon the recalcitrant husband in order to pressure him to divorce his wife, justifying his ruling as follows: “Only when they impose upon him something that he cannot bear, or that is excessively difficult for him, is it an [unlawfully] enforced *get*.” R. Herzog ruled in accordance with the rationales mentioned in the Talmud as grounds for divorce, and did not accept the stringent view of R. Moses Sofer, *Responsa Hatam Sofer*, EH 1, #116, on which a *get* cannot be “compelled” in any case where halakhic authorities are not in agreement about imposing a “compelled” divorce. R. Herzog explained that all grounds for divorce that permit “compelling” the husband to give his wife a *get* rest on the same basic consideration. Wherever the Sages thought that the husband was doing his wife an injustice by withholding her *get*, they allowed compulsion, just as they would allow compulsion in order to enforce any other judgment.

38 The enactment spread first among the Franco-German Jewish communities, see E. Westreich, “Polygamy and compulsory divorce of the wife in the decisions of the rabbis of Ashkenaz in the 11th and 12th Centuries” (Hebrew), *6 Bar-Ilan Law Studies* (1988), 118–64 [henceforth “Polygamy”]. It is attributed to one of the outstanding spiritual leaders of these communities, Rabbenu Gershom Meor Hagola. On the accuracy of this attribution, see Z. Falk, *Marriage and Divorce: Reforms in the Family Law of German-French Jewry* (Hebrew), (Jerusalem: 1962), 28–31; A. Grossman, *The Early*

divorcing his wife against her will.<sup>39</sup> Today, it is widely accepted that the prohibition against divorcing a woman against her will applies in the State of Israel to all Jews irrespective of the original traditions of the community of their parents.<sup>40</sup> Likewise, it is widely accepted that no time limit was placed on the validity of the enactment. As its validity has never expired, it applies even in our day.<sup>41</sup> Therefore, in the State of Israel, the status of women with respect to the matter of consent to divorce, has largely been made equal to the status of men in the period of the Mishnah and Talmud. Both husband and wife may be divorced against their will only when grounds for divorce exist that allow for the use of coercive measures to force the husband to give, or the wife to accept, a writ of divorce.

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*Sages of Ashkenaz* (Hebrew), (Jerusalem: 1981), 147–48. Later, the enactment spread among other Jewish communities. See M.A. Friedman, *Jewish Polygamy in the Middle Ages: New Documents from the Cairo Geniza* (Hebrew), (Jerusalem: 1986), 1–11; S.Z. Havlin, “The *takanot* of Rabbenu Gershom Meor Hagola in family law in Spain and Provence (in light of manuscripts of responsa by Rashba and R. Isaac de Molina)” (Hebrew), 2 *Shenaton Hamishpat Haivri* (1975), 200, 205–10; *Obligation*, n. 17 above, 34; idem, “New light on the enactments of Rabbenu Gershom Meor Hagola: their authorship, scope and spread” (Hebrew), 11–12 *Shenaton Hamishpat Haivri* (1984/6), 317, 326–28; *Responsa Ran*, #48; Rosen-Zvi, n. 18 above, 258–60.

39 On the application of this enactment, attributed to Rabbenu Gershom, in various Jewish communities, see *Responsa Rashba*, 4, #186; Friedman, *ibid.*; Westreich, *ibid.*

40 The rabbinical courts in Israel maintain that the prohibition against divorcing one’s wife against her will — by way of the *herem* attributed to Rabbenu Gershom, a condition in the *ketuba*, custom, or the Jerusalem ban — applies today in the State of Israel to all Jews who immigrated from anywhere in the Diaspora. See Schereschewsky, n. 22 above, 63–67, 279; E. Westreich, “The Jewish woman’s marital status in Israel — interactions among various traditions” (Hebrew), 7 *Plilim* (1998), 308–26. Regarding the application of this enactment to the Yemenite Jews, see R. Arusi, “The ethnic factor in rabbinical decision-making (enforcement of divorce on the grounds of revulsion in the Yemenite community)” (Hebrew), 10–11 *Dine Israel* (1981/3), 125, 131–48.

41 Some authorities maintained that this enactment, attributed to Rabbenu Gershom, was enacted for a specified period of time only, and as that period has elapsed, is no longer valid. See Havlin, “*Takanot*,” n. 38 above, 218–19; idem, “New light,” n. 38 above, 324–25; Grossman, n. 38 above, 149. On the validity of this enactment in our day, see Schereschewsky, n. 22 above, 65–67.

There are, however, exceptions to the general rule prohibiting a husband from divorcing his wife against her will. For example, if she violates biblical prohibitions, or norms of modest comportment, if she becomes an apostate, if the marriage was prohibited, or if she has committed adultery.<sup>42</sup> In certain well-defined cases, there may be grounds that would allow the husband to contract an additional marriage. In practice, the situation of a woman whose husband has received a dispensation to marry another wife is similar to that of a woman who may be divorced against her will.<sup>43</sup>

Even with the enactment of *herem derabenu gershom*, full equality between husband and wife does not exist. In certain situations, for example, when the husband cannot be located, his wife will remain an *aguna*, whereas should the husband find himself in similar circumstances, he can obtain permission to contract a second marriage. Likewise, it is sometimes easier for the husband to obtain permission to remarry, and more difficult for the woman to prove that there are grounds for divorce that allow for compulsion of her husband.<sup>44</sup>

Nevertheless, the enactment of Rabbenu Gershom clearly narrowed the difference in status between husband and wife with regard to divorce. Just as the *get* must in general be given of the husband's free will, so too must it in general be received of the wife's free will. In many cases, just as it is necessary to prove that there is cause for divorce that suffices to permit the husband to be compelled to divorce his wife against his will, so too is it necessary to prove that there is cause for divorce that suffices to permit the wife to be forced to terminate her marriage against her will.

42 See *Hagahot Harema*, EH 114:6; Schereschewsky, *ibid.*, 332.

43 See Westreich, "Polygamy," n. 38 above, 118–119; *idem*, "Polygamy and compulsory divorce of the wife in Jewish law in Italy during the 15th and 16th centuries" (Hebrew), 9 *Bar-Ilan Law Studies* (1991), 227–56; *idem*, n. 29 above, 39–95.

On grounds for allowing a husband to contract a second marriage in Israeli law, see section 79 of the *Penal Law, 5737 — 1977*; H.C. of Justice 301/63 *Streit v. the Chief Rabbis of Israel*, (1964) P.D. 18 (1) 598; Additional Appeal 10/69 *Boronowski v. the Chief Rabbis of Israel*, (1971) P.D. 25 (1) 7; P. Shifman, *Family Law in Israel* (Hebrew), (Jerusalem: 1995), vol. 1, 241–44 [henceforth *Family Law*], Rosen-Zvi, n. 18 above, 72, 79, 308.

44 See Rosen-Zvi, *ibid.*, 41.

c Sanctions Against a Husband or Wife who Refuses to Give or Receive a *Get*

i *Matching the Level of Enforcement with the Appropriate Sanction*

The medieval halakhic authorities distinguished between two levels of enforcement with respect to divorce judgments: (1) *kofin legaresh* — “compelling” divorce; and (2) *hiyuv legaresh* — “obligation” to divorce.

In the Mishnah and in certain talmudic passages, the Sages use the expression “*yotzi veyiten ketuba*” — he must divorce her and pay her *ketuba*.<sup>45</sup> Opinions differ as to the meaning of this expression. One of the Tosafists, R. Isaac b. Samuel (Ri), understood it to mean “that we compel him, for since he acted in an unlawful manner, we compel him to divorce her . . . with whips.”<sup>46</sup> His main proof for this interpretation is from a passage in the Babylonian Talmud that cites the opinion of the Amora Rav: “[If the husband said to his wife:] ‘I will not maintain [you] and I will not provide [you with maintenance],’ he must divorce her and pay her *ketuba* (*yotzi veyiten ketuba*).” The Talmud then cites the opinion of the Amora Samuel: “Before they **compel** him to divorce her, let them **compel** him to maintain her” (emphasis added). Ri concluded from this that when the Amora Rav said, “He must divorce her and pay her *ketuba*,” he meant that the husband was “compelled” to divorce his wife.

However, in the medieval period, it was not this interpretation that became generally accepted, but that of Rabbenu Hananel.<sup>47</sup> From the time of Rabbenu Hananel on, many halakhic authorities distinguished

45 See bJebamot 64a, 65a; bKetubot 63a, 71a, 77a.

46 *Tosafot*, bKetubot 70a s.v. *yotzi*. See also *Tosafot*, bJebamot 64a s.v. *yotzi*; *Mordekhai*, Ketubot, #194. See also *Responsa Hakhmei Provence*, #84; *Tur*, EH 154. Some maintain that the matter in dispute between the Ri and Rabbenu Hananel was already the subject of a Tannaitic and Amoraic controversy. See “Coercion,” n. 32 above, 153, 176.

47 See *Mordekhai*, Ketubot, #194, #205; *Otzar Hageonim*, Ketubot, Likutei Peirush Harah, 117–18. Rabbenu Hananel’s reading of Rav’s words in bKetubot 63a, 77a, is as follows: “They compel him [with regard to paying the *ketuba*], and he divorces her and pays [*kofin oto veyotzi veyiten*].” See also R. Solomon b. Adret’s interpretation in *Hidushei Harashba*, bKetubot 77a s.v. *ad shekofin*.

between “compelling” divorce and “obligating” divorce. When the cause for divorce is one regarding which it is stated in ancient sources, “he must divorce her and pay her *ketuba*,” the sanctions imposed on the husband who refuses to give a writ of divorce are more moderate than those imposed when the ground for the divorce is one with regard to which “compulsion” is mentioned.<sup>48</sup> When the level of divorce is “obligation” to divorce, the rabbinical court cannot resort to flogging, or any other severe coercive measure, such as pronouncement of a ban (*nidui*), or excommunication (*herem*), the use of which is only permitted when the court rules that the husband may be “compelled” to divorce.<sup>49</sup>

According to Rabbenu Hananel and subsequent authorities, when it is stated, “he must divorce her,” this means that the level of sanctions is lower. No use may be made of the sanctions that may be imposed when the husband is “compelled” to divorce his wife. When the cause of divorce falls under the rule “he must divorce her and pay her *ketuba*,” we “compel” the husband with regard to the *ketuba*, but **request** of him that he grant his wife a divorce. The sanction is weak: verbal persuasion. The recalcitrant husband is asked to give his wife a *get*. He is told that he is obligated to divorce her, and if he refuses,

48 See bKetubot 77a; jKetubot 11:7.

49 Rabbenu Tam emphasized that when the husband is not “compelled” to give a divorce, it is forbidden to coerce him by way of flogging or any other harsh coercive measure, such as *herem* or *nidui*. See *Sefer Hayashar*, Responsa, #24; *Mordekhai*, Ketubot, #204. The distinction is that between verbal pressure and coercion by means that have a more direct effect on him. See also *Responsa Baalei Hatosafot*, #75; *Tosafot*, bKetubot 70a s.v. *yotzi*; *Responsa Rashba*, 5, #95; 7, #414; *Piskei Harosh*, Jebamot, 6:11, 15; *Responsa Rosh*, 43, #4; #12–1; *Responsa Mahari Bruna*, #211; *Responsa Maharah Or Zarua*, #157; *Tashbetz*, 2, #8, #68, #256; *Responsa Yakhin Uboaz*, 1, #130; 2, #21; *Responsa Rashbash*, #383 (first one); *Responsa Maharalbah*, #33; *Gvurat Anashim*, #72.

However, R. Saul Israeli, in his “On coercion and consent regarding a *get*” (Hebrew), 12 *Torah Shebeal Pe* (1970), 33, maintained that according to R. Asher b. Yehiel (Rosh), (*Piskei Harosh*, Jebamot, 6:11), banning (*nidui*) may also be used in cases where the husband is “obligated” to divorce his wife. He argues that this follows from a responsum of Rosh (*Responsa Rosh*, 53, #6) which states that in cases of “compelled” divorce, the coercive measure used is flogging, whereas *nidui* is the measure used when the court orders divorce, even when the level of enforcement is not that of “compelled” divorce — “and the *nidui* is for having violated the words of the Sages.”

the Sages will be displeased with him, and due to his improper behavior the Jewish community will be permitted to refer to him as a “sinner.”<sup>50</sup>

“Recommended” divorce is not mentioned as a separate category in the early halakhic literature. The medieval halakhic authorities only distinguished between two levels of enforcement: “compelling” divorce and “obligating” divorce. The levels of “*mitzva* to divorce” and “recommended” divorce, in the sense that these terms are used today in the judgments of the rabbinical courts in Israel, did not exist then. In certain situations there is a *mitzva* to grant a divorce, but the enforcement level in such cases is that of “compelled” divorce. The halakhic literature prior to the recent generations sometimes mentions that there is a *mitzva* to divorce, for example, when the woman is “evil”<sup>51</sup> — that is, causes her husband to sin. But there is no mention of any special sanction that is to be used in such cases; rather, the sanctions of “compelled” divorce are applicable.

One of the aims of a ruling issued by a rabbinical court in Israel recommending divorce may lie outside the confines of Jewish divorce

50 See *Responsa Hakhmei Provence*, #73–74, #84; *Responsa Baalei Hatosafot*, #75; *Sefer Mitzvot Gadol*, positive commandments, 48 (end); *Mordekhai*, Ketubot, #194, #204–05; *Responsa Maharik*, #29; *Sefer Haaguda*, Ketubot, #98; *Tashbetz*, 2, #8, #256; *Responsa Yakhin Uboaz*, 2, #21; *Hagahot Harema*, EH 154:21.

According to many medieval authorities, the source for the distinction between *yotzi veyiten ketuba* and *kofin* is in the Jerusalem Talmud. See jKetubot 11:7; *Korban Haeida* ad loc., s.v. *yater mikan yotzi veyiten ketuba*; s.v. *umeshani shamanu shemotzi*; *Amudei Yerushalayim* ad loc., s.v. *shamanu shemotzi shamanu shekofin*.

R. Moses of Coucy writes: “We read in the Jerusalem Talmud, at the end of [chapter] *Almana nizonet*: ‘They only coerce with respect to disqualified women.’ That is to say: for example, [with respect to marriage of] a widow to a High Priest, whom they compel to divorce her [since the marriage is prohibited]. And [the Jerusalem Talmud] asks: But surely we learned in the Mishnah: ‘Someone who forbids his wife, by a vow, to benefit from him — **he must divorce her and pay her ketuba**’? [emphasis added]. And it answers: ‘We heard that he must divorce her, did we hear that they compel him?’” R. Moses of Coucy infers from this: “From this we learn that they only compel divorce in a case regarding which it was taught ‘they compel.’ But [where it was not stated that ‘they compel’] the Sages say to him: ‘You are obligated to divorce [her], and if you violate [this], you will be called a sinner.’” — *Sefer Mitzvot Gadol*, positive commandments, 48 (at the end).

51 See n. 193 below.

law proper. The intent of the ruling may be to grant the court jurisdiction over a matter that has been linked to the divorce suit. According to Israeli law, during divorce litigation, ancillary matters, such as property of the husband and wife, education of the children, and so on, may be attached by one of the parties, in his/her divorce suit, to the primary matter being litigated: the divorce suit.<sup>52</sup> Now if the divorce suit is denied, the jurisdiction of the rabbinical court over the ancillary matters expires. However, even if the rabbinical court merely “recommends” divorce, the ruling is regarded as a divorce judgment for all purposes,<sup>53</sup> and the jurisdiction of the rabbinical court over the ancillary matters that were linked to the divorce claim stands.

ii *Rabbenu Tam’s harhakot (“isolating measures”)*

A possible remedy, used primarily when a judgment is issued “obligating” divorce, and certainly in the case of a ruling “compelling” divorce, is the exercise of Rabbenu Tam’s *harhakot* (“isolating measures”). Due to the significance of these measures in Israeli law, as will be explained below,<sup>54</sup> we shall devote a separate, more comprehensive, discussion to these measures.

Rabbenu Tam’s *harhakot* are first mentioned in the twelfth century, in a responsum by Rabbenu Tam — R. Jacob b. Meir — in his *Sefer Hayashar*, regarding a woman who claimed that she found her husband repulsive. Rabbenu Tam did not accept the view that the husband of such a woman can be “compelled” to divorce her. He rejected outright the opinion of the rabbis of Paris, who argued that in such a case, “You may use specified means of compulsion until he says that he is willing [to divorce her].”<sup>55</sup> All the severe coercive measures, such as flogging or bans, that these authorities maintained could be imposed in a “compelled” divorce, were, in Rabbenu Tam’s opinion, prohibited in the situation considered in his responsum. Yet, since “Rabbenu Tam’s heart went out to the woman who claimed ‘*mais alai*,’ and he too sought a solution so that Jewish women would not become *agunot*...he

52 See section 3 of the *Rabbinical Courts Jurisdiction Law (Marriage and Divorce)*, 5713 — 1953.

53 See nn. 143, 194 below.

54 See below, section 3d.

55 *Sefer Hayashar*, Responsa, #24.

searched for a solution to the problem of revulsion.... Had Rabbenu Tam thought that the husband was acting properly, and that a woman had no standing when she claimed revulsion, he would not have troubled to suggest the application of the sophisticated measure of *harhaka*.<sup>56</sup>

Rabbenu Tam contends that a measure that exerts less direct pressure than such measures as flogging, bans and excommunication may be imposed on the husband in order to impel him to grant a divorce. In his opinion, use of these more moderate coercive measure dispels any apprehension that a coercive measure used in a situation where there are no legal grounds for a “compelled” *get* will result in the granting of a unlawfully coerced *get*.

He writes: “If all of our rabbis agree, you may issue a decree with a severe curse [for violators of the decree]. This decree will state that every man and woman of the house of Israel... is forbidden to speak with him [the husband], to do business with him, to host him, to give him food or drink, to escort him, or to visit him when he is ill.”

Rabbenu Tam lists specific measures of social isolation that may be inflicted on the husband, but adds that the list of measures mentioned in his responsum is not closed, and other indirect measures, similar to those mentioned, may also be inflicted: “And they may add stringent measures as they please, [to be imposed] on anyone, if that man does not divorce and release this girl [his wife], for there is no compulsion in this, for if he wishes, he will comply, and he will not suffer in his body on account of this ban [the *harhakot*], but rather, we will separate ourselves from him.”<sup>57</sup>

56 Weinrot, n. 17 above, 431–32. On p. 439, Weinrot explains that in his opinion, Rabbenu Tam’s *harhakot* serve as a conceptual bridge between Maimonides’ view that a *get* may be “compelled” when a woman claims her husband is repulsive to her, and Rabbenu Tam’s view that a *get* may not be “compelled” in such a case. He held that even Rabbenu Tam recognized the need to spare a woman from being trapped in a marriage when it is clear that she and her husband are incompatible. He and Maimonides disagree only as to what means may be employed to bring the marriage to dissolution.

57 *Sefer Hayashar*, Responsa, #24. On the scope of the application of Rabbenu Tam’s *harhakot*, see also “Coercion,” n. 32 above, 162; A. Beeri, “Legal means for enforcing a Jewish divorce (*harhakot rabeinu tam*)” (Hebrew), 18–19 *Shenaton Hamisphat Haivri* (1992/4), 65, 73–74.

A similar distinction between direct and indirect measures is found in another responsum by Rabbenu Tam: "If a man betrothed a woman, but does not want [to marry] her, he cannot be compelled to divorce her, not by Jewish law, nor by way of [coercion by] the non-Jewish authorities. But if he was imprisoned over a tax matter, or something else, they can say to him: 'We will not help you get out of prison until you divorce her,' for this is not coercion, for they do not do anything to him [directly], but only refrain from helping him."<sup>58</sup>

The rationale in this responsum is thus similar to that found in Rabbenu Tam's responsum suggesting imposition of *harhakot*, namely, the rationale of withholding benefit: "For there is no compulsion in this, for if he wishes, he will comply, and he will not suffer in his body on account of this ban [the *harhakot*], but rather, we will separate ourselves from him."

In contrast to banning, when these *harhakot* are applied, they have no direct effect on the "body" of the recalcitrant husband.<sup>59</sup> They do not share the nature of flogging, excommunication (*herem*), and banning (*nidui*), whose effect is unmediated and physical, acting upon the person's body. Rather, the measure employed is indirect, for the status of a excommunicated or banned individual (*muhrum* or *menude*) is never affixed to the recalcitrant husband. It is the public at large, who live with him in the same community, who are forbidden to come into contact with him. They may not speak to him, do business with him, host him, give him food or drink, escort him, or visit him when he is ill. *Herem* and *nidui*, on the other hand, have a direct effect. A categorical status is assigned to the party who refuses to give or receive a *get*, a status the excommunicated or banned party cannot evade. The fourteenth century halakhic scholar from Spain, R. Nissim Gerondi, explains that

58 *Hagahot Mordekhai*, Gitin, #468. See also Beeri, *ibid.*, 73–74. Regarding imprisonment imposed for tax debts during the Middle Ages, see *Responsa Rosh*, 7, #11: "There is a widespread custom throughout the Diaspora that someone who owes taxes to the community is incarcerated in prison. He is not brought before a court, but the city notables judge him according to their custom."

59 The Talmud explicitly states that *herem* and *nidui* act on the person's body. See bMoed Katan 17a. Subsequent sources also emphasized that *herem* and *nidui* impact on the person's body: "*Nidui* is a punishment of his body" — *Seder Eliahu Rabbah*, #13.

a *herem* is inflicted on a person's body, and he carries it with him wherever he goes.<sup>60</sup>

Rabbenu Tam's *harhakot* are not a universal sanction, because they only apply in a specified place. The party upon whom the measures have been imposed may free himself from their burden by uprooting himself from his community and moving to another, whose members are not bound to observe the measures. By remaining in his community, the isolated party attests to his tacit agreement to accept the onus of the *harhakot*. Some explain that when the party remains in the locale where the measures have been imposed, they are regarded as a sanction that the individual has brought on himself. Therefore, when those measures are put into effect, the divorce that follows is not tainted by compulsion or duress.<sup>61</sup> In the late Middle Ages, R. Joseph Colon, citing a slightly different version of Rabbenu Tam's responsum regarding *harhakot*, attributes great significance to the fact that the isolated husband can leave the locale in which the measures have been imposed.<sup>62</sup>

60 See *Responsa Ran*, #48: "Because this *herem* is not affected by locality, for it rests on the person's head." See also *Encyclopedia Talmudit*, vol. 17, "*herem*" (*hermei tzibur*).

61 This distinction between externally inflicted coercion and coercion that the husband inflicts "upon himself" was noted by R. Moses Feinstein in his *Responsa Igrot Moshe*, EH 1, #137. Yet R. Feinstein clarified in his responsum that changing one's place of residence is no small matter. It may be assumed that once a person is settled in a particular place, it is difficult for him to leave. See also *Responsa Shevet Halevi*, 5, #27.

62 "For here no coercion is exerted upon him, for if he so desires, he can find himself a different place [to live], and he will not be stricken in his body on account of this *nidui* [the *harhakot*], but rather we separate ourselves from him" — *Responsa Maharik*, #102, 135.

The court's order to distance oneself from the isolated party only applies to the members of the community in which he then lived. If the recalcitrant spouse chooses to move to another community, he can extricate himself from the burden of the *harhakot*. The choice to stay in the community and bear the consequences — the burden of the *harhakot* — is a decision that the husband reaches freely. Therefore, his granting a *get* in order to free himself of those measures is also regarded as an action rooted in the original freely-reached decision to remain in his own community.

Use was sometimes made of the wording found in Rabbenu Tam's responsum, according to which the *harhakot*, in contrast to *herem* and *nidui*, are not inflicted on the individual's "body," nor does he "carry" them "on his body" wherever he goes. This follows what Rabbenu Tam writes in his responsum: "And he is not stricken in his body."<sup>63</sup>

However, we should also consider the weakness of the distinction between a direct action, inflicted upon a person's "body," and an indirect action. One main argument against the validity of this distinction in contemporary society might be that it does not adequately take into account the effect of the sanction on the recalcitrant non-religious spouse, especially the husband, with regard to his/her free will. An action that in a formal sense is direct might have less effect on the husband's will than an indirect action that is of greater significance from the husband's perspective and has greater effect on his free will. This may be the case if the social effects of *herem* or *nidui* are less severe than those of Rabbenu Tam's *harhakot*. When the *harhakot* are implemented, the isolated party may agree to divorce his spouse in order to free him(herself) of the oppressive feeling of social isolation, which in contemporary society might sometimes be significantly greater than the social isolation experienced by someone placed under a ban or into excommunication. The heavy social pressure brought to bear on a recalcitrant husband when Rabbenu Tam's *harhakot* are imposed

63 In Jewish society of the twelfth century, the great majority of Jews had a profound belief that a *herem* or *nidui* penetrated every organ of one's body, and that the banned party carried the sanction in his body wherever he went. In such a society, a sanction that is "in his body" is very severe, and to a large extent deprives the individual of his free will with regard to giving a *get*. Therefore, imposition of such a sanction generates the apprehension that the *get* will not be given of the husband's free will, but will be an unlawfully coerced *get*. Rabbenu Tam's *harhakot*, on the other hand, only affect someone in his own community, and he does not carry them with him to other locales. R. Elijah, the Vilna Gaon, comments: "For he can save himself from this by moving to another city. As long as no action is taken against his body, it is not called 'compulsion'" — *Biur Hagra*, EH 154, #64. This is in contrast to the effects of banning, as R. Moses Feinstein remarked, explaining the ubiquity of the effects of *nidui*: "When the court puts him under *nidui* . . . he should be concerned that **his body will be stricken** wherever he is" — *Responsa Igrot Moshe*, EH 1, #137 (emphasis added). Hence, the *harhakot* are not considered sanctions that deprive the recalcitrant husband of his free will. See *Responsa Binyamin Zeev*, #79. See also Beeri, n. 57 above, 84.

impacts on his/her will to give/receive a *get*. Under such circumstances, his/her free will to divorce is weaker than that of someone on whom a *herem* or *nidui* was pronounced.<sup>64</sup>

This difficulty is particularly significant given the possibility of adding more *harhakot* to those listed in Rabbenu Tam's responsum, intensifying the pressure on the isolated party. Since the list of measures was never closed, several additional such measures of great weight have been added over the generations, significantly impacting the husband's free will. R. Yomtov of Joigny, a disciple of Rabbenu Tam, wrote that Rabbenu Tam himself added measures that were not included in the list of *harhakot* mentioned above, found in the version of *Sefer Hayashar* that has come down to us:

...to force and expel anyone who violates a decree or enactment decreed or enacted by the Sages. And furthermore, he should be placed under *herem* and *nidui*, and nobody may allow him to enjoy any benefit, as a great scholar [Rabbenu Tam] wrote in a responsum beginning with the words *mikol mehatzetzim* [the first words in the above-mentioned responsum by Rabbenu Tam]... He responded to three of the greatest authorities of the generation, Rabbenu Samuel, Rabbenu Elijah, and Rabbenu Meshulam.<sup>65</sup> He wrote that they should apply to him [the husband] all means of coercion: they should neither circumcise his son, nor teach him, nor bury him, if he does not divorce [his wife] of his free will with a valid *get*, according to the [halakhic ruling of the] sages of his town, for this is not [considered] "compulsion" according to Rabbenu Tam.<sup>66</sup>

It is possible, however, that R. Yomtov of Joigny meant to say that these sanctions may **only** be imposed on one who violates a decree or enactment passed by the ancient authorities, who imposed a *herem* on anyone who violated their decrees. Only if a person acted in an improper manner — for example, if he married his wife without the consent of her relatives — may these strong sanctions be imposed. In such cases it

64 On the serious consequences for the husband's free will when Rabbenu Tam's *harhakot* are imposed, see Beeri, *ibid.*, 85.

65 See *Sefer Hayashar*, Responsa, #24. See also Beeri, *ibid.*, 75 n. 33.

66 See *Responsa Binyamin Zeev*, #88. On the identification of "Rabbenu Yomtov" with R. Yomtov of Joigny, disciple of Rabbenu Tam, see Beeri, *ibid.*, 76–77.

is possible to impose a *herem* or a *nidui*. Elsewhere the words of R. Yomtov of Joigny are cited as follows:

And Rabbenu Tam rules that if a person does not want to give his wife [a *get*], the community can forbid him [by an oath], to enjoy their property, for this is not [unlawful] enforcement. And R. Yomtov ruled that **if someone violates an ancient decree**, he may be forced to give a writ of divorce, just as we force divorce upon [someone who married] a woman who is [halakhically] disqualified from marriage to him, and similarly, [on] someone who betrothed a woman without the consent of any of her relatives. If he is in the country [that is, has not fled], by rights he should be placed under *herem* and *nidui*, and he should be forbidden by oath to enjoy [other people's property], and he should be punished by the king and his officers. His son should not be circumcised, and he should not be buried, unless he divorces his wife of his own free will with a valid *get* according to [valid halakhic procedure, supervised by] the sages of his town"<sup>67</sup> (emphasis added).

In the sixteenth century, the halakhic authorities added these measures to the list of *harhakot* of Rabbenu Tam mentioned in the earlier halakhic literature. In his responsa, R. Binyamin Zeev of Arta mentioned the option of implementing the far-reaching measures earlier proposed by R. Yomtov of Joigny; and R. Moses Isserles wrote in his glosses on the *Shulhan Arukh* that these measures may be imposed on the recalcitrant husband.<sup>68</sup> Their wording implies that they maintain that these sanctions may be imposed whenever Rabbenu Tam's isolating measures are imposed, and not only in the special circumstances mentioned by R. Yomtov of Joigny.

### iii *Level of Enforcement*

On the understanding of the medieval halakhic authorities, when a divorce judgment is enforced at the highest level, that is, when divorce is "compelled," even sanctions that impact on the individual's body, such as flogging, are permitted. The *get* is indeed "enforced" (*meuse*), but enforced in a lawful manner. On the other hand, when the enforcement level of the divorce judgment is lower, that is, in the case of "obligation" to divorce, sanctions that affect the individual's body are forbidden. Should they be implemented nonetheless, the validity of the *get* is liable

<sup>67</sup> *Sefer Etz Haim*, part 2 (Jerusalem: 1964), 198.

<sup>68</sup> See *Responsa Binyamin Zeev*, #88; *Hagahot Harema*, EH 154:21.

to be adversely effected, because the divorce will have been “enforced” in an unlawful manner. Less severe sanctions that do not affect the individual’s body are permitted in such circumstances, and if they are indeed employed, the *get* is not regarded as having been unlawfully “enforced.”

In the responsum that first mentions the *harhakot*, Rabbenu Tam refers to a situation in which divorce may not be “compelled.” He states explicitly that when a woman rebels against her husband with the claim that she finds him repulsive, the husband is not “compelled” to give her a *get*. In these circumstances, the use of harsh coercive measures, such as flogging or bans, is forbidden: “And if you should say that we may not force him with a whip, but we may force him with decrees and bans... *shamta* (a ban) is interpreted as denoting death (*sham mita*) or utter desolation (*shmama*). So you see that it [*nidui*] is harsher than flogging, and there is no greater coercion.”<sup>69</sup> Yet though recourse to such coercive measures (which are only permitted in the case of a “compelled” divorce) is forbidden, Rabbenu Tam, responding to the plight of a woman who finds her husband repulsive, allows other coercive measures to be used, namely, the *harhakot*.

The fourteenth-century Ashkenazic authority R. Mordekhai b. Hillel held that Rabbenu Tam’s *harhakot* are coercive measures that may be employed even when a *get* may not be “compelled,” and the enforcement level is lower, that is, when there is an “obligation” to grant/receive a *get* (*yotzi veyiten ketuba*).<sup>70</sup> On R. Mordekhai b. Hillel’s understanding, a new sanction was proposed during the days of Rabbenu Tam, a sanction that may be employed when the court issues a judgment of “obligation” to divorce.

Similarly, the formulation of the rule in R. Moses Isserles’ glosses on the *Shulhan Arukh* implies that Rabbenu Tam’s *harhakot* may be employed when the enforcement level is that of “obligation” to divorce.<sup>71</sup>

69 *Sefer Hayashar*, Responsa, #24. See also *Responsa Maharik*, #102, #135.

70 *Mordekhai*, Ketubot, #204. Cf. R. Mordekhai Jaffe, *Levush*, Habutz Vehaargaman, Laws concerning Divorce, 134.

71 Some argue that the responsum in which Rabbenu Tam’s *harhakot* are first mentioned implies that the *harhakot* may be imposed even when there is no obligation to divorce. Rather, they may be imposed whenever, in the opinion of the rabbinical authorities, the welfare of Jewish women demands that their emotional distress be addressed by imposing these sanctions.

Beeri (*Obligation*, n. 17 above, 296–97) initially supported this view. At that stage in the evolution of his thinking, he argued that if the halakhic basis for implementing Rabbenu Tam’s *harhakot* is the husband’s

In his sixteenth-century codification of Jewish law, the *Shulhan Arukh*, R. Joseph Caro writes:

Wherever they [the early sources] said *yotzi* ("he must divorce her"), the husband is compelled, even with whips, to divorce his wife. But some say that anyone about whom the Talmud did not state explicitly *kofin lehotzi* ("he is

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**obligation** to divorce his wife, the crucial point is missing from the responsum in which Rabbenu Tam mentions the *harhakot*. He should have written, that, regarding the case under discussion, "they compel him [to divorce his wife] with words," the formulation that is usually found in the medieval responsa dealing with the obligation to divorce, and he should have noted that the husband is obligated to divorce his wife. Beeri argued that Rabbenu Tam's measures, "more than they are based on the husband's legal obligation to divorce his wife, are based on the welfare of the Jewish woman, or in the words of the author of the *Levush* [R. Mordekhai Jaffe]: 'if the court sees that the woman's welfare may be improved thereby.'" In his opinion, at this point, he felt that the halakhic basis for the *harhakot* was the woman's distress: "Even those who are stringent about coercion and are worried about an unlawfully enforced *get*, recognize that consideration must be given to a woman who is filled with feelings of hate and revulsion for her husband. There is no disputing that 'she is not like a captive who must have sexual relations with a person whom she hates.' However, this does not suffice . . . as grounds to 'compel' [the highest level of enforcement] the husband to divorce his wife."

However, in a later article ("Legal means," n. 57 above, 68–70), Beeri wrote that the wording and placement of R. Moses Isserles' gloss on *SA*, EH 154:21, clearly imply that the *harhakot* may only be executed against the husband in a case where he is "obligated" by law to divorce his wife. In such a case, even though the husband has the status of a "sinner," a ruling of "compelled" divorce may not be issued against him, due to the halakhic dispute over whether, under these circumstances, the law permits the use of measures that are permitted in cases of "compelled" divorce. However, it is permitted to impose on him the real — and effective — pressure that results from implementation of the *harhakot*. Since the husband is obligated to divorce his wife, his disregard for the court's binding ruling, which turns him into a "sinner," serves as a firm basis for the court's action obligating the community to distance itself from the sinning husband. But in cases where the court does not think that the woman's claim justifies obligating the husband to grant her a divorce, it will not impose the *harhakot* on him, even if it is convinced that, given the circumstances, the couple should indeed divorce on account of their irreparable incompatibility.

In the later article, Beeri maintained that R. Moses Isserles deflected Rabbenu Tam's rule from its original purpose. The law had originally been intended to help any woman who hated her husband, and who, without imposition of the *harhakot*, would be left with no recourse. The normative

compelled to divorce his wife”), but only *yotzi veyiten ketuba* (“he must divorce her and pay her *ketuba*”), may not be compelled with whips to divorce his wife, but rather, we say to him: ‘The Sages have obligated you to divorce your wife, and if you do not do so, it will be permissible to call you a sinner.’<sup>72</sup>

In his glosses on R. Joseph Caro’s remark, R. Moses Isserles writes:

Since there is a dispute among the Sages [about whether or not divorce is “compelled” when the sources say “*yotzi*”], it is proper to rule stringently, and not to compel with whips, so that the *get* will not be enforced in an unlawful manner.<sup>73</sup> But if his wife is forbidden to him, all agree that he may be compelled with whips. And wherever we may not compel with whips [because the enforcement level is not that of “compelled” divorce, which justifies the use of such harsh means against the husband], we also may not put him under a ban (*nidui*).<sup>74</sup> Nevertheless, they may decree on all persons who are members of the nation of Israel not to grant him any benefit, nor to do business with him,<sup>75</sup> nor to circumcise his son, nor to bury him, until he gives [her] a writ of divorce.<sup>76</sup> The court may impose any stringency like this [any indirect sanction of withholding benefit] that it desires, provided it does not put him under a ban.<sup>77</sup>

There were halakhic authorities who were inclined to restrict the possibility of imposing this sanction, which they considered harsh, on the recalcitrant husband. Sometimes they argued that whenever divorce cannot be “compelled,” the *harhakot* cannot be imposed.<sup>78</sup> In adopting this

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law today is that which finds expression in the gloss of R. Moses Isserles. According to R. Moses Isserles, application of the law authorizing *harhakot* is only possible in a limited number of cases, namely, those in which the husband is “obligated” to divorce his wife. In Beer’s opinion, imposing the *harhakot* only when the husband violates a binding ruling of the court that he must divorce his wife unquestionably strengthens the halakhic basis for the imposition of *harhakot*.

72 SA, EH 154:21.

73 See *Tur*, EH 154, quoting the view of R. Asher b. Yehiel.

74 See *Mordekhai*, Ketubot, #204.

75 See responsum attributed to Rabbenu Tam, *Sefer Hayashar*, Responsa, #24. See too *Responsa Maharik*, #102, #135.

76 See *Responsa Binyamin Zeev*, #88.

77 *Hagahot Harema*, EH 154:21.

78 R. Joseph b. Lev initially held that the sanction of *harhaka* is harsh, and should not be used in situations where the husband is not “compelled” to divorce his wife: “*Harhaka* is more difficult for them than *nidui*. If *nidui* is regarded as unlawful coercion, all the more so *harhaka*.” See n. 80 below.

view, their primary consideration was the opinion that in actual practice the *harhakot* could constitute a harsher sanction than *nidui*, or at least one of equal harshness. Indeed, on the view of R. Joseph b. Lev, initially, the only justified halakhic policy is one that permits the use of Rabbenu Tam's *harhakot* only in situations where divorce may be "compelled."<sup>79</sup>

However, at the concluding stage of his halakhic deliberation, R. Joseph b. Lev inclined — in circumstances where, in his opinion, implementation of the *harhakot* was justified — toward leniency in the imposition of the *harhakot*, and was ready to consider the possibility of applying them even where by law divorce could not be "compelled," provided that he was joined by several other sages of his generation. R. Joseph b. Lev wrote: "Regarding the imposition of Rabbenu Tam's *harhakot*, even though we have given reasons to be stringent, I am nonetheless inclined to be lenient. If some of the generation's halakhic authorities and sages agree to impose Rabbenu Tam's *harhakot* in a case like ours, I will concur along with them." Thus, in certain circumstances,<sup>80</sup> he was ready to rule that it was possible to impose Rabbenu Tam's *harhakot* when divorce cannot be "compelled."<sup>81</sup>

In the responsa literature of recent generations, the view of R. Joseph b. Lev is sometimes mentioned by rabbis who are not sure that the implementation of the *harhakot* is permitted.<sup>82</sup> The isolated party's decision to remain in his place of residence does not necessarily mean that he tacitly agrees to be placed in a difficult situation, similar to that of a banned or excommunicated party,<sup>83</sup> and in some

79 One halakhic authority, R. Menahem Mendel Schneerson, has argued that the need to move to another community must be considered a severe blow to the recalcitrant husband, which significantly infringes upon his free will to divorce, in much the same manner as does banning, *nidui*. Thus, the *harhakot* may only be imposed in those circumstances where banning is permitted, that is, in cases of "compelled" divorce; see *New Responsa Tzemah Tzedek*, EH #264. Regarding the policy of restricted use of Rabbenu Tam's *harhakot*, see also *Seder Eliahu Rabbah*, #13.

80 See *Responsa Mahari b. Lev*, 2, #18; see also *Gvurat Anashim*, #72.

81 See *Responsa Mahari b. Lev*, 2, #79 (at the end).

82 See R. Ovadiah Yosef, *Responsa Yabia Omer*, 7, EH #23; 8, EH #25. See also Beer, n. 57 above, 89.

83 On the status of the excommunicated and banned (*muhrum* and *menude*), see *Encyclopedia Talmudit*, vol. 17, "herem."; G. Libson, "The ban and those under it: Tannaitic and Amoraic perspectives" (Hebrew), 6–7 *Shenaton Hamishpat Haivri* (1979/80), 177, 184–96.

situations an even more difficult situation than theirs: "In the closed and restricted Jewish community in the period of Rabbenu Tam, such *harhakot* meant isolation from the real world, and the husband's removal from the realm of law and society. He became like an isolated cell."<sup>84</sup>

Nevertheless, in the responsa literature of recent generations, there are those who maintain that the strong pressure applied to the husband by way of Rabbenu Tam's *harhakot* does not diminish his free will. R. Herzog argues that if the husband agrees to divorce his wife after these measures are applied to him, this means that he is not sufficiently attached to his wife, and that in the end the *get* is given of his free will: "It is not so harsh that he would divorce his wife if he was deeply attached to her, and if he divorces her, he is not regarded as having acted under duress."<sup>85</sup>

According to R. Herzog, the imposition of Rabbenu Tam's *harhakot* is permitted when the halakhic authorities have considered the circumstances and concluded that "in order to fulfill his duty to God, it is a *mitzva* for [the husband] to divorce [his wife]," so that she not remain an *aguna*, that is, bound to her husband in an undesirable marriage. These were the circumstances, according to R. Herzog, in a case that came before him: "A woman claimed that she found her husband repulsive, and it was the opinion of the court, after clarifying the matter, that her claim had a strong foundation." R. Herzog decided as follows:

In any event, it was fitting to force [the husband] with words, for by rights he is obligated to divorce her. According to Rabbenu Tam... they may in any event force him with words, and also with the *harhakot*, which are much more [severe] than words. This applies when it is clear to the court that the law is that he should divorce her, and not chain her to him and cause her to suffer for no purpose.<sup>86</sup>

As stated earlier, the category of divorce that is a *mitzva*, and that of recommended divorce, in the sense found in the halakhic literature of recent generations, are not found in the halakhic literature of the Middle Ages.<sup>87</sup> Therefore, no consideration is given in that literature to

84 Weinrot, n. 17 above, 432.

85 *Responsa Heikhal Yitzhak*, EH 1, #1.

86 See Herzog, "Apprehensions," n. 24 above, 17; *ibid.*, EH 1, #3.

87 See text at nn. 3 above, 193 below.

the imposition of Rabbenu Tam's *harhakot* at levels of enforcement lower than that of obligation to divorce. Because of the fear that the *get* will not be free of the taint of unlawful enforcement, in contemporary rulings of rabbinical courts in Israel, the judges do not use these measures to uphold a divorce judgment when the enforcement level does not exceed that of *mitzva* or recommended divorce. In practice, the rabbinical courts in Israel have imposed Rabbenu Tam's *harhakot* in circumstances where divorce could not be "compelled," but a ruling was issued that the husband is obligated to divorce his wife.<sup>88</sup>

#### d Imprisonment as Punishment for Serious Crimes

Due to the importance attached to the liberty of the individual in Jewish law, particularly in the early periods, Jewish law did not generally approve of imprisonment or detention, whether for the purpose of inquiry, as a means to compel compliance, or as punishment.

In the past, imprisonment was used in the Jewish legal system as a punishment for serious crimes as a last resort, when there was no other choice. A punishment of imprisonment until death existed: "If someone was flogged, and then repeated his offense, the court confines him to a cell, and feeds him barley until his stomach bursts. If someone killed another person, but there were no witnesses, they confine him to a cell, and feed him the bread of adversity and water of affliction."<sup>89</sup> This was a punitive sanction imposed in especially serious cases: it was only used when the offender had committed murder or manslaughter.<sup>90</sup> In addition, imprisonment as an exceptional punishment could be imposed as an emergency ruling when extraordinary measures to combat criminal

88 This has been the policy in numerous unpublished cases; see my forthcoming Hebrew article in *Bar-Ilan Law Studies*. See too the ruling cited by Beeri, n. 57 above, 93–95; *Responsa Yabia Omer*, 7, EH #23; 8, EH #25; *Responsa Tzitz Eliezer*, 17, #51. See also the ruling issued by the Rabbinical Court associated with Kehilat Mahzikei Hadat in Antwerp (and later confirmed by R. Nissim Karelitz, head of a rabbinical court in Bnei Brak), cited in Beeri, 95 n. 99.

89 mSanhedrin 9:5.

90 See *Dvar Hamishpat*, n. 7 above, 24:4–10, 186; *Ase Lekha Rav*, #57, 303; *Mayim Hayim*, #78, 268. See also L.I. Kaminer, "The punishment of imprisonment in Jewish law," 9 *Tehumin* (1988), 147–49.

behavior became necessary: “Whence do we know that we may put [offenders] in stocks, and imprison, and impose confinement? For the verse states: ‘[Let judgment with diligence be imposed upon him], whether it be for death, or for banishment, or for confiscation of goods, or for imprisonment’ (Ezra 7:26).”<sup>91</sup> Maimonides mentioned these and other extraordinary punishments in his *Mishne Torah*. Yet he emphasized that a judge who imposes such a punishment must recognize the importance of human dignity, which includes the right to walk about as a free man: “And in every way his actions should be for the sake of Heaven, and human dignity should not be taken lightly in his eyes.”<sup>92</sup>

e Imprisonment and Non-release from Imprisonment for the Purpose of Enforcing a Divorce Judgment

i *Imprisonment*

In the early sources, imprisonment for the purpose of enforcing a divorce judgment is mentioned occasionally:

A mourner on the day of the death of his relative, someone who is digging among debris [not knowing with certainty that a corpse is buried there], someone who has been promised to be released from prison, and a sick or elderly person who can eat an olive-sized portion [of the Paschal offering] — [regarding each of these people,] they slaughter [the Paschal offering] for them [along with the rest of those invited to eat the Paschal offering in company]. Regarding all of these people, they do not slaughter [the Paschal offering] for them alone, lest they bring the Paschal offering to disqualification.<sup>93</sup>

In the discussion in the Babylonian Talmud it is stated: “Rabbah bar Huna said in the name of R. Johanan: This only applies to a Gentile

91 bMoed Katan 16a.

92 See *Code*, Laws concerning the Sanhedrin 24:9–10. Following Ezra 7:26, which mentions, among other things, “imprisonment,” Maimonides wrote that imprisonment is one of the measures available to a Jewish judge. However, he mentioned imprisonment in the chapter in which he recorded the punitive measures available to the court in extraordinary circumstances. It might be argued that the rule that “he may bind his arms and legs, and put him in prison” (Laws concerning the Sanhedrin 25:7) also applies only in special circumstances, and that these measures should not be used as a matter of course.

93 mPesahim 8:6.

prison, but in the case of a Jewish prison, they slaughter for them alone."<sup>94</sup> R. Solomon Yitzhaki (Rashi) explains that "a Jewish prison" is designated to serve, among other things, as a coercive measure against a husband who is obligated to divorce his wife. He is imprisoned in an attempt to extract his consent to give a *get*:

A Jewish prison — for example, to compel [a husband] to divorce a woman who is disqualified [from marrying him], or to pay money. Or else, as it was taught in a baraita: "If he gets up [on his feet] and walks outside, etc."<sup>95</sup> — But would it occur to you that this one walks in the marketplace and that one is killed? Rather, it teaches [us] that we imprison him, until we see what will happen to him.<sup>96</sup>

According to Rashi, imprisonment was used as a means of compelling a husband to grant a divorce, and also as a means of compelling payment of certain monetary debts, and as an interim measure during the course of deliberations in capital cases.

Rashi mentioned a case of "compelled" divorce. Moreover, it is not an ordinary case of divorce, but one where the intention is "to compel [the husband] to divorce a woman who is disqualified [from marrying him]." It is possible that Rashi maintains that only in these special circumstances, when the husband and wife should end their undesirable relationship, is it permissible to impose upon the recalcitrant husband the harsh measure of imprisonment, but not necessarily in every case of "compelled" divorce. However, he does not state explicitly that this is his opinion.

This possible interpretation of Rashi — that only in exceptional cases should a Jewish prison be used to persuade a husband to give his wife a *get* — accords well with real-life conditions in the Jewish communities of the Middle Ages. Jewish prisons did not ordinarily exist in that period. In the course of the centuries when Jews lived in the Diaspora, they generally made use of Gentiles who exercised coercive

94 bPesahim 91a.

95 See *Mekhilta deRabbi Yishmael*, Mishpatim, 6; *Mekhilta deRabbi Shimon bar Yohai*, 21:19; Sifre Deuteronomy, 237; Tosefta, Baba Kama 9:7; bKetubot 33b; bSanhedrin 78b; jKetubot 4:4; jNazir 9:5; jSanhedrin 8:8; 9:3.

96 Rashi on bPesahim 91a s.v. *beit haasurin shel yisrael*. However, in his commentary on Ezra 7:26 s.v. *veleesurin*, Rashi explains: "to afflict him with suffering"; the punishment of imprisonment is not mentioned. See also Elon, *Freedom*, n. 1 above, 187; Kaminer, n. 90 above, 140–41.

measures, such as imprisonment in a Gentile prison,<sup>97</sup> to convince the recalcitrant husband to divorce his wife.

Imprisonment of a husband or wife who refuses to give or receive a divorce, the aim of which is the granting of a *get*, or its acceptance, is a direct sanction. Hence many medieval halakhic authorities maintained that when the enforcement level is lower than that of “compelled” divorce, this sanction may not be used.

So ruled, among others in the Middle Ages, R. Joseph Colon, who discusses the case of a man who had been imprisoned in order to compel him to divorce his wife, and was later released. It was not a case in which the husband could be “compelled” to give his wife a divorce. Afterwards, he agreed to divorce his wife, because, among other things, he feared being sent back to jail. R. Joseph Colon ruled that the *get* was invalid, because it was flawed by duress.<sup>98</sup> He writes:

And all the more so in the case of the stringent prohibition of a married woman, regarding which it is fitting to rule in a stringent manner . . . for

97 The responsa literature indicates that until recently, a recalcitrant husband was usually not imprisoned in a Jewish prison. Over the many generations when imprisonment or the threat of imprisonment is mentioned in the responsa literature as a sanction to be used against the recalcitrant husband, the reference is to imprisonment in a Gentile prison. See, among other sources, *Responsa Maharik*, #63; Cohen, n. 16 above, 11–12; *Responsa Mabit*, 1, #76.

See, however, *Kerem Hemed*, 2, p. 6b, *takana* 34 of the *takanot* (enactments) passed in 1512 by the community of exiles from Castille in Fez. These enactments might reflect an exception to the rule. Included among them is a drastic course of action that may be taken against a man who betroths a woman in a manner that violates the enactment requiring that every betrothal take place in the presence of at least ten people. The betrothal itself is valid, but severe sanctions may be used to force the husband to divorce his wife: “Besides the punishment that they will receive, involving lashes, afflictions, and imprisonment . . . he will remain in prison until he gives his betrothed bride a valid *get*, and he will not be set free for the Sabbath or for holidays.” The mention of the Sabbath and holidays suggests that this imprisonment might possibly be in a jail belonging to the local Jewish community. Even so, this would be an exception that does not reflect the usual situation. Due to the gravity of the husband’s conduct in this case — according to an earlier enactment from 1494, the betrothal in such a case is declared invalid — the halakhic authorities were ready to imprison him so that he would give his wife a *get*. See also Elon, *Jewish Law*, n. 8 above, 704–05.

98 *Responsa Maharik*, #63. See also *Responsa R. Bezalel Ashkenazi*, #15; *Responsa Maharalbah*, #124; *Responsa Raahna*, #63.

certainly the original presumption [that the husband did not grant the *get* willingly] stands until it is proven that the matter has changed, that is to say, that the authority [who had had him imprisoned] is no longer in a position to apply duress as [he was] before. In that case there is no reason to assume that he acted as a result of the original duress.

In the same vein as the opinion that emerges from the writings of this authority, who belongs to the Ashkenazic school of halakhic decision-making in the Middle Ages, are the writings of three thirteenth and fourteenth century authorities who belong to the Spanish school—R. Solomon b. Adret (Rashba), R. Asher b. Yehiel (Rosh), and R. Isaac b. Sheshet (Ribash), all of whom mention that imprisonment was used in order to compel a husband to grant his wife a divorce or *halitza*.<sup>99</sup> Their writings imply that this measure was only used in appropriate circumstances, where the cause for divorce justified the use of coercive measures permitted only at the highest enforcement level, that is, in cases of “compelled” divorce.

A thirteenth-century responsum by Rashba implies that a distinction must be made between measures that may be activated in ordinary cases and harsh measures permitted only in cases where use of such measures is warranted. Rashba authorized the use of a “*herem* of imprisonment,” that is, he allowed the employment of the harsh measure of imprisonment, to bring an end to an unfit marriage. According to Rashba, this *herem* applies in a case where “someone seized an Ishmaelite (Gentile) girl and converted her, and then he betrothed her, and he is with her without a *ketuba*.”<sup>100</sup> In such a case, due to the circumstances — the husband took as a wife a woman whom he should not have married, and living with her without a *ketuba* is forbidden — the law is that the husband may be “compelled” to divorce his wife.

In the fourteenth century, in one of his responsa Ribash mentions exceptional punitive measures, including imprisonment, that may be

99 Sometimes these authorities spoke in vague terms, without offering detailed explanations. Imprisonment was used to force a levir to grant his brother’s widow *halitza*, or to force a husband to give his wife a *get*. These matters were mentioned as facts, without entering into any discussion about the halakhic basis for the imprisonment. See *Responsa Rosh*, 52, #8; *Responsa Ribash*, #348.

100 *Responsa Rashba*, 5, #242. See also Elon, *Freedom*, n. 1 above, 187.

imposed on a sinner: “Regarding a *kohen* who remarried his divorced wife [a prohibited marriage], if you are unable to beat him and force him in that manner, and not even by way of [enforcement by] Gentiles, impose upon him different coercive measures, either imprisoning him, or putting him under a ban, or putting him in confinement.”<sup>101</sup>

Recourse to such measures is probably the exception; they may only have been imposed in unusual circumstances, such as those found in the case discussed by Ribash: the marriage of a *kohen* and his divorced wife is forbidden, and should such a marriage take place, its continuation must be prevented, in the same way that any other violation of the law must be prevented.<sup>102</sup>

As for cases in which the circumstances are not exceptional or unusual, in a different responsum Rashba discusses the question of when imprisonment, or the threat of imprisonment, may be employed for the purpose of compelling a husband to give his wife a *get*. He discusses the validity of a *get* that a husband gave out of fear he would be imprisoned. The husband agreed to divorce his wife, because he feared he would be “incarcerated in chains” if he failed to do so, or else “thugs” (*pritzim*), acting on behalf of his wife, would attack him. In the past, these thugs had threatened that if he refused to give a *get* “they would kill him.” And indeed “they tried to kill him, but he escaped,

101 *Responsa Ribash*, #348. Ribash relies on the talmudic passage in bJebamot 60b: “He said to him: ‘Go divorce her, and if not, I will force you to divorce her’”; and on Rashi’s commentary ad loc. s.v. *mafikna lekha*: “I will put you under *nidui*, and you will divorce her against your will.” See also Elon, *ibid.*, 188. Elsewhere (*Responsa Ribash*, #508), Ribash dealt with a case where the wife’s uncle had acted improperly, bringing about the woman’s marriage against the court’s wishes. Ribash ruled that the uncle be incarcerated, so that the husband and wife could be persuaded to end their unfit marriage with divorce. On the principle that “the court may impose flogging and punishment not prescribed by Torah law,” see *Jewish Law*, n. 8 above, 421–25; 515–19. See also bSanhedrin 46a; bJebamot 90b; bMoed Katan 16a; *Code*, Laws concerning the Sanhedrin 24:7–9.

102 When another solution exists, for example, if the husband separates from his wife, and avoids secluding himself with her, no compulsion is used unless the husband is “one of those who may be compelled to divorce” — *Tashbetz*, 2, #22.

after having been badly beaten."<sup>103</sup> Rashba ruled the *get* invalid, because it was tainted with duress: "Whenever they are able to coerce him, and they have threatened to coerce him, he is regarded as having been coerced, for regarding the case where 'they suspended [tortured] him, and he agreed to sell,'<sup>104</sup> he does not have to wait until he is [actually so] suspended." That is to say, the very fact that the husband could be imprisoned constitutes a threat to him. He acts due to the threat that he will be imprisoned if he does not divorce his wife, and therefore is regarded as one who is forced to perform an act (*anus*), and does not act of his own free will; the *get* that he gave her therefore has no validity.

Similarly, R. Shimon b. Tzemah Duran (Rashbatz) writes: "Not only when they have actually beaten him, but once they threaten to beat him, and they are able to do so, it is considered duress." A number of Rashbatz's contemporaries, who addressed the same issue, expressed a similar opinion. In the same vein, R. Hisdai Crescas writes: "If Gentiles prevented him from leaving town until the judges were selected, even though they later allowed him [to leave] — whenever it is in their power to stop him, it is considered absolute duress, for we say that he acted out of fear."<sup>105</sup> R. Johanan b. Mattathias writes: "He continues to be considered an *anus*, as long as he had been coerced once before about the matter, and the person who coerced him the first time

103 At first, the husband refused to give a *get* of his own free will: "For at the time of the *get*, the court threatened that if he did not divorce his wife, they would lock him in chains." Eventually the husband gave a *get*, but declared that he was divorcing his wife under duress: "Due to their threats, he ordered that a *get* be written and signed, and he said: 'I am ordering the *get* to be written on account of threats.' And they said to him: 'Do not say that. Rather, order the *get* of your own free will, and not because of the duress.'" In the end, the husband agreed to divorce his wife of his own free will: "And then he said: 'I am ordering the *get* of my own accord.'" Rashba was asked whether a *get* given under those circumstances should be considered a *get* that had been unlawfully enforced. See *Responsa Rashba*, 2, #276. See also *Freedom*, n. 1 above, 187. Cf. *Responsa Rashba*, 1, #577. On the disqualification of a *get* given under duress, see also *Responsa Rashba*, 4, #40. On a *get* given out of fear on the husband's part that he would be imprisoned or put to death if he did not divorce his wife, see *Responsa Mahari Berav*, #40; *Responsa Mahari b. Lev*, 2, #77; *Responsa Kedushat Beit Yisrael*, #38; *Responsa Shem Aryei*, #93–94. See also bBaba Batra 48a.

104 bBaba Batra 48a.

105 *New Responsa Ribash*, #27.

was always able to coerce him again if he did not comply with his request."<sup>106</sup> Many authorities accepted this opinion.<sup>107</sup>

Only in a case of "compelled" divorce is a direct coercive measure like this permitted. According to Rashba's above-mentioned responsum, the *get* in the case brought before him was invalid, among other reasons, because there was no cause for divorce that allowed for compulsion, so the *get* was enforced in an unlawful manner.<sup>108</sup> But had there been a cause for divorce that allowed for compulsion, threatening imprisonment in order to pressure the husband to give a *get* would have been permitted. Rashba writes, in conclusion, that since the woman is a rebellious wife, if the common practice in the place where the husband was threatened with imprisonment is to follow the halakhic rulings of Maimonides, who maintained that divorce is "compelled" when a woman claims that she finds her husband repulsive,<sup>109</sup> we may rely on that practice, because it is also halakhically justified to compel divorce in light of the Geonic enactment according to which divorce is "compelled" in such a case.<sup>110</sup> Rashba held that whenever

106 Ibid., #32.

107 Regarding the apprehension that the *get* will be considered to have been unlawfully enforced if the husband was threatened that his failure to divorce his wife would result in his being harmed, see, among other sources, *Responsa Maharik*, #63; *Responsa Radbaz*, 5, #2095; *Pithei Teshuva*, EH 134, #15. The halakhic authorities were generally of the opinion that such a threat infringed on the husband's free will, and raised the concern that any *get* given in consequence of such a threat must be considered unlawfully enforced. For decisions on the matter handed down in recent generations, see, among other sources, *Responsa Mayim Tehorim*, #15; *Responsa Shem Aryei*, #93–94; *Responsa Kedushat Beit Yisrael*, #38.

108 On the validity of a *get* given in a case where there are no grounds justifying a ruling of "compelled" divorce, but the husband was imprisoned nonetheless, see *Responsa Ritba* (Jerusalem: 1959), #13. See also "Freedom," n. 1 above, 187.

109 See *Code*, Laws concerning Marriage 14:8; Laws concerning Levirate Marriage and Halitza 2:10; *Obligation*, n. 17 above, 280–82.

110 See *Geonic Responsa, Shaarei Tzedek*, part 4, gate 4, #15; *Geonic Responsa, Hemda Genuza*, #140; *Otzar Hageonim*, Ketubot, p. 191, #478; *Jewish Law*, n. 8 above, 541–46; Beer, *ibid.*, 224–28; and sources cited in n. 18 above. Rashba is indeed of the opinion that the husband is not generally "compelled" to give his wife a *get* when she rebels and claims that she finds her husband repulsive. See *Responsa Rashba*, 1, #1192; *Responsa Rashba attributed to Nachmanides*, #38. However, following Maimonides and the Geonic enactment mentioned above, he rules: "And in places where they are accustomed to follow them, we do not have the authority to disagree with them or disregard what they had to say."

there is a halakhic basis for the highest enforcement level, that is, for a “compelled” *get*, the divorce judgment may be enforced by way of imprisonment or threat of imprisonment.

At the beginning of the fourteenth century, the Rosh discussed whether or not imprisonment may be used to pressure a person to grant his brother’s widow *halitza*.<sup>111</sup> He compared the law that applies in this case to that which applies to a husband who was lawfully compelled to give his wife a *get*, in which case the *get* is regarded as having been compelled in a lawful manner. It would appear that he compares coercion regarding *halitza* to coercion regarding divorce, when divorce may indeed be “compelled.”

## ii *Delaying Release from Prison*

Over the centuries, when imprisonment of a recalcitrant husband has been mentioned in the halakhic literature, in most cases the husband had not originally been imprisoned for the purpose of enforcing a divorce judgment, but for some other reason. For example, the husband, or his father, had been imprisoned for a monetary debt, or because they had committed an offense that resulted in a jail sentence.<sup>112</sup>

According to the medieval authorities, delaying the recalcitrant husband’s release from prison in order to pressure him to give a *get*, when he had been imprisoned for some reason unrelated to the divorce, is permitted even when it is forbidden to impose imprisonment directly. The compulsion is of the sort referred to in the Ashkenazic halakhic literature as “withholding benefit.” In this context, “withholding benefit” is effected by delaying the release from prison of the husband or his relative, where he had been imprisoned for some other reason.

Just as society grants benefits to each of its members, so too may it withhold such benefits from those who pose a threat or cause injury to

111 See *Responsa Rosh*, 52, #8.

112 See *Responsa Ribash*, #127, #348; *Tashbetz*, 1, #1; *Responsa Yakhin Uboaz*, 2, #21; Cohen, n. 16 above, 11–12; 12–13; 13–14; *Responsa Mabit*, 1, #76; *Responsa Maharalbah*, #120; *Responsa Bezalel Ashkenazi*, #15; *Responsa Mahari Berav*, #40; I. Glickman, “Concerning one who puts himself in a situation of duress with regard to divorce” (Hebrew), *Noam* 3 (1960), 183.

other members of that society, or from those who act in a manner deemed improper according to its social code. The action is not direct; the husband is not denied his liberty, nor does his body suffer any physical assault. In contrast, imprisonment of a husband who refuses to give a writ of divorce is a direct sanction.

The ruling, according to which a passive measure — “withholding benefit” — does not diminish the validity of a *get*, is in line with the principal rationale of Rabbenu Tam’s *harhakot*.<sup>113</sup> Rabbenu Tam, in his responsum, rules that delaying the release of a recalcitrant husband who has been imprisoned for some other reason is permitted for the purpose of attaining the desired goal — the granting of a *get*. This measure is permitted because it is an indirect measure, which is sometimes permitted, even when the direct measure of imprisonment is forbidden.

R. Joseph Colon explained that Rabbenu Tam’s ruling in this case is based on the assumption that a passive measure, “withholding benefit,” is not considered duress, which disqualifies a *get*. He writes:

Withholding benefits is not considered duress. And even though it is obvious to all that a person is always obligated to secure the release of his fellow Jew from captivity [the religious obligation to ransom captives], when he is able to do so [when he can afford to pay the ransom], even so, it is not considered duress when he withholds efforts [to release him — withholding benefit]; so too it is not considered duress when he withholds efforts [to seek the prisoner’s release].<sup>114</sup>

Similarly, he explains: “[The *get*] is not considered as [having been given under unlawful] duress, because they do nothing bad to him, but rather, they refrain from helping him.”<sup>115</sup>

Rabbenu Tam’s disciple, R. Yomtov of Joigny, also notes the distinction between a direct action and one that is indirect — withholding benefit.<sup>116</sup>

Parallel to this, a similar principle prevailed in the halakhic rulings of the Spanish and north African halakhic authorities of the fourteenth

113 See *Hagahot Mordekhai*, Gitin, #469; *Responsa Maharik*, #133, #166. On delaying release from prison, see also: Cohen, *ibid.*, 13–14; *Responsa Ribash*, #127, #348; *Tashbetz*, 1, #1; *Responsa Binyamin Zeev*, #88.

114 See *Responsa Maharik*, #166.

115 *Responsa Maharik*, #133. See also *Responsa Mabit*, 1, #22; *Responsa Darkhei Noam*, EH #53; *Responsa Sheerit Yosef*, #16.

116 See *Responsa Binyamin Zeev*, #88. See also “Legal Means,” n. 57 above, 85.

and fifteenth centuries. R. Isaac b. Sheshet (Ribash) and R. Shimon b. Tzemach (Rashbatz) are inclined to recognize the validity of a *get* given under indirect duress, when there is no direct compulsion. A divorce cannot be compelled in a direct manner, but the husband can be compelled to do something that he is obligated by law to do, the indirect result of this compulsion being that he divorces his wife.

Ribash concludes, from statements in one of the Rosh's responsa,<sup>117</sup> that when the halakhic authorities say to the husband, "Either do what you are obligated to do by law, or divorce your wife" — "this is not considered absolute coercion, but rather, they compel him to do that which he is obligated to do by law, and if he divorces his wife, he is exempt." Therefore, he writes,

we put him under *nidui*, or flog him until he agrees to cohabit with her. If he, of his own [free will], divorces her, in order to save himself from those [measures], it is not an unlawfully enforced *get*. For the court did not compel him at all to give the *get*, but rather, to fulfill his conjugal obligation to the best of his ability, just as he is obligated by law to fulfill the [other] commandments. It is as if he owed people money, and he was in jail for that debt, and his wife's relatives said to him: 'If you divorce your wife, we will repay your debt, and you will be released from prison,' and he agreed and divorced her of his free will. Would anyone say that this is a coerced *get*, because he did it in order to be released from prison? No, for he was not put in prison so that he might divorce his wife, but rather for his debt, and the *get* is not unlawfully enforced, but rather given willingly."<sup>118</sup>

In another responsum, Ribash discusses the case of a husband who betrothed a woman in a deceptive manner. In so doing he violated

117 See *Responsa Rosh*, 43, #13; *Responsa Maharik*, #166.

118 *Responsa Ribash*, #127. According to Ribash, then, the court may force the husband to go back to his wife, just as she or her representative may prevent him from leaving town without her permission, so that he may cohabit with her, in accordance with the obligation that rests upon him by Jewish law. "And if he does not want to go back [to his house] in accordance with the court's order, they may put him under a ban, just as they may put under a ban anyone who does not obey the law." See also *Responsa Bezalel Ashkenazi*, #15; *Hagahot Harema*, EH 154:21; Glickman, n. 112 above, 178; J.D. Bleich, *Contemporary Halakhic Problems* (NY: 1983), vol. 2, 96; I. Breitowitz, *Between Civil and Religious Law* (Westport CT: 1993), 20–26. Cf. *Responsa Ribash*, #348. On the effect of duress inflicted on one of the husband's relatives, e.g., his father, on the husband's free will to grant a divorce, see also *Tashbetz*, 1, #1; *Responsa Mahari b. Lev*, 2, #77.

a communal enactment forbidding a man to betroth a woman unless there are ten people present, and the local rabbi ruled that he be arrested for that transgression. The husband knew that if he agreed to divorce his wife he would be released from prison. The imprisonment had not been intended from the outset to serve as a means of pressuring him to give a divorce, but as a punishment for his having breached the enactment. Ribash considers, among other things, whether a *get* which the husband knows will secure his release from prison is considered an unlawfully enforced *get*. In his opinion, since the incarceration was not intended from the outset to cause him to give a *get*, the *get* is not considered to have been unlawfully enforced.<sup>119</sup>

The seventeenth-century authority, R. Mordekhai Halevi, noted the common denominator between the Ribash's responsum and that of Rabbenu Tam, cited above, regarding someone who was in jail on account of unpaid taxes or some other matter unrelated to the *get*, and his release from prison was made conditional on his agreement to give a divorce. The recalcitrant husband is already in prison. A benefit — his release — is withheld from him. Since the measure is indirect, it is permitted.<sup>120</sup>

The same approach is evident in a responsum by the Rashbatz regarding a recalcitrant husband's father who has been prevented from leaving a certain locale. In his opinion, this is not considered coercion that infringes upon his son's free will. The son may decide to divorce his wife or not to divorce her. Rashbatz distinguished, among other things, between this prevention of the father's leaving his place of residence, and imprisonment or flogging: "For even if they had prevented the husband himself from leaving, the way they had stopped his father, it would not be considered coercion, for they did not imprison him, nor did they beat him, and he could come and go as he pleased within the town, and also outside the town, provided that he did not change his place of residence." Later he added an alternative argument explaining

119 See *Responsa Ribash*, #232. Nevertheless, since the husband had declared before others that he was being compelled to give a *get*, the responsist held that the *get* was invalid on account of duress. On this, see also *Responsa Kedushat Beit Yisrael*, #38; *Responsa Heikhal Yitzhak*, EH 1, #1; Glickman, *ibid.*, 178, 181–82.

120 See *Responsa Darkhei Noam*, EH #53.

why the father's being prevented from leaving, in the context of this case, is not considered duress:

How can this husband be considered to have acted under duress [just] because his father was not allowed to leave that locale? First, they did not prevent him from leaving until his son divorced his wife, but until he appeared before the court. This prevention of his leaving was lawful, for by rights, if someone wishes to make his wife an *aguna*, or to cause her to become an *aguna*, he should be prevented from leaving until [the woman's relatives] submit their claims before the [rabbinical court] judges.<sup>121</sup>

In other words, when a measure that is permitted by law is used, and as a result, pressure is brought to bear on the husband to divorce his wife, the *get* is not regarded as having been unlawfully enforced.

The problem with imposing imprisonment or flogging in the case dealt with by Rashbatz arises from the fact that the case did not warrant a verdict that the husband is "compelled" to divorce his wife, and therefore the use of direct means of compulsion was forbidden. In another case, Rashbatz ruled that a certain *get* was not tainted by duress, even though the husband divorced his wife due to his fear of what the authorities would do. The *get* was valid, because the cause for divorce justified ruling that divorce could be "compelled": "Even if he divorced his wife on account of fear, it is not an unlawfully enforced *get*, for by rights he can be compelled."<sup>122</sup>

The approach of the Spanish and north African halakhic authorities was also accepted in the rulings of the halakhic authorities in the Ottoman Empire. Releasing the husband from a sanction that had not been imposed from the outset for the purpose of enforcing a divorce judgment, but for some other purpose, in exchange for his agreement to give a *get*, is mentioned in a responsum by R. Moses of Trani. A man had been put in jail and beaten. Representatives of the community and relatives of his wife offered to pay the money required for his release from jail, in return for which he agreed to give his wife a *get*. After the *get* was given, the husband claimed that it was invalid. R. Moses of Trani commented: "A *get* is only considered unlawfully enforced when [the husband] is coerced with regard to the divorce. But if he is coerced

121 *Tashbetz*, 1, #1. See also *Beit Yosef*, EH 134 s.v. *harash bar tzemah*; *Responso Maharashdam*, EH #63; Glickman, n. 112 above, 180; Bleich, n. 118 above, 97; Breitowitz, n. 118 above, 26.

122 *Tashbetz*, 2, #69.

with regard to a different matter, and in order to free himself from that coercion he divorces his wife, [the *get*] is not regarded as unlawfully enforced, provided that the coercion was justified."<sup>123</sup>

R. Samuel of Modena also wrote that he accepted the guiding principle in Rashbatz's responsum, namely:

The husband is not coerced, neither physically nor financially. But his wife or others pressure another person, so that when the husband sees his relative or his son in distress, he [too] is distressed, and divorces his wife. Rashbatz wrote of this that it is not an unlawfully enforced *get*, for it is only considered coercion when [this measure] is applied [to the husband himself], whether physically or financially.... But if they coerced him regarding a different matter in an unjustified manner, and as a result of that coercion he divorced his wife, it might be considered an unlawfully enforced *get*.<sup>124</sup>

The principle that guided the Spanish and north African halakhic authorities, as well as those in the Ottoman Empire, is as follows: regarding the husband's consent to divorce, sanctions that work in a direct manner differ from those that work indirectly. The assumption is that when the measure is indirect, as when a life preserver is withheld from a drowning person — and not direct, as when a person who cannot swim is cast into deep water — the *get* is not regarded as having been unlawfully enforced.

This distinction between direct and indirect coercion is not free of halakhic uncertainties, particularly when heavy pressure, social or

123 *Responsa Mabit*, 1, #22. Moreover, argued R. Moses of Trani, since money was paid in exchange for the husband's release from prison, and he agreed to the divorce, his consent was valid. This is similar to the case of a person who was tortured until he agreed to sell, where the sale is valid, despite the duress, according to the verdict of Rav Huna in the *sugya* in bBaba Batra 48a.

See also another responsum by R. Moses of Trani, *Responsa Mabit*, 1, #76, on the matter of a husband against whom a monetary claim had been brought before a non-Jewish court, for which he was put in prison. Eventually, he agreed to divorce his wife. R. Moses of Trani ruled that the *get* was valid, because, among other reasons, in this particular case there were grounds for divorce that allowed for "compelling" the husband to give a *get*. There was no problem of duress, because the husband's debt was waived in exchange for his consent to the divorce, and in exchange for that monetary benefit, he agreed to the divorce.

124 *Responsa Maharashdam*, EH #63.

otherwise, is applied against the husband. He finds himself in a difficult situation, and sometimes can only extract himself from it by giving a *get* — an act he does not carry out of his own free will. Nevertheless, the distinction between a direct and an indirect measure is accepted by many halakhic authorities,<sup>125</sup> including authorities of recent generations.<sup>126</sup> In their opinion, whenever divorce may not be

125 In the past, the issue was discussed by R. Joseph b. Mordekhai Gershon Hakohen and by R. Judah Aszod. R. Joseph b. Mordekhai dealt with a husband who acted out of fear that if he did not so act he would not be released from prison. Following the ruling of R. Joseph Colon in his *Responsa* (#166), R. Joseph b. Mordekhai ruled that even though the husband acted after he was caused “damage and duress,” that duress did not infringe on his free will, “since there was no intention to do him evil, only to deprive him of benefit” — *Responsa Sheerit Yosef*, #16. R. Judah Aszod dealt with a husband who mistreated his wife, ran off to America, and left her without a solution to the problem of her status as a married woman. According to R. Aszod, since the husband failed to fulfill his marital obligations, he may be “compelled” to divorce her, even with lashes. Nevertheless, he ruled that the husband should not be compelled in a direct manner, but indirect coercion was permitted. The indirect coercion should be executed as follow: efforts should be made to have the husband arrested in the country in which he now resides, and to ensure that “they do not release him until he agrees to send his wife a *get*.” R. Aszod explained that even though the woman brings it about that her husband is put in jail, the imprisonment does not detract from the *get*’s validity, for it is regarded as “withholding benefit.” See *Responsa Maharia (Yehuda Yaale)*, 3, #132.

126 In recent generations, the distinction between direct and indirect coercion has been mentioned in a ruling by Dayan S. Daichovsky; see S. Daichovsky, “Compelling a *get* by way of recommendation to reduce a prison sentence by a third” (Hebrew), 1 *Tehumin* (1980), 248–249 [henceforth “Compelling a *get*”]. It is also mentioned in a responsum by R. Masud Mahadar, who deals with the case of a man who is ready to give his wife a *get* in order to remove a threat of imprisonment. A judge had told him that he was sentenced to twenty years in prison, but if he gave his wife a *get*, the document recording that sentence would “be made to disappear.” R. Masud mentions, among other things, the responsa of Rabbenu Tam, R. Joseph Colon, and R. Moses of Trani on non-release from prison (where the husband had been imprisoned for something unrelated), which is considered “withholding benefit.” He holds that if the recalcitrant husband had actually been sentenced to prison (for another reason), withholding benefit is permitted. But if the judge meant to intimidate him so that he would agree to divorce his wife, the *get* is regarded as having been unlawfully enforced, since “the intention [of the coercion] was [to bring about the] divorce” — *Responsa Mayjim Tehorim*, #15.

“compelled,” the husband may also not be put in jail, since the direct measure could cause the *get* to be regarded as having been enforced in an unlawful manner.

### 3 *Enforced Get in Israeli Law*

#### a *Rabbinical Courts Jurisdiction Law (Marriage and Divorce), 5713 — 1953, section 6*

The legal arrangement that applied until 1995 regarding the enforcement of divorce judgments in Israel is set down in section 6 of the *Rabbinical Courts Jurisdiction Law (Marriage and Divorce), 5713–1953* (henceforth *Rabbinical Courts Jurisdiction Law*).<sup>127</sup>

That section states:

Where a Rabbinical Court, by final judgment, has ordered that a husband be compelled to grant his wife a letter of divorce or that a wife be compelled to accept a letter of divorce from her husband, a District Court may, upon expiration of six months from the day of the making of the order, on the application of the Attorney General, compel compliance with the order by imprisonment.

Halakhic authorities in Israel have discussed the halakhic basis for the arrangement set down in this law. Following the establishment of the State of Israel, when the possibility of passing a law allowing rabbinical courts to imprison someone who refuses to divorce his wife or to grant his brother’s widow *halitza* was raised, differences of opinion were expressed among the halakhic authorities. Some were concerned that the sanction of imprisonment might be too severe, and therefore liable to bring about the disqualification of the *get* or the *halitza*, because the husband, or relative in the case of *halitza*, would be acting under duress, and not of his own free will.

Rabbis who sought a halakhic anchor for such an arrangement had to contend with the difficulty posed by the rulings of many important halakhic authorities, who over the course of many generations viewed imprisonment as a severe sanction inflicted on the individual’s body, similar, in effect, to flogging. In their opinion, there is no justification for imposing the sanction of imprisonment when there is any uncertainty as to whether the circumstances warrant “compelled”

127 *Law Book of the State of Israel, 5713 — 1953, 165.*

divorce. R. Meshulam Ratta argued that legislation that would enable rabbinical courts to enforce divorce judgments by imprisonment is problematic.<sup>128</sup>

Among the rulings these authorities had to contend with was that of R. David b. Zimra (Radbaz). Dealing with the case of a husband “who beat his wife regularly, and constantly humiliated her,” Radbaz cited the

128 See *Responsa Kol Mevasser*, 1, #83. According to R. Meshulam Ratta, the imprisonment mentioned in Rashi’s commentary on bPesahim 91a s.v. *beit haasurin shel yisrael*, and in other places, is a “temporary imprisonment used to compel compliance or to keep the prisoner under guard.” Even the “confinement in a cell” (*kippa*) of certain murderers, which resembles life imprisonment from which the prisoner will never be released, is an exceptional measure that was only used in cases of murder, “and not for other capital offenses.” Similarly, R. Ratta argued — in light of what is stated in bMoed Katan 15a, “*minalan deasrinan*,” and what Maimonides wrote in the *Code*, Laws concerning the Sanhedrin 24:9 — that exile to a city of refuge, which resembles imprisonment, is also an exceptional temporary measure, used only in the case of unintentional murder. So too, R. Ratta argues, we should not rely on the “combining of uncertain points of law” suggested by the Gaon of Kovno, R. Isaac Elhanan Spektor, in his responsum (*Responsa Ein Yitzhak*, 2, #34, 5), for there he was dealing with a situation that was after the fact, where coercion had already been exercised and a *get* had already been given, whereas passing a law will bring about *ab initio* acts: “By passing a law we create a situation of *sfeik sfeika* with our own hands [that is, cause ourselves to enter into a situation where the halakhic permissibility rests on a conjunction of two uncertain points of law]...we have not rid ourselves of apprehension as to an unlawfully enforced *get*.” See also “Coercion,” n. 32 above, 175.

According to Elon, it is not clear from R. Ratta’s ruling whether or not he rejects the possibility of imposing imprisonment even in a case where divorce or *halitza* may be “compelled.” Elon argues that it stands to reason that R. Ratta refers only to a case where by law the divorce may not be “compelled.” He emphasizes that in any event, it would appear from the writings of many prominent halakhic authorities, such as Rashi, Rashba, Rosh, and Ribash, that when divorce may be “compelled,” compulsion may be exercised by way of imprisonment.

Regarding imprisonment, R. Ratta wrote: “And in general I am against giving rabbinical approval to a law that would allow imposing a set prison term of three or five years as a punishment, for we do not find something like that in our halakha, but only temporary imprisonment for the purpose of compelling compliance or keeping the imprisoned party in protective custody.” Elon notes that this is true with respect to early Jewish law, but since the fourteenth century, imprisonment has been recognized as a valid punitive measure in most Jewish communities, with the knowledge and approval of the halakhic authorities, and sometimes even at their initiative; see *Freedom*, n. 1 above, 188 n. 2.

position of R. Simha of Speyer that in such a case divorce is “compelled.” But he noted that the early sources do not include the husband’s violent behavior toward his wife among the grounds for “compelled” divorce, and also that there are those who disagree with R. Simha of Speyer. Therefore, Radbaz ruled that divorce judgments should not be enforced by way of severe measures such as flogging: “Granted that coercion by way of words or by way of payment of the *ketuba*, or [imposition of] a penalty [is permitted]. But coercion by way of flogging, or by way of Gentiles — such a thing was never done.” Still, Radbaz maintains that the indirect use of severe measures, including imprisonment, is permitted:

They may imprison [the husband] because he beat [his wife], and they should not mention to him at all that he should divorce his wife. If he stands up on his own [that is, decides to divorce his wife] on account of his punishment, and divorces her, this is not [a case of] duress, for he knowingly brought the duress upon himself. Let him not beat her, and he will not [have to] divorce her. But as for compelling him to give a divorce by way of *nidui*, or *shamta*, or some physical punishment — I do not see [a justification], nor do I agree [to it], and all the more so [if it is] by way of Gentiles.<sup>129</sup>

The Radbaz emphasized in another responsum as well that direct imprisonment of a recalcitrant spouse in a Gentile prison is regarded as a harsh coercive measure, equal in intensity to flogging: “There is no distinction between imprisonment and flogging, for they are both afflictions of the body. It is obvious. And all the more so, imprisonment at the hands of cruel Gentiles, who have no mercy.”<sup>130</sup>

Furthermore, one who is sent to prison becomes separated from his wife. Separation of this sort must be handled with caution, and is only permitted in special circumstances that justify resorting to this severe measure.<sup>131</sup>

129 See *Responsa Radbaz*, 4, #157 (1228).

130 *Responsa Radbaz*, 4, #108 (1180). In this responsum, Radbaz writes that in his day, non-Jews had a harsh attitude to prisoners, making them feel “like a bison in a net.” The expression refers to a bison caught in a hunting trap; see Isaiah 51:20, and the interpretation of the Sages in bBaba Kama 117a.

131 R. Aryeh Leib Haft writes in *Responsa Divrei Taam*, #128: “They do not separate him from his wife. . . . In my opinion, Rabbenu Tam did not allow such separation, for that is real coercion, for we steal his wife from him. It is also illogical to coerce him in this manner, by separating him from his wife, and stealing conjugal rights from him, and forcing him not to fulfill his conjugal obligations, which are imposed on him by Torah law, according to most halakhic authorities. This is beside the fact that [separating him from his wife] raises the fear of an unlawfully enforced *get* . . . for they [the Rabbis] do not compel [divorce] with conjugal or monetary obligations.”

Yet many halakhic scholars of recent generations maintain that when imprisonment is appropriately imposed, there need be no apprehension that the *get* will be regarded as having been unlawfully enforced. R. Herzog maintained that when a rabbinical court rules that a husband should be “compelled” to divorce his wife, imprisonment may be used as a means of forcing the husband to comply. He held that to avoid any apprehension that imprisonment will be imposed on a person who cannot be “compelled” to divorce his wife, it is important that it be possible to appeal the ruling of the lower rabbinical court to the high rabbinical court. That court can, among other things, overturn the ruling that the husband is “compelled” to give a divorce if it finds that the grounds for divorce do not justify such a ruling. R. Herzog also maintained that it is important that in its ruling the court write explicitly that “the husband should be compelled by way of imprisonment.” In his opinion, were it written in a general way that the husband “should be compelled,” there would be a possibility that the court meant that the husband should be compelled to divorce by ordering a substantial amount of maintenance to be paid to the wife.<sup>132</sup>

According to R. Herzog, it would appear from analysis of the *responsa* literature that the determining factor is the degree of pressure that the coercive measure exerts upon the recalcitrant spouse. If the prison conditions are such that they do not exert excessive pressure on the husband to give his wife a divorce, there is room for imposition of imprisonment.<sup>133</sup>

As stated above, in the past, Jewish courts did not usually imprison Jews, including recalcitrant spouses, in a Jewish prison. But circumstances have changed in recent generations; the number of women denied a *get* has risen, and the conditions of life in a permissive society have made it more possible, and acceptable, in certain segments of

132 See his letter dated the week the Matot-Mase Torah portion was read in the synagogue, in 5713 (1953), cited in “Coercion,” n. 32 above, 174–75.

133 See *Responsa Heikhal Yitzhak*, EH 1, #1. See also #2: “Not every imposition of a sum [of money] constitutes absolute duress.... Since the monetary payment does not seriously diminish his livelihood, it shows that he is not as closely attached to his wife as he claims he is, and the *get* is valid. It is not an unlawfully enforced *get* unless they impose upon him something that is not in his power to bear, such as physical torture, or a huge sum that will destroy him.”

society, for such women to choose to live with new partners before being released from their marital bond. More effective solutions to the problem of the husband's refusal to give a *get* became necessary, so the utilization of imprisonment as a sanction against the recalcitrant spouse was permitted. In one of the rulings of a rabbinical court in Israel, the judges (*dayanim*) took into account, among other things, the fact that prison conditions are not as harsh today as they used to be in times past. R. Ovadiah Yosef writes: "And all the more so regarding the coercion that is used today, which is not coercion with whips, but rather, sitting in prison. There is no comparison between [the conditions in] the prisons of our day and those of early times."<sup>134</sup> As a direct consequence of this new reality, the rabbinical court, given its authority to do so under Israeli law, ordered the recalcitrant husband imprisoned.

Following the precedents in the halakhic literature, R. Shear Yashuv Cohen, present head of the Haifa District Rabbinical Court, asserted:

The coercive measure that stands at our disposal in the State of Israel is imprisonment. Even those who oppose coercing with whips would agree to coerce with imprisonment. Rashi explained that Jewish prisons are used 'to compel [a husband] to divorce a woman who is disqualified [from marrying him].'<sup>135</sup> R. Ovadiah Yosef has noted: 'There is no comparison between the prisons of our day and those of early times.' In his letter to the rabbis and *dayanim* of Israel from the fifth of Av, 5713 [1953], R.I.H. Herzog, of blessed memory, accepted the proposal that [recalcitrant parties be] compelled by way of imprisonment.<sup>136</sup>

Similarly, R. Saul Yisraeli writes that imprisonment in an Israeli jail in our day is less harsh than the imprisonment of a recalcitrant spouse mentioned in the early halakhic literature.<sup>137</sup>

134 *Responsa Yabia Omer*, 3, EH #20. See also #18–19, where discussion of the subject begins.

135 Rashi on bPesahim 91a s.v. *beit haasurin shel yisrael*.

136 S. Cohen, "Compelling a *get* at present" (Hebrew), 11 *Tehumin* (1990), 195, 201. On the validity of a *get* given by a recalcitrant husband after having been put in prison, see also M. Silberg, *Personal Status in Israel* (Hebrew), (Jerusalem: 1965), 125–26; Elinson, "Refusal to give a *get*" (Hebrew), 69 *Sinai* (1971), 135–36.

137 See *Mishpetei Shaul* (Jerusalem: 1997), 236.

- b Deficiencies of the *Rabbinical Courts Jurisdiction Law*, section 6
  - i *The Remedy is not Speedy*

Much time elapses from the time divorce proceedings begin until the court, “by final judgment, has ordered that a husband be compelled to grant his wife a letter of divorce or that a wife be compelled to accept a letter of divorce from her husband.”<sup>138</sup> In general, only after the final date of appeal has passed, or after the appeal has been rejected by the Supreme Rabbinical Court of Appeals, is it possible to compel a recalcitrant spouse to give or accept a *get* by way of imprisonment.<sup>139</sup>

Even after a final judgment has been handed down, and assuming that the recalcitrant spouse remains steadfast in his or her refusal to give or accept the *get*, the partner who is refused the *get* must wait an additional period of time. This delay stems from the fact that in section 6 of the *Rabbinical Courts Jurisdiction Law*, the Israeli legislator revealed a clear intention not to let the matter of compelling a *get* rest solely in the hands of the rabbinical courts.<sup>140</sup> The Israeli legislator did not authorize the rabbinical court to impose the sanction by itself. The rabbinical court was authorized to determine that Jewish law allows compulsion, but was not granted the authority of execution at the stage of imposing imprisonment. The law required that the rabbinical court’s ruling be evaluated by two external supervisory authorities, which had to approve it before imprisonment could be imposed on the recalcitrant spouse: the Attorney General must agree to apply to the district court for an order of imprisonment, and the district court must decide to accede to that request. Only after the rabbinical court ruling passed these additional tests set down in the law could its decision to imprison the spouse be carried out.

In addition to these two control mechanisms, which invoke the supervision and discretion of external organs, there is also a delaying

138 See sec. 8 of the *Rabbinical Courts Jurisdiction Law*.

139 See S. Daichovsky, “A critique of rabbinical court decisions” (Hebrew), 13–14 *Dine Israel* (1986/8), 7, 12 [henceforth “Critique”].

140 See H.C. of Justice 85/54 *Zada v. Attorney General*, (1954) P.D. 8, 738; H.C. of Justice 54/55 *Rosenzweig v. Head of Implementation, Jerusalem*, (1955) P.D. 9, 1540; Silberg, n. 136 above, 388–89; C.A. 220/67, 164/67 *Attorney General v. Yihye and Ora Avraham*, (1968) P.D. 22 (1) 29, 49–50. See also *Family Law*, n. 43 above, 37 n. 11; 201.

mechanism, the purpose of which is to prevent hasty action. The rabbinical court's ruling may only be applied after a specified time has elapsed from the day it was handed down. Before the *Rabbinical Courts Law (Enforcing Divorce Judgments)* (henceforth, *Rabbinical Courts Law*) was enacted, this time period was six months from the day that the order of compulsion by imprisonment was given as the final judgment of the rabbinical court.<sup>141</sup>

All these mechanisms prevented the speedy application of the sanction of imprisonment against the recalcitrant spouse.<sup>142</sup>

This same deficiency existed with respect to the arrangement set down by the Israeli legislator in section 7 of the *Rabbinical Courts Jurisdiction Law*, regarding a levir who refuses to grant his brother's widow *halitza*, after a rabbinical court has ordered, in a final judgment, that he be compelled to perform *halitza*. Here, "the District Court is authorized, after three months from the day that the order was issued, in accordance with the Attorney General, to compel compliance with the order by way of imprisonment."

ii *The Remedy can be Implemented only when the Court Decides to "Compel" Divorce*

For other reasons as well, this legal arrangement leaves certain needs unsatisfied. Any rabbinical court ruling in which it is stated that the court "compels," "obligates," "deems a *mitzva*" or "recommends" divorce, is regarded as a divorce judgment.<sup>143</sup> Yet the Israeli legislator, in section 6 of the *Rabbinical Courts Jurisdiction Law*, stated that a rabbinical court is authorized "to compel compliance with the order by imprisonment." The Supreme Court held that the imposition of imprisonment is only possible after the court has ordered that the husband or wife be "compelled" to give or accept a *get*, but not after it rules that they are "obligated" to divorce or be divorced, or hands down a ruling

141 This period may also extend beyond the six months "from the day the order was issued" mentioned in section 6; see Silberg, *ibid.*, 390–91.

142 See "Coercion," n. 32 above, 210; "Critique," n. 139 above, 12.

143 See H.C. of Justice 661/77 *Haber v. Supreme Rabbinical Court*, (1978) P.D. 32 (3) 329; H.C. of Justice 644/79 *Guttman v. Tel Aviv-Jaffa District Rabbinical Court*, (1980) P.D. 34 (1) 443, 446–48.

at any level of enforcement lower than “compelled” divorce.<sup>144</sup> The Israeli legislator set down this limitation in section 6 of the *Rabbinical Courts Jurisdiction Law* in order to prevent any possibility of an unlawfully enforced *get*. When strong measures of enforcement, such as imprisonment, are used to enforce a divorce judgment, in circumstances where the halakha states that divorce may not be compelled, there is concern lest a *get* be regarded as having been unlawfully enforced.

This concern made it difficult to find an effective way to ameliorate the plight of women refused a *get*. Until 1995, the *dayanim* serving on panels in rabbinical courts in Israel were fearful of compelling someone to give or receive a *get* by way of the harsh sanction mentioned in section 6 — imprisonment — when they were not sure that there was a cause for divorce that warranted “compulsion” according to Jewish law. In such a case, the *get* would be regarded as having been unlawfully enforced, that is, given under pressure, and not of the spouse’s free will.

The rabbinical courts in Israel attached great importance to the stringent views of certain halakhic authorities, particularly the Rosh, R. Moses Isserles (Rema), and R. Moses Sofer. According to the Rosh, the list of grounds for divorce mentioned in the Mishnah and Talmud as warranting “compulsion” to divorce is closed, and nothing may be added to it. Only in rare cases has the use of analogy enabled halakhic authorities to

144 See H.C. of Justice 822/88 *Rosenzweig (Borokhof) v. The Attorney General*, (1988) P.D. 42 (4) 760. The court decided that the husband is “obligated” to give his wife a *get*, but did not rule that he can be “compelled” to divorce her. The problematic nature of the situation wherein a sanction can only be imposed when divorce can be “compelled” is clearly evident in this case. A woman was locked into a difficult situation for nine years due to her husband’s refusal to give her a *get*. The court was powerless to act in the most efficacious manner, that is, to impose the sanction of imprisonment. Elon J. described the predicament thus: “We can only advise the petitioner to continue to present her claims and her troubles before the honorable Rabbinical Court in Haifa, viz., that she has not yet been released from her state of being an abandoned wife. . . . We are confident that the honorable Rabbinical Court will reconsider her case, as was stated in the earlier verdicts of the District Rabbinical Court and the Supreme Rabbinical Court, and find a way to compel the husband to give his wife a *get*, in order to save the woman from the chains of her marriage” — *ibid.*, 761.

add new grounds for “compulsion” of divorce. Usually, divorce may be “compelled” only in those cases regarding which the Sages of the Talmud explicitly mentioned “compulsion.”<sup>145</sup> As the causes for compelling a *get* in the early halakhic sources are few and well-defined, this opinion limits the possibility of ruling that a *get* may be compelled in our day. In his glosses on the *Shulhan Arukh*, Rema ruled, in accordance with the opinion of the Rosh, that the court may not “compel” divorce if there is any disagreement among the halakhic authorities as to whether or not a *get* may be compelled in the circumstances in question. He therefore prohibited the use of direct coercive measures, such as flogging, *herem*, and *nidui*, when there is no agreement that the divorce may be “compelled.”<sup>146</sup> R. Moses Sofer maintained that when the halakhic authorities are not in unanimous agreement that a certain ground for divorce warrants compulsion, use may not be made of direct coercive measures to force the recalcitrant spouse to give or to receive a *get*.<sup>147</sup> For in these circumstances, the recalcitrant spouse can claim that he or she is not in violation of the obligation to obey the Sages, as according to some halakhic authorities, he or she cannot be compelled to give or receive a *get*.

There were those who criticized this stringent tendency regarding the use of imprisonment in the judgments of the rabbinical courts. The tendency to be strict stands in opposition to the viewpoint of R. Herzog, who wrote: “Even though the husband knows that there are authorities who rule against compulsion, if the rabbinical court rules in favor of compulsion, he might give his consent [to divorce], for there is a religious obligation to obey the words of the sages of his generation.”<sup>148</sup> Yet R. Herzog’s viewpoint has not been the prevailing opinion in the decisions of the rabbinical courts in Israel.

The significant weight accorded by the rabbinical courts to the aforementioned stringent opinions regarding “compulsion” militates against a judgment of “compelled” divorce when the cause for divorce is the subject of controversy. The *dayanim* of the Rabbinical Courts do not think they have the authority to rule in favor of “compelled” divorce in situations where the law has not been clearly decided, for

145 See *Piskei Harosh*, Jebamot 6:11; *Responsa Rosh*, 17, #6; *Tur*, EH 154, in the name of his father, the Rosh. Consideration of the Rosh’s position is evident in a responsum by the Radbaz, see *Responsa Radbaz*, 4, #108 (1180).

146 See *Hagahot Harema*, EH 154:21.

147 See *Responsa Hatam Sofer*, EH 1, #116.

148 *Responsa Heikhal Yitzhak*, EH 1, #1.

uncertainty remains as to whether or not divorce can be “compelled.” Uncertainty as to the validity of a document that ends the marriage bond is uncertainty concerning the biblical prohibition of adultery, and since in cases of uncertainty as to biblical law (*sfeika deoraita*) we rule stringently, divorce cannot be “compelled” when there is uncertainty.

Yet just as these considerations are taken into account, weight should also be given to an opposing consideration, namely, ameliorating the plight of women who are refused a *get*, for this too is an important value in Jewish law. Before the *Rabbinical Courts Law* was enacted, not enough was done from the perspective of the spouse who was refused a *get*, as only on rare occasions did the *dayanim* issue a ruling with the highest level of enforcement, that is, “compelled” divorce.<sup>149</sup> Until 1995 (5755), consideration of the possibility of ruling in favor of “compelled” divorce was generally based on the assumption that it was preferable that the *get* be given without having to resort to the drastic measure of imprisonment: “The hesitations of the rabbinical courts are many, and the reluctance to use coercive measures is still very great. Sometimes the judgment does not fit the legal arguments, as if at the last minute the court refrained from using the authority granted to it”; “Even in cases where there is justification for considering compelling divorce, the rabbinical courts prefer to exert moral or monetary pressure, for example, ordering a large award of maintenance to the woman. Only in the most extreme cases do they resort to orders of imprisonment.”<sup>150</sup>

149 See Shifman, *Family Law*, n. 43 above, 297. See also “Coercion,” n. 32 above, 205.

150 “Coercion,” *ibid.*, 210. See also E. Magen, “Personal liberty and debtors in the Execution Office” (Hebrew), *Hapraklit* 40 (1992), 390–93; Kaminer, n. 90 above; Shifman, *ibid.*, 297–98.

In light of the legal practice with respect to the enforcement of divorce judgments up to 1995, one scholar has concluded: “Divorce is almost never compelled today in the State of Israel, despite the legal authority that rests in the hands of the rabbinical courts” — Shochetman, “Women’s status,” n. 32 above, 421 n. 211.

An example of a judgment that does not fit the legal arguments presented is the judgment in 194/5713, P.D.R.1, 77. The court explained that it did not rule that a *get* may be “compelled” in that case, “because of the fear that it would be an unlawfully enforced *get*.” See also the criticism voiced by Rosen-Zvi and Frishtik regarding the rabbinical courts’ hesitation, in the period prior to adoption of the new law in 1995, to issue rulings of “compelled” divorce in serious cases of violence against the woman: Rosen-Zvi, n. 18 above, 427–28; M. Frishtik, “Physical abuse by a husband as grounds for divorce in Jewish law” (Hebrew), 17 *Dine Israel* (1993/4), 99–115.

iii *The Remedy of Imprisonment is Ineffective in Certain Cases*

The effectiveness of imprisonment was cast in doubt by problematic cases, for example, that of Yihye Avraham, a husband who, despite prolonged incarceration, refused to release his wife from the chains of an unwanted marriage.<sup>151</sup>

Moreover, the remedy of imprisonment was not effective for cases in which women refused to accept a *get*. According to talmudic law, in cases of “compelled” divorce, the sanction applied is flogging.<sup>152</sup> Yet in the wake of the position expressed in the writings of R. Abraham b. David (Raabad),<sup>153</sup> most halakhic authorities maintain that a woman should not be flogged. The rabbinical courts have, to the extent possible, avoided imposing another harsh sanction — imprisonment — on a woman who refuses to accept a *get*. Even when the situation justified a ruling that the enforcement level was that of “compelled” divorce, the courts refrained from ruling that a woman be “compelled” to accept a *get*, and so too refrained from imposing the sanction of imprisonment. Instead, they preferred to grant the husband a dispensation to contract a second marriage,<sup>154</sup> and exempt

151 See *Attorney General v. Yihye and Ora Avraham*, n. 140 above, 29.

152 See bKetubot 78a. According to the medieval halakhic authorities, in cases where divorce may be “compelled,” another direct coercive measure — *nidui* — may also be used. See *Sefer Hayashar*, Responsa, #24; *Hagahat Harema*, EH 154:21.

153 See *Hasagot Haraabad on Halakhot Rabati of R. Isaac Alfasi*, Ketubot, ch. 5, regarding a rebellious wife: “How does he compel? Should you say, with whips — it is not the way of the world to [whip] a woman.” See also *Hasagot Haraabad*, Laws concerning Marriage 21:10: “I have never heard of punishing a woman with whips.”

See also Appeal 5720/89, P.D.R. 3, 369, which states that the woman is obligated to accept a *get*, but not that she may be “compelled” to do so, for she would be liable to be imprisoned, “and for a woman, that is no less coercive than whips”; Appeal 5716/8, 5716/9, P.D.R. 2, 141–42; “Coercion,” 199–201; Schereschewsky, n. 22 above, 294 n. 7.

154 The consideration in favor of a dispensation to contract a second marriage is that there is apprehension that if a *get* is compelled in questionable circumstances it will be regarded as having been unlawfully enforced, and should the wife remarry, she will be guilty of adultery and her children will incur *mamzerut*. But if a man remarries without having been issued a dispensation to contract a second marriage, he only violates the enactment of Rabbenu Gershom, and not the biblical prohibition of adultery, and his offspring from the second marriage do not incur *mamzerut*.

him from his obligations toward his first wife, including the obligation to pay her maintenance.<sup>155</sup>

The Attorney General's involvement also prevented the imprisonment of women. In a very rare case, in which a rabbinical court ordered a woman imprisoned for having refused to accept a *get*, in the end she was not sent to prison. The Attorney General did not want to request that the district court approve execution of the rabbinical court's order to compel the woman to accept a *get* by way of imprisonment.<sup>156</sup> Since one of the conditions for enforcing a divorce judgment by way of imprisonment is the Attorney General's endorsement, his policy on imprisoning women prevented application of this remedy when a woman refused to accept a *get*.

Concern was sometimes voiced that when the husband is already in prison for criminal offences unrelated to his refusal to give his wife a *get*, the sanction of imprisonment will have no effect on him, particularly if he is serving a long prison sentence. According to section 47 of the *Penal Law, 5737–1977*, a criminal prison term is deferred until after

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In H.C. of Justice 235/68 *R.B. v. the Chief Rabbis of Israel*, (1969) P.D. 23 (1) 475, the Supreme Court accepted the position of the rabbinical courts that when a woman refuses to accept a *get*, the most suitable way to force her to accept it is by granting her husband permission to contract a second marriage, and not by imprisonment. This verdict was affirmed in *Boronowski v. the Chief Rabbis of Israel*, n. 43 above, 47. There Agranat J. voiced a similar opinion, namely, that with regard to a woman, imprisonment is an excessively harsh coercive sanction.

155 In a responsum regarding a woman suffering from epilepsy, Rosh wrote: "The same measures that are used to compel a man to give a *get* are used to compel a woman to receive a *get*. If she refuses [to accept the *get*], he may withhold her maintenance, clothing, and conjugal rights" — *Responsa Rosh*, 42, #1. Following Rosh, R. Joseph Caro rules in *SA*, EH 117:11, that if a woman suffers from epilepsy she may be compelled to accept a *get*, and if she refuses to do so, her husband may withhold her maintenance, clothing, and conjugal rights. See also *Responsa Maharam of Lublin*, #1. Following the earlier rulings, the rabbinical courts have ruled that if a woman refuses to accept a *get* when there are grounds for compelled divorce, the husband is exempt from paying her alimony. See Appeal 147/5722, P.D.R. 5, 131–32; 980/27, P.D.R. 7, 359; 281/29, P.D.R. 8, 21.

156 See *Zada v. Attorney General*, n. 140 above, 738. See also Warhaftig, "Coercion," n. 32 above, 200–201. However, on p. 210 n. 39, Warhaftig mentions a ruling by the Petach Tikva District Rabbinical Court, with Dayan R. Solomon Karelitz presiding, in which a woman was compelled to accept a *get* and was incarcerated. After a short time she agreed to accept the *get* and was released.

all civil prison terms, including prison time imposed for refusing to give a *get*, have been completed. In a case that came up where the husband was serving a long criminal prison sentence, there was apprehension that although he would be sentenced to additional civil imprisonment on account of refusal to grant a *get*, making his total sentence longer, the very fact of the long criminal sentence would cause him to refuse to give his wife a *get*.<sup>157</sup>

iv *Exclusion of Other Remedies*

The legal framework for exerting coercive measures against a recalcitrant spouse was, until 1995, specified in section 6 of the *Rabbinical Courts Jurisdiction Law*. This arrangement was regarded as exclusive. The prevailing view in the decisions of the Israeli Supreme Court was that a rabbinical court was barred from imposing coercive measures not mentioned in that section, for example, punitive maintenance.<sup>158</sup> In light of this view, there was doubt as to the legal authority of the

157 See 329/459, P.D.R. 8, 128, regarding a woman who petitioned the court that her husband be compelled to divorce her. Her husband was serving a fourteen-year prison term for serious criminal offenses unrelated to his refusal to give his wife a *get*. The husband demanded that in exchange for his agreement to give a *get*, he be pardoned for the crimes he had committed. The rabbinical court ruled that the grounds for divorce justified the verdict that he be compelled to grant a divorce. The judges were of the opinion that imprisoning him for refusing to give a *get* would have no effect on him, as he was in any event serving a long prison sentence. Therefore they turned to the Israeli legislator to allow the use of flogging, solitary confinement, or "the like," against a recalcitrant spouse of this type. Another case, 1208/46, dealt with the petition of a woman, whose husband had been sentenced to life imprisonment for murder, to compel him to give her a *get*. Since the husband was going to be in prison for an extended period of time anyway, the woman's attorney asked that he be put in solitary confinement in order to compel him to give the *get*. The Jerusalem District Rabbinical Court ruled that the husband could be compelled to give his wife a *get*, and since he was already in jail, could be placed in solitary confinement, as demanded by the woman's attorney. See S. Raphael, "Halakhic rulings regarding a *get*" (Hebrew), *Collected Articles in Honor of R. Shimon Katz* (Bnei Brak: 1987), 65. See also n. 160 below.

158 See *Rosenzweig v. Head of Implementation, Jerusalem*, n. 140 above, 1559; C.A. 664/82 *Salomon v. Salomon*, P.D. 38 (4) 365; C.A. 798/82 *Noni v. Noni*, P.D. 40 (3) 744, 747.

rabbinical courts in Israel to impose any of the other coercive measures for enforcing divorce judgments mentioned in the rabbinical sources, such as Rabbenu Tam's *harhakot*. Moreover, the prevailing opinion was that a rabbinical court did not have the legal authority to impose an additional coercive measure, such as solitary confinement, on a prison inmate<sup>159</sup> for the purpose of forcing him or her to give or accept a *get*.<sup>160</sup> Therefore, in such cases, where the remedy of imprisonment is ineffective, the husband or wife who was refused a *get* was left with no effective solution to his or her distress.

In light of the factors mentioned above, the means made available by the Israeli legislator in section 6 of the *Rabbinical Courts Jurisdiction Law* often did not solve the problems with which the refused spouse was forced to contend.<sup>161</sup> Rabbis,<sup>162</sup>

159 See *Rosenzweig (Borokhof) v. Attorney General*, n. 144 above.

160 In practice, this view did not always guide Israel's rabbinical courts, which did, on occasion, make use of the measures mentioned in the halakhic literature, but not expressly mentioned in Israeli law, e.g., special alimony payments or Rabbenu Tam's *harhakot*. See *Obligation*, n. 17 above, 290–307; 350–57; 359–69; “Legal Means,” n. 57 above, 65, 93–95; *Salomon v. Salomon*, n. 158 above, 370. See also n. 157 above.

As will be explained below, the present formulation of the *Rabbinical Courts Law (Enforcement of Divorce Judgments)*, 5755–1995, allows the imposition of solitary confinement and other restrictive orders on the recalcitrant husband/wife. These orders appear to be based on the rationale of “withholding benefit” from the recalcitrant spouse.

161 Z. Falk, in his *Divorce Action by the Wife in Jewish Law* (Hebrew), (Jerusalem: 1973), described the typical situation prior to the passing of the law in 1995. He cited statistical conclusions from his examination of the divorce cases in the Jerusalem District Rabbinical Court in 1960. 93 divorce suits initiated by the wife, directly or indirectly, were submitted; 88 of these cases were examined. In 37 cases (42%) the woman succeeded in receiving a *get*, whereas in 34 cases (39%) the woman did not receive a *get*, even after ten years. Of the 88 divorce suits, only in 12 of the cases (14%) did the court obligate the husband to give a *get*. In the rest, the *get* was either given by mutual consent or not given at all. Of the 12 cases in which the court ruled that the husband was obligated to give a *get*, in seven cases (58%) the husband obeyed immediately, and in five cases (42%) he did not. In two cases, the woman petitioned the court to issue a compulsion order, but her petition was not accepted, and she was forced to make additional concessions. Of the verdicts “obligating” divorce, 38% were not carried out as set down by the court, and in those cases the woman was forced to make additional concessions in order to receive her *get*.

162 See S. Raphael, “The problem of coercion regarding a *get*” (Hebrew), 18 *Torah Shebeal Peh* (1981), 63; E. Basri, “A divorce given under coercion

justices,<sup>163</sup> and scholars<sup>164</sup> turned to the Chief Rabbinate and the legislature, the *Knesset*, with the request that they come up with another halakhic and legal arrangement to alleviate the distress of the refused spouse. Such a solution was particularly necessary for women denied a *get*, as they, unlike men refused a *get*, cannot solve their problem by obtaining a dispensation to contract a second marriage.

c Authority Granted by the *Contempt of Court Ordinance*

In addition to being authorized to imprison a recalcitrant spouse, as mentioned above, rabbinical courts are also authorized to exercise other measures against a litigant who refuses to obey its rulings. This authority is set out in section 7a (a) of the *Religious Courts (Summons) Law, 5716 — 1956* [henceforth *Religious Courts Law*]: “When hearing a matter within its jurisdiction, a court shall, *mutatis mutandis*, have all the powers conferred by sections 6 and 7 of the *Contempt of Court Ordinance*.” Section 6 of the *Contempt of Court Ordinance* establishes the authority of the court “to enforce by fine or imprisonment obedience to any order.” Section 7 establishes the authority of the court “regarding the person alleged to be disobedient” to “make such order of fine or imprisonment as may seem just,” or “order that a writ of sequestration be issued against his property.”

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(*get meuse*)” (Hebrew), 16–17 *Shenaton Hamishpat Haivri* (1991), 535, 552–53. See also the judgment in 329/459, P.D.R. 8, 128, mentioned in n. 157 above.

163 See *Attorney General v. Yihye and Ora Avraham*, n. 140 above, 36–47, where Silberg J. proposes that a condition be attached to every betrothal, to the effect that retroactive nullification of the marriage could ensue should the husband disappear or unlawfully refuse to give his wife a *get*.

164 Warhaftig, “Coercion,” n. 32 above, 216, writes as follows: “In these times, special attention should be devoted to the negative consequences of inaction, avoiding solutions, and recoiling from bold decision-making. Not all of the Jews in the State of Israel accept the halakha; only a part of them serve God with joy. Rigidity, uncertainty, and recoiling from exploiting all the halakhic possibilities are liable to lead to ruinous situations and other mishaps, in which Jewish women, and a large portion of the community, will come to a bad end.” See also *Family Law*, n. 43 above, 297–98; Rosen-Zvi, n. 18 above, 184–86.

As stated above, divorce judgments may be issued by the rabbinical courts at different levels of enforcement: “compelled” divorce, “obligated” divorce, *mitzva* to divorce, and “recommended” divorce. However, in exercising the authority bestowed on it by the law with regard to compelling compliance, the rabbinical court is subject to halakhic limitations on its ability to impose sanctions, particularly when a divorce judgment is issued at one of the lower enforcement levels.

d *Rabbinical Courts Law (Enforcement of Divorce Judgments)*, 5755 — 1995

i *Restrictive Orders*

Due to the shortcomings of the legal arrangement that had been in place in the State of Israel with regard to the enforcement of divorce judgments, particularly when the enforcement level of the divorce judgment was less than that of “compelled” divorce, the *Rabbinical Courts Law (Enforcement of Divorce Judgments)*, 5755 — 1995<sup>165</sup> was enacted.

The *Rabbinical Courts Law* widens the scope for exercising coercive measures against a recalcitrant spouse. The draft law that preceded enactment of the *Rabbinical Courts Law* explicitly noted that the law was aimed at harnessing a halakhic tool — Rabbenu Tam’s *harhakot* — for the purpose of alleviating the plight of a spouse who was refused a *get*.<sup>166</sup>

The *Rabbinical Courts Law* authorizes the rabbinical courts to issue a variety of restrictive orders against a recalcitrant spouse. If a rabbinical court determines, by final judgment, that a man must give his wife a *get*, or a wife must receive a *get*, but the spouse refuses to comply with the judgment, the court may issue restrictive orders for a period, and with conditions, that it sets.

Section 1 of the *Rabbinical Courts Law* states that these restrictive orders may be issued at all levels of enforcement of divorce judgments. A restrictive order may infringe, among other things, upon the recalcitrant spouse’s civil liberties, such as his or her right of mobility, or other rights, in whole or in part, in various areas.

<sup>165</sup> *Law Book of the State of Israel*, 5755 — 1995, 1507, p. 139.

<sup>166</sup> See the explanation of the aim of the *Draft Law: Proposals of Legislation of the State of Israel* — 5754, 2281, p. 493.

Sections 2(1) to 2(6) of the *Rabbinical Courts Law* specify restrictive orders against a recalcitrant spouse that restrict his or her rights in the following areas: (1) leaving the country; (2) obtaining an Israeli passport or transit pass as specified in the *Passports Law, 5712 — 1952*, holding these travel documents or extending their validity (except for their validity for the purpose of returning to Israel); (3) obtaining, maintaining, or renewing a driver's license; (4) appointment, election, or service in an office regulated by law, or in an office in a supervised authority, as defined in the *State Comptroller Law, 5718 — 1958*; (5) working in a profession regulated by law, or operation of a business requiring a license or legal permit; (6) opening or maintaining a bank account, or drawing checks from a bank account. For this purpose the individual against whom the restrictive order was issued will be treated as a special restricted customer in the sense specified in the *Checks Without Cover Law, 5741 — 1981*.

Regarding a levir who refuses to grant his brother's widow *halitza*, the Israeli legislator set down in this law that when a rabbinical court determines that he must grant his brother's widow *halitza*, and he refuses to do so, the rabbinical court may, after thirty days have passed from the day the original decision was taken, issue a restrictive order against him.<sup>167</sup>

The data made available to me by the administration of the rabbinical courts in Israel suggests that in actual practice, in most cases restrictive orders have been effective, and have led to the recalcitrant husband's giving his wife a *get*.<sup>168</sup>

## ii *Denying Privileges to an Inmate*

A rabbinical court is also permitted to issue restrictive orders that infringe on the rights of a prison inmate. The purpose of section 2(7)

<sup>167</sup> Section 6 of the *Rabbinical Courts Law*.

<sup>168</sup> See also remarks by R.E. Ben-Dahan at a meeting of the Knesset Legislation Committee, Feb. 14, 2000, protocol 83, p. 2: "Since the law was passed about four years ago, nearly 200 verdicts with restrictive orders were given, in consequence of which most of the recalcitrant spouses, almost 120 of them, gave their wives a *get*. . . . There are about 60–70 recalcitrant spouses against whom the courts issued restrictive orders who have not yet given their wives a *get*."

of the *Rabbinical Courts Law* is to alleviate the plight of someone denied a *get* whose spouse was sentenced to a period of imprisonment. The spouse is serving time anyway, so an additional prison sentence might not persuade him or her to give or receive a *get*. This section sets down other sanctions that could encourage an inmate of this type to comply with the court's verdict. The restrictive orders specified in this section allow the rabbinical court to issue orders infringing upon the prisoner's rights to receive permission to walk about freely, to be granted special leaves or early release from prison, and other privileges.

An important halakhic idea that is relevant in the context of depriving an inmate of privileges is the concept of "withholding benefit." When an incarcerated inmate is denied privileges, especially when he is serving time for an offense unrelated to the divorce proceedings, the sanction is indirect — "withholding benefit." Yet since the inmate undoubtedly loathes being in prison, and longs to be released or given leave, even for only a short while, denying him privileges, in accordance with the authority granted the rabbinical courts in section 2(7) of the *Rabbinical Courts Law*, constitutes a very serious assault on his human rights, and on his free will to grant a divorce. Is the imposition of sanctions mentioned in section 2(7) of the *Rabbinical Courts Law* a faithful expression of the idea of "withholding benefit," which is the main rationale of Rabbenu Tam's *harhakot*? Withholding a relatively trivial benefit is not the same as withholding a significant benefit. The rabbinical court must surely consider carefully, in light of the halakhic level of enforcement, whether it is appropriate to withhold a significant benefit.

"Withholding benefit" with regard to a prisoner who is already serving a jail term unrelated to his refusal to grant his wife a divorce was considered in a rabbinical court judgment prior to the enactment of the *Rabbinical Courts Law* in 1995. In that ruling, R. Solomon Daichovsky held that the court could permit denying the prisoner a reduction of a third of his sentence for good behavior so as to encourage him to give his wife a *get*. This ruling preceded the *Rabbinical Courts Law*, section 2(7) of which granted the court legal authority to impose such an indirect measure.

In the course of the proceedings, the husband had shouted defamatory remarks at the *dayanim*. R. Daichovsky had, therefore, held that the court could rule that it would not recommend to the prison authorities that they release the prisoner; only "good behavior"

justifies recommending that an early release be granted.<sup>169</sup> However, R. Daichovsky suggested that the court announce its readiness to forgo the contempt of court charge, and not impose the sanction, if the husband would agree to give a *get*.<sup>170</sup> The halakhic basis of the court's ruling was "withholding benefit."<sup>171</sup>

In line with R. Daichovsky's remarks, this rationale — "withholding benefit" — can be said to apply to certain sanctions in section 2(7) of the *Rabbinical Courts Law* that deprive an inmate of his rights. These rights can be viewed as privileges society gives the inmate, and can, under certain circumstances, deny him. Rabbenu Tam himself wrote that a recalcitrant husband who wishes to be freed from prison when he has been incarcerated for a matter unrelated to his divorce may be denied assistance.<sup>172</sup>

The law was amended in 2000. The amended law adds to the sanctions that may be imposed upon the recalcitrant husband who is already in prison.<sup>173</sup> Section 2(7), in its current formulation, allows the

169 See Daichovsky, "Compelling a *get*," n. 126 above, 248–49.

170 Ibid. The *dayan* took into account, among other things, the fact that another legal course of action was available to the court: approaching the prison authorities, reporting the prisoner's conduct during the proceedings, and requesting that, in light of this conduct, his prison term not be reduced by a third. The court could threaten the prisoner with this possibility, and tell him it was willing to forgo the contempt of court charge and not activate the sanction if he would be willing to give his wife a *get*.

171 R. Daichovsky (ibid., 252–53) explained that this manner of coercing a *get* is not entirely free of halakhic problems. Yet for him the critical factor was the argument that the court's recommendation to the prison authorities would constitute acting in an indirect manner — "withholding benefit," and not a direct act of unlawful coercion. He relied, among other things, on the fact that reduction of a prison term by a third for good behavior is not automatic.

172 See *Hagahot Mordekhai*, Gitin, #468–69. See also *Responsa Maharik*, #133, #166; *Responsa Mabit*, #22; Daichovsky, ibid., 254.

173 *Rabbinical Courts Law (Enforcement of Divorce Judgments) (Amendment no. 4) 5760–2000, Law Book of the State of Israel, 1732*, p. 133.

The purpose of the amendment of the law, in light of the explanations offered by R.E. Ben-Dahan, director of the rabbinical courts in Israel, at a meeting of the Knesset Legislation Committee, February 14, 2000, Protocol no. 83, p. 2, is: "to fill a lacuna that became evident over the course of time that the law existed. There are, on average, about 20 to 30 inmates — the number varies — who [are unwilling to grant their wives a *get*, and] are in prison for all sorts of reasons, including reasons

prisoner to be denied the right to purchase articles in the prison canteen, to keep personal possessions, to send and receive letters (except for letters addressed to the court, his attorney or rabbinic pleader, or the State Comptroller), and to receive visitors (except for visits from his attorney or rabbinic pleader, his clergyman, an official inspector, or his minor children). As these sanctions sometimes have a severe impact, the rabbinical courts impose them only where halakhically appropriate, viz., in particularly serious cases.

iii *Section 3 — Imprisonment to Compel Compliance*

The legislator set down in section 3 of the *Rabbinical Courts Law* that a rabbinical court may issue a restrictive order — imprisonment to compel compliance — that infringes on the individual's right to walk about freely. This drastic remedy is not free of halakhic uncertainties. As noted above, the explanations accompanying the draft proposal of the

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unrelated to the granting of a *get*. Their prison sentence makes it impossible for us to deny them any privileges [by restrictive orders mentioned in sections 2(1)–2(6) of the *Rabbinical Courts Law*], for a prison inmate cannot, in any event, use his driver's license. . . . We are herein suggesting a number of restrictions to be placed on such prisoners, and denial of privileges such as the possibility of leave, the possibility of making purchases in the prison canteen, the possibility of watching television. . . . We have also suggested the possibility of putting the person into solitary confinement for fourteen days, with a break each time."

The Deputy Attorney General, Joshua Shofman, offered the following explanation in the aforementioned protocol, p. 3: "The proposal to enact the law followed a number of actual cases. When a rabbinical court compels enforcement of a divorce judgment by way of civil imprisonment . . . in the case of a prisoner serving a life sentence or sentenced to many years [for other offenses], these sanctions hardly have any effect. . . . Nobody takes pleasure in denying prisoners their privileges, and with a great sorrow we, along with the administration of the rabbinical courts, have come to the conclusion that there is justification for imposing these sanctions, which may be imposed upon the prison inmate for misconduct in prison. Here we are dealing with a person against whom there is no complaint regarding his behavior in prison, but rather about a matter no less serious: allowing his wife to remain an *aguna* . . . we are dealing with a situation in which the key remains in the hand of the prisoner. Whenever he decides to comply with the court order and give a *get*, he will be freed from the restrictions."

law that led to the enactment of the *Rabbinical Courts Law* mention Rabbenu Tam's *harhakot*.<sup>174</sup> However, the rationale of those *harhakot* — to impose an indirect measure, which “withholds benefit” — does not apply to the sanction of imprisonment in section 3 of the *Rabbinical Courts Law*. This section deals with a direct measure: a spouse who is at liberty is sent to prison so that he or she will give or receive a *get*.

Nevertheless, an important consideration is the fact that this imprisonment is a less severe sanction than the imprisonment mentioned in section 6 of the *Rabbinical Courts Jurisdiction Law*. The legislator set various limitations to the authority of the rabbinical court. First, when a rabbinical court issues a restrictive order to compel someone, by way of imprisonment, to comply with a ruling, the rules of sections 3(5) and 3(6) of the *Contempt of Court Ordinance* apply to the rabbinical court that issues the order. According to the rules in these sections, a court that imposes imprisonment to compel compliance is required to notify the Attorney General of its action. The Attorney General, or his proxy, must bring the matter of the prisoner before the rabbinical court that issued the order for reconsideration whenever he deems it necessary, and not less than once every six months from the beginning of his imprisonment. After giving the prisoner and any other party with standing in the case the opportunity to voice their arguments, the rabbinical court may reconfirm the order, change it, attach conditions to it, cancel it, or issue another ruling that it deems appropriate.

Similarly, section 3(b) of the *Rabbinical Courts Law* limits the prison term that the rabbinical court may impose when it issues a restrictive order to compel compliance by way of imprisonment: “The period of imprisonment to compel compliance shall not exceed five years; however, the court may, if it finds it necessary for the purpose of enforcing its judgment, extend the sentence from time to time, provided that the total prison term does not exceed ten years.” This limitation on the prison sentence that may be imposed on a recalcitrant spouse reflects a new approach. It will be recalled that section 6 of the *Rabbinical Courts Jurisdiction Law* allows imposition of a prison term that is unlimited in time and continues until the desired result is achieved.

In addition, the *Rabbinical Courts Law* demands great caution when the court issues a restrictive order imposing imprisonment to compel compliance or extending a prison term. Section 3(b) of the *Rabbinical*

174 See n. 166 above.

*Courts Law* states that the court is obligated, whenever it imposes or extends imprisonment, to examine whether or not that sanction “is necessary for the enforcement of the judgment.” In light of this section and section 4(b) of the law, it would appear that the court is required to consider whether there are other means, less drastic than denying liberty, that could lead to the same result. This limitation is also new: section 6 of the *Rabbinical Courts Jurisdiction Law* does not allow the court to exercise its judgment at any stage following the imposition of imprisonment. After the Attorney General and the district court exercise their judgment and decide to imprison the recalcitrant spouse, there is no later stage at which the court is given another opportunity to examine whether it may be possible to exercise a less hurtful measure.

With respect to the type of recalcitrant spouse exemplified by Avraham Yihye, who was imprisoned for many years, indeed, until the day he died, it becomes clear at some point that denying such an individual his liberty will not induce him to release his wife from the chains of her marriage. In such circumstances, when it has become clear that the remedy of imprisonment is ineffective, it would appear that the remedy may not be “necessary for the enforcement of the judgment.” The rabbinical court could therefore consider the possibility of ruling that the recalcitrant spouse should no longer be imprisoned. Should the court decide to release him, there is room to consider imposing other restrictive orders, if they are liable to influence his behavior with respect to the granting of a *get*. In practice, the rabbinical court should probably interpret this exception narrowly, so that even if there is only a small chance that the restrictive order will cause the recalcitrant spouse to give or receive a *get*, it should still be issued. There is reason to fear that a judicial policy that eases the burden of proof required for releasing the husband or wife from prison on the grounds that there is no chance that it will influence him or her, will cause a recalcitrant spouse to become even more adamant in his or her refusal.

In 2000, section 3(a) was added to the *Rabbinical Courts Law*, stating that prison inmates may be held in solitary confinement for a period of five days, and then held there again after a break of seven days. In my opinion, based on the principles of Jewish law and policies of halakhic authorities and rabbinical courts in recent generations, discussed above, even if imprisonment or solitary confinement is permitted, imprisonment or solitary confinement imposed as a direct measure to

bring about the granting of a *get* must only be used as a last resort, after other, less severe, measures have already been tried, with no results. In the past, when imprisonment was imposed in accordance with the *Rabbinical Courts Jurisdiction Law*, it was only imposed on rare occasions, and only when its implementation was justified, according to the *dayanim*, due to particularly serious circumstances.<sup>175</sup> It can be assumed that since the halakhic principles have not changed, a similar policy should be adopted with regard to imprisonment or solitary confinement imposed by way of the *Rabbinical Courts Law*.

From the perspective of Jewish law, the rabbinical court must take into consideration the fact that sending a prisoner into solitary confinement is a direct measure, and not merely “withholding benefit.” It must be carefully examined whether the use of this sanction raises the concern that the *get* will be regarded as having been unlawfully enforced, particularly in a case where divorce may not be “compelled.”<sup>176</sup>

However, occasionally more activist rabbinical court panels have tended to impose the imprisonment mentioned in the *Rabbinical Courts Law* more often than imprisonment was imposed in the period prior to 1995, when the only law that authorized imprisonment of a recalcitrant husband was the *Rabbinical Courts Jurisdiction Law*.

#### iv *Restrictive Orders Against Women*

The *Rabbinical Courts Law* did not initially apply to a woman who refused to accept a *get*. The law was later amended to allow restrictive orders to be issued against a woman who refuses to accept a *get*. A rabbinical court may issue a restrictive order against a woman when the head of the Supreme Rabbinical Court gives his confirmation. After a restrictive order is issued against a woman, her husband will not be

175 See text at nn. 143–50 above.

176 The protocol of the Knesset Legislation Committee, n. 168 above, implies that the new sanctions added in sections 2(7) and 3 of the law in 2000 were enacted after consultation with the *dayanim*. Their implementation usually meets the halakhic requirements for avoiding an unlawfully coerced *get*. However, due to the severity of the infringement of the recalcitrant spouse’s exercise of free will, every application of the new sanctions requires careful examination in light of the relevant halakhic principles.

permitted to contract an additional marriage until the expiry of three years from the day the order was issued.<sup>177</sup> The legal principle underlying these rules discriminates against the husband. Restrictive orders against him are valid without the approval of the head of the Supreme Rabbinical Court, and the request for a restrictive order applying to his wife prevents him, for a time, from contracting an additional marriage. However, this discrimination is permitted. Israeli Law permits distinctions that are based on relevant factors.<sup>178</sup> Here, the legislator took into account the relevant factor — the fact that the husband's halakhic standing in this matter is stronger. The husband can obtain an allowance to contract an additional marriage, but no similar option is available to a married woman. Therefore, the legislator set down that when a restrictive order is issued against a woman, the approval of an additional party is required. That party will consider all the relevant factors, and also examine the alternative of a dispensation to contract another marriage as a solution for the distress of a husband who is refused a *get*.

In practice, the rules set down by the legislator regarding the use of restrictive orders against a woman, in particular the need for confirmation by the head of the Supreme Rabbinical Court, created a situation that is not egalitarian. The restrictive order is a measure that in actual practice is rarely exercised against a woman. In most of the infrequent cases in which the district rabbinical court issued a restrictive order against a woman, the required confirmation was, in the end, not granted by the head of the Supreme Rabbinical Court.<sup>179</sup>

v *The Relationship between the Sanctions in the Rabbinical Courts Law and the Rationale of Rabbenu Tam's harhakot*

The dominant rationale permitting the use of Rabbenu Tam's *harhakot* in circumstances that do not allow for a ruling of "compelled" divorce is that the *harhakot* are not a direct measure — taking something away from someone, but rather a passive measure — "withholding benefit."

177 See sections 1(3) and 1(6) of the *Rabbinical Courts Law*.

178 See H.C. of Justice 4541/94 *Miller v. Minister of Defense*, (1995) P.D. 49 (4) 94; H.C. of Justice 721/94 *El Al Airlines, Ltd. v. Danilowitz*, (1994) P.D. 48 (5) 749.

179 I rely primarily on conversations with R. E. Ben-Dahan, director of the Rabbinical Courts in Israel, and R. R. Frank, director of the office of the Chief Rabbi.

What is considered “withholding benefit” in the contemporary circumstances of the State of Israel? Weinrot argues that the state’s refraining from providing services and allocating resources to a citizen who refuses to give his wife a *get* falls into the category of “withholding benefit.” The reason is that the right to services and resources is not absolute. In his opinion, the services that the state provides are “all creations of the law and the social outlook, and as such they are conditional by their very nature.”<sup>180</sup> According to him, this new type of “withholding benefit” — the state’s refraining from providing services and allocating resources to a citizen — is effective in today’s society in Israel, where many people are not religiously observant and do not accept the authority of Jewish law and the rabbinical courts. The traditional *harhakot* of Rabbenu Tam are no longer effective sanctions on such individuals, being

based entirely on authority and on the vital connection between the individual and the sociological-communal cell, when there is obviously a binding correlative relationship between the two... With respect to the individual’s dependency upon the social cell, the state did indeed replace the community, but the dependency not only did not diminish, but it even increased. One cannot imagine today an individual isolated and detached from social interaction, from the services provided by the state and public bodies, in the areas of welfare, support, work, and similar areas. However, the element of religious authority has disappeared [with regard to non-religious Jews]. Thus was created a strange circle. The halakha gives up on the permissive, secular community, within which the principal means by which it exercises its authority are no longer effective, and without them, the halakha has no way to actualize [its authority]. The way to break this circle is not by expanding the jurisdiction of the rabbinical courts, but rather by deepening the authority of these courts in spheres where this jurisdiction already exists at present.<sup>181</sup>

180 Weinrot, n. 17 above, 441.

181 Ibid. The problematic nature of exercising Rabbenu Tam’s *harhakot* in contemporary Israeli society was also noted by R. Shaul Israeli, “On coercion and consent regarding a *get*” (Hebrew), 12 *Torah Shebeal Pe* (1970), 38: “A severe high-pressure tactic exists... isolating the individual from society by having no business dealings with him... But it obviously requires that the society be united and disciplined. If the matter is difficult to execute in our day, it is not the halakha’s fault; the blame rests only on the state of our public affairs. [Critics of the halakha], instead of properly identifying the weakness, point to the halakha as if it were the cause of the problem [of injustice to those with recalcitrant spouses].”

The explanation accompanying the draft proposal that preceded enactment of the *Rabbinical Courts Law* states that the restrictive orders in the law which deny privileges that the state bestows on its citizens fit in well with the idea embodied in Rabbenu Tam's *harhakot*. However, Rabbenu Tam mentioned other sanctions that may be exercised against a recalcitrant husband, and even the sanctions that were added in later generations differ from those utilized in Israeli law. Indeed, in the responsum where his measures are first mentioned, Rabbenu Tam foresaw the possibility of adding more *harhakot*: "And they may add stringent measures as they please, [to be imposed] on anyone." Still, the new *harhakot* must satisfy the rationale of the old, traditional measures. It is thus warranted to examine the degree to which the new restrictive orders that were added by the Israeli legislator satisfy the rationale of the "old" measures.

Similarly, thought must be given to the argument raised by Beeri that prior to the enactment of the *Rabbinical Courts Law*, Rabbenu Tam's *harhakot* were rarely implemented in halakhic rulings in general, and in the rulings of the rabbinical courts in Israel in particular. This was due to fear that exercising the measures in question might infringe upon the husband's exercise of free will in giving a *get*.<sup>182</sup>

In addition, as stated above, there is a sound basis for the argument that the *harhakot*, in their modern Israeli form, should only be implemented when the divorce judgment is at the level of "obligation" to divorce or higher.<sup>183</sup> It is therefore desirable that whenever the rabbinical courts issue rulings that include restrictive orders found in the *Rabbinical Courts Law*, they specify the level of the divorce judgment. This should be done in order to satisfy the authorities who hesitate to implement Rabbenu Tam's measures, particularly when the circumstances do not justify a judgment by the court that divorce is "compelled" or "obliged."<sup>184</sup>

182 See Beeri, "Legal means," n. 57 above, 90–95; 96, n. 101. However, Rabbenu Tam's *harhakot* were occasionally imposed in judgments of the rabbinical courts. See also *Responsa Yabia Omer*, 7, EH #23, 8, EH #25; *Responsa Tzitz Eliezer*, 17, #51.

183 See section 2c iii above. See also Beeri, *ibid.*, 81, 91–92.

184 See the articles by the *dayanim* Rabbis Haim Gedalia Cymbalist, Uriel Lavi, and Joseph Goldberg in 5 *Shurat Hadin* (1999), 230–97, which discuss at length the halakhic authority to impose the various restrictive orders

The rationale of “self-duress” — duress inflicted by the recalcitrant husband himself when he decides of his own free will to remain in the place where the *harhakot* were activated — does not apply to every case in which the restrictive orders may be issued according to the new Israeli law. In general, remaining in his own place does not always attest to the husband’s true and sincere agreement to assume the burden of the *harhakot*. This is particularly true with respect to the *harhakot* in the restrictive orders allowed by the *Rabbinical Courts Law*. They apply in the State of Israel wherever the recalcitrant husband goes, not just in a specific community. One of the sanctions, which can be applied alone or with other restrictive orders, is the restrictive order specified in section 2(1) of the law, which bars exit from the country. In such a case, even the option of escaping the sanction by going abroad does not exist. This being so, in light of the view that the basis for Rabbenu Tam’s *harhakhot* is the recalcitrant spouse’s choice to remain in his locale, it would seem necessary to carefully examine to what degree the restrictive orders stand the test of this halakhic rationale. Attempts should be made to avoid a situation in which there is real concern that there will be halakhic doubt as to whether the *get* given or received as a result of the exercise of a restrictive order is valid.<sup>185</sup>

e Deficiencies of the *Rabbinical Courts Law (Enforcement of Divorce Judgments)*, 5755 — 1995

The two main shortcomings in the arrangement set down in the *Rabbinical Courts Law* are: (i) The absence of a hierarchy regarding the exercise of the sanctions, which has importance in view of the principles of Jewish law. (ii) The absence of an effective supervisory mechanism prior to implementation of the decision to begin or extend the prison term, or place a prisoner in solitary confinement, to prevent

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mentioned in the *Rabbinical Courts Law*, in light of the halakhic principles relevant to Rabbenu Tam’s *harhakot* and unlawfully enforced divorce. It may be that such discussion should be a matter of course in rabbinical courts judgments in which the court orders the imposition of restrictive orders against a recalcitrant spouse.

185 See the articles mentioned in the previous note on the question of how the restrictive orders can be adjusted to accord with the relevant halakhic principles.

imposition of unnecessary restrictive orders, especially severe restrictive orders, such as imprisonment.

i *Absence of a Hierarchy Governing Imposition of Sanctions*

HIERARCHY OF SANCTIONS IN THE PRESENT LAW

An important principle in the arrangement in the draft law that led to enactment of the *Rabbinical Courts Law* was the establishment of a hierarchy governing the imposition of sanctions against the recalcitrant spouse on the basis of the different halakhic levels of enforced divorce. The arrangement in the draft proposal was meant to preserve the distinction between the highest level of enforcement, “compelled” divorce, and the other levels. The drastic remedy of imprisonment was meant to serve the rabbinical court as a means of enforcement only when it ruled that the husband is “compelled” to give his wife a *get* or to grant his brother’s widow *halitza*. It was proposed that the court could have recourse to the other means of enforcement specified in the draft law when the court had issued a divorce judgment at a lower level of enforcement, such as “obliged” divorce. The restrictive orders in section 3 of the law, imposing imprisonment and solitary confinement to compel compliance, and the restrictive orders in section 2(7), which empower the rabbinical court to deprive the prisoner of his rights, did not appear in the draft proposal.

The legislator, in the *Rabbinical Courts Law, 5755 — 1995*, did not accept the principles reflected in the proposal put forward in 1994. He did not revoke sections 6–8 of the *Rabbinical Courts Jurisdiction Law*.<sup>186</sup> The arrangement in the law passed in 1995 differed from that suggested in the proposal in that an alternative arrangement for compelling divorce was set down, alongside an amendment of the prior legal arrangements. Essentially, section 6 of the *Rabbinical Courts Jurisdiction Law* remained in place. This section allows the imprisonment of a recalcitrant spouse when a rabbinical court rules that he may be “compelled” by way of imprisonment to divorce his wife, in the manner described above. The only change to this arrangement introduced in the 1995 law was a shortening of the waiting period in the process of compelling a *get* by way of imprisonment from “six months”

186 See *Proposals of Law of the State of Israel, 5754 — 1994*, 2281, pp. 486–95.

to “sixty days.”<sup>187</sup> Due to the small number of judgments “compelling” divorce, this change is insignificant, because the sanction itself is hardly ever applied, and as noted above, this arrangement is generally unsatisfactory. The sanctions in the *Rabbinical Courts Law* are applicable in many more cases, because they may be imposed even when the level of enforcement is less than that of “compelled” divorce. A rabbinical court that imposes the sanctions in the *Rabbinical Courts Law* is permitted, by itself — subject to the limitations of the rules in sections 6(3)–6(5) of the *Contempt of Court Ordinance* — to issue a restrictive order imposing imprisonment to compel compliance against a husband or wife who refuses to give or accept a *get*, or other restrictive orders, whether the court “compelled,” “obliged,” deemed it a *mitzva* or “recommended” that he give his wife a *get* or that she accept it from him.

#### HIERARCHY OF SANCTIONS IN JEWISH LAW

While there is no hierarchy specified in the law, a halakhic hierarchy exists regarding the exercise of sanctions against a recalcitrant spouse, and rabbinical courts in Israel follow the rules of Jewish law. In those cases where divorce may be “compelled,” the manner of compelling the *get* is most severe. Divorce may be compelled by way of flogging, *herem*, *nidui*, imprisonment, or solitary confinement.<sup>188</sup> Financial pressure may also be applied to the recalcitrant spouse. Financial pressure is usually applied by increasing the alimony payments that the husband must make to his wife.<sup>189</sup> In less severe cases, which do not rise to the level of cases in which divorce may be “compelled,” a ruling is sometimes issued that a spouse is “obligated” to give/receive a *get*. In such circumstances, a salient sanction is the original sanction of verbal persuasion, which exerts social and moral pressure on the husband to divorce his wife.<sup>190</sup> When a ruling is issued that the husband is

187 Section 11 of the *Rabbinical Courts Law*.

188 See *Responsa Rashba*, 1, #1192.

189 See Herzog, n. 24 above, 3–28; Elinson, n. 136 above, 150–58.

190 Some halakhic authorities emphasize that these measures may be used in this situation because they do not impact on the body of the recalcitrant spouse. See, e.g., *Responsa Rashba*, 7, #414, regarding a husband whose conduct does not justify a verdict of “compelled” divorce: “They ask the husband to give a divorce, and if he refuses, they compel him to pay the *ketuba*, but they do not compel him to give the *get*. But the court may issue verbal threats, provided that they do not put him under *nidui*, or humiliate him, or cause him bodily distress.” See also *Responsa Rashba*, 5, #95.

“obligated” to divorce his wife, some authorities permit the imposition of financial pressure, while others forbid it.<sup>191</sup> The possibility of imposing Rabbenu Tam’s *harhakot* also exists.<sup>192</sup>

There is no unique sanction that has been used when the halakhic authorities of recent generations have ruled that divorce is either deemed to be a *mitzva*<sup>193</sup> or “recommended.” The sanctions used, if any, have been very moderate in comparison with those employed when divorce is “compelled” or “obliged.”

The meaning of the expression “*mitzva* to divorce” has undergone a change in recent generations. It can be argued that the levels of divorce below that of “obligated” divorce — divorce deemed a *mitzva* and recommended divorce — are a solution that the halakhic authorities of recent generations found for their concern that employment of excessively harsh coercive measures without sufficient halakhic justification would render the *get* in question unlawfully enforced. In addition to the accepted levels of enforcement that are mentioned frequently in the halakhic literature for many generations — “compelled” and “obliged” divorce — the halakhic literature of recent generations mentions two levels of enforcement considered less severe than “compelled” or “obliged” divorce: “divorce deemed a *mitzva*,” and “recommended” divorce. The level of “divorce deemed a *mitzva*,” and the lowest level of enforcement — recommended divorce — do not justify the imposition of harsh sanctions against a recalcitrant spouse. Since the sanctions will not be imposed, there is no concern that a *get* given after a ruling was issued that it is a *mitzva* to divorce or that it is recommended to do so will be regarded as unlawfully enforced.

Therefore, whenever the halakhic authorities or rabbinical court judges are not convinced that divorce may be “compelled” or

191 See Herzog, n. 24 above, 3–28; Elinson, n. 136 above, 141–58; *Rosenzweig v. Head of Implementation*, n. 140 above, 1552–58; Silberg, n. 136 above, 389; Schereschewsky, n. 22 above, 328–31.

192 See Rabbenu Tam’s responsum, *Sefer Hayashar*, Responsa, #24. See also nn. 70–78.

193 R. Solomon b. Shimon (Rashbash) dealt at length with the category of divorce deemed a *mitzva*. See *Responsa Rashbash*, #411, and cf. #383 (the first one). However, most of the halakhic authorities who deal with the sanctions directed against a recalcitrant spouse do not relate to divorce that is deemed a *mitzva* as a separate category. Only in the rulings of recent generations, especially the rulings of the rabbinical courts in Israel, is “divorce deemed a *mitzva*” clearly recognized as a distinct category.

“obliged” even according to the more stringent opinions, as a precautionary measure, and to satisfy all doubts, the ruling is issued that divorce is a *mitzva* or recommended.

Sometimes, refraining from ruling in favor of “compelled” divorce in such circumstances itself raises halakhic uncertainties, and at times, this prevents the exercise of an effective remedy against the recalcitrant spouse. Another consequence is that there is occasionally a blurring of the distinction between grounds for divorce that justify a verdict of “compelled” or “obliged” divorce and allow for the use of more severe measures of compulsion, and grounds for divorce that do not allow for the use of such measures.

When divorce is recommended, the intent of the halakhic authority or *dayan* is that only moderate sanctions, if any, may be employed against the recalcitrant spouse. Harsh measures like imprisonment or depriving the prisoner of his rights may certainly not be imposed.

When a ruling is issued that it is a *mitzva* to divorce, the sanction is effective primarily against a religiously observant person, who accepts the authority of the Torah’s commandments and the rabbinical court. Since he wants to observe Jewish law and not violate its prohibitions, when the *dayanim* instruct him that it is a *mitzva* to give a *get*, he feels an obligation to obey and to do as he has been instructed.

This feeling of obligation to obey the court’s ruling diminishes when the divorce judgment is formulated as a mere recommendation, even when the recalcitrant spouse defines himself as religiously observant. When a ruling is issued recommending divorce, the ruling is not accompanied by any effective sanction against the recalcitrant spouse.<sup>194</sup>

In light of the significant difference between “obligation” to divorce and “recommendation” to divorce, R. Ovadiah Yosef ruled that care must be taken to formulate the divorce ruling as a recommendation and

194 However, the jurisdiction of the rabbinical courts over matters connected with the divorce suit remains in place. The Supreme Court has ruled that any rabbinical court judgment that mentions divorce at any level of enforcement, even the most moderate levels — *mitzva* and recommendation — is considered a divorce judgment. Hence, matters connected with the divorce claim remain within the jurisdiction of the rabbinical court. See *Haber v. Supreme Rabbinical Court*, n. 143 above; *Guttman v. Tel-Aviv-Jaffa District Rabbinical Court*, n. 143 above.

not as an obligation whenever the circumstances of the case fail to justify a ruling of “obligation” to divorce.<sup>195</sup>

#### DESIDERATA FOR A HIERARCHY OF SANCTIONS

Some have expressed the opinion that even when the *harhakot* of Rabbenu Tam are applied by way of implementation of the restrictive orders mentioned in the *Rabbinical Courts Law*, for example by activating the restrictive orders mentioned in section 2(7) of the law, depriving the prisoner of his rights, this should be done in a reasonable fashion, without going to extremes in withholding benefits, in order to avoid any fear that the *get* be regarded as having been unlawfully enforced. Restrictive orders that have a dimension of withholding benefit may be implemented as long as a restriction that the recalcitrant spouse cannot withstand is not imposed. This takes into account the fact that some authorities opposed the *harhakot*, and raised doubts about the validity of a *get* given after imposition of such measures.<sup>196</sup>

Depriving the prisoner of privileges is a harsh measure, and in certain circumstances might not pass the said test. It should also be noted that depriving the prisoner of his rights by imposing the restrictive orders of section 2(7) is only possible when the implementation of Rabbenu Tam’s *harhakot* is possible, and, many halakhic authorities contend, this should be done only in cases where divorce is “compelled,” or at least “obliged.” Therefore, a careful examination of the circumstances of each case should determine which sanction, if any, is to be imposed for the purpose of enforcing the divorce judgment.

The imprisonment provided for by section 6 of the *Rabbinical Courts Jurisdiction Law (Marriage and Divorce) 5713–1953* was little used as a sanction against a recalcitrant spouse, as it could only be used when a ruling of “compelled” divorce was issued. The scope of the restrictive orders in the 1995 law is wider. The legislator determined

195 *Responsa Yabia Omer*, 2, EH #10.

196 See “Legal Means,” n. 57 above, 98. Beeri notes that the question of whether the *harhakot* involve illegitimate pressure that invalidates the *get* has been raised. According to Beeri, the state authorities may deny the recalcitrant husband privileges — “withholding benefits” as described in the *Rabbinical Courts Law* — provided that the denial of services and benefits does not prevent the husband from leading a normal life; a range of possibilities of earning a living remain available to him in the private sector; and his social ties are not seriously impaired.

that they can be exercised even when the level of enforcement is less than “compelled” or “obliged” divorce. While the legal authority to impose the sanctions was given to the rabbinical courts even in cases of divorce that is deemed a *mitzva* or recommended, most panels of *dayanim* in the rabbinical courts in Israel seem to refrain from exercising this authority in such cases.

As was stated in the draft proposal that preceded the law, the intended purpose of the law was to “harness a halakhic tool as a solution for the plight of women refused a *get*.” Deprivation of the recalcitrant spouse’s rights was characterized as an appropriate way of “applying the idea of Rabbenu Tam’s *harhakot* in the Jewish communities of today.” Even the halakhic authorities who do not share the concerns raised by R. Joseph ibn Lev — who maintained, initially, that Rabbenu Tam’s *harhakot* should not be used, even when divorce is obligatory, because the pressure applied to the recalcitrant spouse is greater than the pressure created by *nidui* or *herem*<sup>197</sup> — are aware of the power of the *harhakot*. Since there are important authorities, including R. Mordekhai b. Hillel<sup>198</sup> and R. Moses Isserles,<sup>199</sup> who write that Rabbenu Tam’s *harhakot* may be imposed when there is an obligation to divorce, it may be assumed that the rabbinical courts will take that fact into account when they must decide in which circumstances the restrictive orders specified in this law will be exercised against the recalcitrant spouse.

In light of the policies adopted by the halakhic authorities and many rabbinical court judges of our day, even though this law allows the imposition of all the restrictive orders even when the enforcement level is less than that of “compelled” divorce, the restrictive order should not, at least with regard to imprisonment or placement into solitary confinement, be imposed as a matter of course. Only in special, unique circumstances, akin to those in which a rabbinical court in the period prior to the enactment of the *Rabbinical Courts Law* would have been ready to impose the imprisonment specified in section 6 of the *Rabbinical Courts Jurisdiction Law*, should the imprisonment or solitary confinement specified in section 3 of the *Rabbinical Courts Law* be imposed.

It would also appear that from the perspective of the halakhic authorities who are concerned that the *get* will be considered to have

197 See *Responsa Mahari b. Lev*, 3, #102, and 2, #18, #79.

198 See above, n. 71.

199 See above, n. 72.

been unlawfully enforced, the use of imprisonment, solitary confinement, or a combination of several restrictive orders must be the last means adopted for the purpose of enforcing a divorce judgment. Such imprisonment, like the imprisonment of debtors, which in the end was also allowed because of the pressing needs of society, is not meant to be punitive. It is intended to serve as a coercive measure — to impel a person to fulfill his obligations. Regarding a debt, a certain responsibility exists on the part of the debtor, for he took upon himself an obligation and did not fulfill it. Similarly, when a judgment is issued that, in the opinion of the court, obliges a *get* to be given or accepted, the spouse who refuses does not fulfill his or her obligation. The following conclusion may be drawn by way of analogy: just as the imprisonment of a debtor is the final option, to be used only after all other means of collection proved to be of no avail, so too the imprisonment of a recalcitrant spouse is a drastic final option, which may only be implemented after less drastic measures have been exercised against him to no effect.

The argument is sometimes heard that in the clash between the rights of the recalcitrant spouse against whom the coercive measure of imprisonment is employed, and the rights of the spouse refused a *get*, it is justified to favor the rights of the latter, who should be able to turn to the authorities to have the other spouse imprisoned, regardless of the circumstances. For an imbalance exists in this context between the recalcitrant spouse and the spouse refused a *get*. The freedom of the spouse refused a *get* is infringed upon in a manner that the refused spouse cannot repair, whereas the infringement of the freedom of the recalcitrant spouse can be ended at any moment, when that spouse recognizes his partner's right to be freed from an unwanted marital bond, and agrees to give or accept a *get*. Therefore, according to those who put forward this argument, there is justification for imposing a harsh sanction that seriously infringes upon the freedom and dignity of the recalcitrant spouse. The sanction is harsh, but the prison keys are in the hands of the recalcitrant spouse, who may at any time release himself from incarceration.<sup>200</sup>

We do not accept this argument. A patient may not be given a medication with clearly negative side effects before an attempt has been

200 See *Attorney General v. Yihye and Ora Avraham*, n. 140 above; H.C. of Justice 631/96, 1803/96 *Baruch Even Tzur v. Supreme Rabbinical Court*, (1996) *Takdim-Elyon*, 96(2), 5756/7 — 1996, 61.

made to cure him with drugs that are less harsh and dangerous. Overly hasty and extensive use of imprisonment for the purpose of alleviating the plight of a spouse who is refused a *get* significantly infringes upon the right of any individual, including a recalcitrant spouse, to have his dignity and freedom defended, a right that is of great importance in Jewish and Israeli law.<sup>201</sup> It should be noted in this context, as stated above, that according to Jewish law, with the exception of special cases that justify the imposition of coercive measures against the recalcitrant spouse, divorce is not forced upon the parties by the court, but depends on the cooperation of the husband and wife.<sup>202</sup>

It stands to reason that it would be proper to specify, either by law or by a special ruling of the Supreme Rabbinical Court, a hierarchy of the various possible sanctions, or combinations of sanctions. Imprisonment must be used as a last resort, as it deprives the recalcitrant spouse of his rights in the most drastic way. Therefore, an order of imprisonment should not be given before other restrictive orders have been used. In our opinion, with all due respect, it is necessary to amend the law. One of the new rules should state that imprisonment to compel compliance should not be imposed on the recalcitrant spouse before an attempt is made over the course of a specified period of time to impose upon him other, less severe restrictive orders.

In addition, a hierarchy among the various alternatives in section 2 of the *Rabbinical Courts Law*, ranking the sanctions according to their severity, should be determined. Specifying this hierarchy is necessary, because barring someone from leaving the country is not equivalent to preventing him from opening a bank account, and neither of these is the equivalent of revoking a driver's license. Setting this hierarchy would not be a simple matter, for these sanctions have never previously been invoked in Jewish law against a recalcitrant spouse. Hence there is not always a clear answer as to which sanction is to be preferred over another. To prevent both feelings of discrimination among the public, and halakhic mistakes, there should be, to the degree possible, uniformity in the judicial policies of the various panels of judges in the district rabbinical courts that impose the sanctions in the *Rabbinical Courts Law*. Therefore, it would be highly beneficial if the Supreme Rabbinical Court directed the district rabbinical courts as to the proper

201 See "Criminal law," n. 1 above, 47–48.

202 See above, text at nn. 10–11.

hierarchy of the sanctions specified in the *Rabbinical Courts Law* according to the principles of Jewish law. While it is true that a ruling of the Supreme Rabbinical Court is not “a binding precedent” from the perspective of the district rabbinical courts, it can be assumed that a reasoned and detailed ruling by the distinguished *dayanim* of the Supreme Rabbinical Court will carry great weight.

At the same time, Israel’s Supreme Court should establish a policy as to the hierarchy of sanctions in the *Rabbinical Courts Law*, reflecting the hierarchy of infringements of the recalcitrant spouse’s rights. Since the authority to implement the *Rabbinical Courts Law* was placed in the hands of the rabbinical courts, and the Supreme Court acts as a supervisory body over the rabbinical courts, the Supreme Court should determine its position in this matter, following consultations with the *dayanim* of the Supreme Rabbinical Court, so that the positions can be coordinated.

Since the law in question at present does not specify a hierarchy concerning enforcement of divorce judgments, the Supreme Rabbinical Court in Jerusalem should, in light of the aforementioned hierarchy of sanctions in Jewish law, supervise decisions of district rabbinical courts that issue severe restrictive orders.

ii *Absence of an Internal Supervisory Mechanism*

The rules applying to the restrictive order imposing imprisonment to compel compliance and the restrictive order in section 2(7), which deprive the prisoner of his rights, must differ from the rules applying to the restrictive orders specified in sections 2(1)–2(6) of the law, which infringe on other civil rights, such as the rights of movement, ownership, occupation, and the like. When the restrictive orders in sections 2(1)–2(6) of the law are imposed, the degree of infringement does not equal the degree of injury to a prison inmate, who incurs additional deprivation of his rights as well as being unable to realize his rights to exit the country, drive, serve in office, engage in his profession, or enjoy the possibility of having a driver’s license, a passport or a bank account. A rabbinical court that imposes the restrictive orders mentioned in sections 2(1)–2(6) of the law infringes on the individual’s civil rights, but does not deprive the recalcitrant spouse of his liberty, for he continues to walk about freely. While there may thus be justification for the arrangement set down by the legislator, according to which the

district rabbinical court may impose restrictive orders on its own, in accordance with its judgment and without any internal supervisory mechanisms, in our opinion, there is no justification for equating the restrictive orders set out in sections 2(1)–2(6) with the restrictive order specified in section 2(7) and the restrictive orders imposing imprisonment or solitary confinement set out in section 3 of the law. The district rabbinical court should not, on our view, implement these restrictive orders on its own.

An additional internal control mechanism is especially important in light of the fact that until now, in spite of the requirement, explicitly stated in section 4 of the law, that the rabbinical court decisions imposing restrictive orders be reasoned, in practice many decisions are not reasoned in a sufficient manner. Indeed, in the *Contempt of Court Ordinance* referred to in the *Rabbinical Courts Law*, there is an external mechanism for monitoring the exercise of sanctions: the Attorney General must be notified. There is also an internal mechanism: the imposition of the sanction must be reconsidered every six months, and the prisoner must be afforded the right to plead his case. The control mechanism is sometimes reactivated, because the *Rabbinical Courts Law* limits the prison term to an initial term of up to five years, which may be extended to ten years. However, these controls are less significant than those specified in sections 6 and 7 of the *Rabbinical Courts Jurisdiction Law*, primarily because the *Rabbinical Courts Law* puts them entirely in the purview of the district rabbinical court. The *Contempt of Court Ordinance*, referred to in section 3 of the law, involves the Attorney General only after the court rules in favor of imprisonment, but does not invest him with the operative authority to prevent imprisonment from the outset. We therefore suggest that when a district rabbinical court imposes a harsh measure on a recalcitrant spouse, this decision should be approved by the Supreme Rabbinical Court.

This suggestion could advance the goal of ensuring that judgments imposing restrictive orders are reasoned. From the perspective of the rabbis and *dayanim* too, there is a critical need to increase the reasoning adduced in rulings on enforcement of divorce judgments, and not only so that the rabbinical decisions satisfy the condition set by the legislator in section 4 of this law: they must be reasoned. The litigants and the *dayan* sitting on the Appeals Court must know whether in the circumstances of the case there is cause for “compelled” or “obliged” divorce. They want a judgment in which it is stated explicitly that the level of enforcement is that of compulsion or obligation, and not *mitzva* or

recommendation. In recent years I have read many decisions of rabbinical courts in Israel that implemented restrictive orders. These decisions reflect the policy followed by the rabbinical courts in Israel today regarding provision of factual details, the grounds for divorce, the reasoning of the halakhic authorities, special circumstances, the duration of the husband's refusal to give a *get*, or the wife's refusal to receive a *get*, and so on. Unfortunately, often these decisions are short and do not include details concerning either the facts of the case or the legal reasoning. It is possible that in some cases, before the rabbinical court issued a final judgment imposing restrictive orders, it deliberated the matter and issued its ruling in light of the relevant data. Note also that more detailed articles have been published in which *dayanim* explain their understanding of the proper policy on the imposition of restrictive orders.<sup>203</sup> But it would appear to us, with all due respect, that every judgment imposing restrictive orders should be detailed, and that all the relevant considerations should find full expression. To institute this policy it would be desirable for the Rabbinical Court of Appeal to be granted the authority to approve all decisions of district rabbinical courts that impose severe restrictive orders, such as imprisonment or solitary confinement.

#### 4 Conclusion

The imposition of harsh sanctions, such as imprisonment to compel compliance, solitary confinement, or the imposition of several restrictive orders together, should be undertaken with great caution. The saying of the Sages: "If you take hold of something too large, you will lose your hold," is often correct. The halakhic authorities tended to employ harsh coercive measures when they regarded the case for divorce as being particularly strong, for example, when the recalcitrant spouse's behavior was considered especially grave, or after a long period of refusal to give a *get*. It is impossible to determine with certainty in every case the relative strength of the cause for divorce. In our opinion, the rabbinical courts should consider the circumstances of the case and the grounds for divorce carefully, and choose the appropriate restrictive orders accordingly. An attempt should be made, to the degree possible,

203 See n. 184 above.

to set a uniform policy, to preclude large discrepancies between different panels of *dayanim*.

Just as caution must be exercised when imposing drastic indirect sanctions, such as depriving the prisoner of his rights, and even greater caution when imposing direct sanctions, such as imprisonment or solitary confinement, consideration must also be given to the severe distress suffered by women who are refused a *get*. While a man whose wife refuses to accept a *get* can solve his problem by obtaining a dispensation to contract an additional marriage, such an option does not exist when a man refuses to give his wife a *get*. Therefore, along with the caution required when imposing harsh sanctions on the recalcitrant husband, serious consideration must also be given to expanding the use of the less drastic sanctions that the law allows, for example, restrictive orders that are directed at the monetary assets of the recalcitrant husband.