

Taanit Esther 5770 (2010)

Dear friends,

ICAR, The International Coalition for *Agunah* Rights is a coalition of 28 organizations working together to promote solutions to the problem of *agunot* and *mesuravot get* (women whose husbands are unable or unwilling to grant them a Jewish divorce) in accordance with *halakhah* (Jewish Law).

ICAR has initiated a Study Day throughout Israel on the subject of *agunot* and *mesuravot get*, on and thereabout International Agunah Day that is marked on the Fast of Esther every year. ICAR sees great importance in exposing the public who is participating in study groups to the *halakhic* sources that refer to the problem of the *agunah* and the *measurevet get* and to the varied solutions that appear within these sources to this difficult problem. ICAR is turning to all of you who participate in any study group to devote some time to this important issue.

In this booklet you will find varied *halakhic* sources. The sources are organized by topic. Within each topic the sources are cited chronologically reflecting their precedence according to the *halakhic* era of each source.

In addition, you will find at the end of the booklet a sample lesson plan that covers a number of sources that relate to the problem of the *agunah* from the large variety included in the booklet, as well as the various solutions that appear in the *halakhic* sources.

I would like to thank Rachel Levmore, Anat Silverstone, Atara Kenigsberg and Bat-sheva Sherman-Shani, members of ICAR, for their contribution to this project and give special thanks to Diana Villa for writing and translating this booklet.

Let us never forget that it is the obligation of each and every one of us to save the oppressed from their oppressor and to act to bring about a just society.

"He who seals his ears to the cries of the poor, he too will cry out and not be answered" (Proverbs 21, 13)

Robyn Shames, Executive Director
ICAR

Texts for Study Groups – International *Agunah* Day

The Fast of Esther – *Halakhic* Solutions to *Get* Recalcitrance

1. Deuteronomy chapter 24, verse 1

When a man takes a wife and possesses her, [if] she fails to please him because he finds something unseemly about her, he writes her a bill of divorcement, hands it to her, and sends her away from his house...

2. *Mishnah Yebamot* chapter 14, *mishnah* 1

A man who gives a divorce is not like a woman who is divorced. For while a woman can be divorced with her consent as well as without it, a man divorces only with his full consent.

3. *Tosefta Ketubot* chapter 12, *halakhah* 3

A woman wants to be married more than a man wants to get married.

4. Babylonian Talmud, *Yebamot* 88a

The rabbis were lenient in order to prevent *agunot*.

Invalid *get*

5. Babylonian Talmud, *Gittin* 88b

Mishnah: A *get* given under compulsion [exercised] by an Israelite court is valid, but by a gentile court is invalid. A gentile court, however, may flog a man and say to him, do what the Israelite [authorities] commands you [and it is valid].

Gemara: Rabbi Nahman said in the name of Samuel: A *Get* given under compulsion [exercised] by an Israelite court with good legal ground is valid, but if it is based on insufficient legal ground, it is invalid, yet it still disqualifies [the woman for a priest]. If enforced by a gentile court on good legal grounds, it is invalid but disqualifies; if without sufficient legal ground, there is no whiff of a *Get* about it.

6. *Mishneh Torah*, Laws of Divorce, Chapter 1, *halakhot* 1-2 (Maimonides, Spain and Egypt, 1135-1204)

[1] A woman may be divorced only by means of a writ that reaches her, and this writ is called a *get*. According to the Torah, there are ten rules that are basic to divorce, and they are as follows: that the man may not divorce his wife except of his own free will; that he must give a divorce by means of a writ, and not by means of anything else... that it must be written specifically for her... that he must deliver it to her; that he must deliver it to her in the presence of witnesses; that he must give it to her as an instrument of divorce; that it must be the husband, or his agent, who gives it to her...

[2] And from where do we know that these ten rules are derived from the Torah? From this verse (Deuteronomy 24:1) "[If] she fails to please him, because he finds something unseemly about her, he writes her a bill of divorcement, hands it to her, and sends her away from his house."

"[If] she fails to please him" implies that he may not give a divorce except of his own free will. If she is divorced against his will, she is not divorced. However a woman may be divorced with her consent as well as without it.

Rabbeinu Gershom's decree

Rabbeinu Gershom, The Light of the Exile, Germany, 960-1028

7. The Rema, *Shulhan Arukh*, *Even Ha'ezer* 119:6 (gloss by Rabbi Moses Isserles, Poland, 1525-1572 on the *Shulhan Arukh*, written by Rabbi Joseph Caro, Spain 1488 - Israel 1575):

And Rabbeinu Gershom enacted a decree that a wife could not be divorced against her will unless she transgressed the law... there are those that say then when a commandment [to procreate] must be fulfilled [and he cannot fulfill it with his wife], he can divorce her against her will or he is allowed to marry two women.

8. *Beit Shemuel*, *ibid.* subpar. 8 (Rabbi Shmuel ben Uri Shraga Faibesh, Poland 1640-1698)

A man should not be allowed to take a second wife unless a hundred rabbis authorize it, in cases in which the first wife cannot be divorced, or when divorce is required and she does not want to accept the *get*.

Lenient *halakhic* perspective in cases of *iggun* [being tied to the absent husband]

9. *Mishneh Torah*, Laws of Divorce, Chapter 13, *halakhah* 28
One does not examine the witnesses thoroughly in *agunah* cases because the Sages instructed to be lenient in these cases in order to release *agunot*.

10. Responsa of the Rosh 51:2 (Rabbi Asher ben Yehiel (Germany 1250 - Spain, 1327)
It is worthy for every *halakhic* authority to examine all sides in order to release... since the sages were lenient regarding women's testimony due to the *agunah* [problem].

Solutions to the *agunah* and *get* recalcitrance problem

Solutions to *get* recalcitrance after marriage

Coerced divorce

11. *Ketubot*, chapter 7, *mishnayot* 9,10
[9] If bodily defects appear in a man [the court] may not compel him to divorce. Rabbi Simeon ben Gamaliel said, "When is this so? In small defects, but in large defects, (the court) compels him to divorce."
[10] The following are compelled to divorce [their wives]: a man who is *afflicted with boils, or has a polyp, or gathers [excrement] or is a coppersmith or a tanner*, whether these [defects] were there before they married or whether they arose after they had married.
Rabbi Meir said regarding all of them: "Even though he stipulated a condition, she can say, 'I thought I would be able to endure it, but now I cannot bear it'". The Sages say: "She must endure it in spite of herself, except when he is afflicted with boils, because [having sex with her] can cause bodily decay. There was a case in Ziddon in which a certain tanner died and he had a brother who was a tanner. The Sages said: "She can say, "I could bear your brother, but I cannot endure you."

12. Babylonian Talmud, *Gittin* 88b

Mishnah: A *get* given under compulsion [enforced] by an Israelite court is valid, but by a gentile court is invalid. A gentile court, however, may flog a man and say to him, do what the Israelite [authorities] command you [and it is valid].

Gemara: Rabbi Nahman said in the name of Samuel: A *Get* given under compulsion [enforced] by an Israelite court with good legal ground is valid, but if it is without sufficient legal ground, it is invalid, but it still disqualifies [the woman for a priest]. If enforced by a gentile court on good legal grounds, it is invalid but disqualifies; if without sufficient legal ground, there is no whiff of a *Get* about it.

13. Jerusalem Talmud, *Gittin* 9:9 (50d)

If [the husband] is compelled [to divorce] due to a bad odor, should this not be even more so when he puts her in mortal danger?

14. Babylonian Talmud, *Baba Batra* 48a

Similarly in the case of divorces, we say that force is applied to him till he says, "I want to [divorce her]."

15. *Mishneh Torah*, Laws of Divorce, chapter 2, *halakhah* 20_

If a man may be compelled by law to divorce his wife, yet he refuses to do so, an Israelite court of law of any time and place has the authority to lash him until he says "I want to [divorce her]". He may then write a writ of divorce and it is valid. If Gentiles flog him and say "do what the Israelite [authorities] command you" and he was pressured by Israelites through the Gentiles until he gives a divorce, it is valid. If the Gentiles themselves forced him until he wrote it, although there is good legal ground for it, it is [nevertheless] invalid. Why is this *get* not annulled, since it has been forced, whether by Gentiles or by Israelites? We do not say that someone was forced unless he was pressured and coerced to do something that he was not under any obligation to do according to the Torah; i.e. if someone was lashed until he sold or gave something away. However, if someone was overwhelmed by his evil inclination so that he did not observe a commandment or transgressed the law, and is lashed until he does what he is obligated to do or distances himself from what he is forbidden to do, he is not being forced: rather he forces himself on the basis of his evil inclination. *Therefore, a man who does not want to grant divorce, inasmuch as he wants to be part of the people of Israel and wants to observe all of the commandments and to keep away from transgressions – and it is only his evil inclination which has*

overwhelmed him – once he has been lashed until his evil inclination has been weakened, and he said "I want to [divorce her]", it is as if he had divorced his wife voluntarily.

Opposition to coerced divorce

16. Responsum by Rabbeinu Tam, *Sefer Hayashar*, Responsa section, chapter 77 (Rabbi Jacob ben Meir Tam, France, 110-1171)
Hence I teach that divorce should not be demanded *in cases in which one is not allowed to compel divorce*. I am of the opinion that if a divorce is obtained [in such cases] by [threat of] excommunication [of the husband], or is ordered by a rabbinic court, it is based on insufficient legal grounds, is invalid and disqualifies [her from marrying a priest].

17. Responsa of the Rosh 51:2 (Rabbi Asher ben Yehiel (Germany 1250 - Spain, 1327)
I have seen how our rabbis, the Sages of Germany and France, keep as far away as possible from any form of compelling a man to divorce his wife in cases of rebellion. They agree with the position of Rabbeinu Tam, may he rest in peace, since he states the main proofs and deserves to be relied upon. And even if these issues were clearly determined, every one must avoid any semblance of adultery and the possibility of *mamzerim* [bastards according to Jewish law] in Israel... and furthermore I say... that nowadays it seems quite the opposite; Jewish women in this generation are haughty. If a woman can free herself from her husband by saying: "I do not want him", not one daughter of Abraham will stay with her husband. They will look at other men and rebel against their husbands. Hence, the correct thing is to avoid compelling divorce.

Other reasons to compel divorce

Does not maintain nor support [his wife]

18. Babylonian Talmud, *Ketubot 77a*

Rav stated: If a husband says, 'I will neither maintain nor support [my wife]', he must divorce her and also give her the *kethubah*. Rabbi Elazar went and mentioned this teaching in front of Samuel [who] exclaimed, 'Make Elazar eat barley; rather than compel him to divorce her let him be compelled to support her'. And what was Rav's reasoning? — No one can live with [a husband who is like] a serpent in the same basket.

He is repulsive to me

19. *Mishneh Torah*, Laws of Marriage, chapter 14, *halakhah* 8

If she says: "He is repulsive to me, and I cannot willingly submit to this intercourse," he must be compelled to divorce her immediately, *for she is not like a captive woman who must submit to a man that is hateful to her.*

20. Responsum by Rabbeinu Tam, *Sefer Hayashar*, Responsa section, chapter 24

How could a scholar make [such] a mistake as to say we force a husband to divorce [his wife] when she says "He is repulsive to me!"... And did they not further state the need to prevent any [Jewish woman] from attaching herself to a Gentile and thus releasing herself from her husband (from his authority) without justification (*Gittin* 88b)! The rebellious wife will attach herself to a Gentile and thus a sinner will be rewarded for her sin...! And if we have learned that custom may uproot the law, God forbid [that this should apply to cases of] ritual prohibition [as opposed to money matters], [when the penalty is] strangulation and [the consequence of this ruling may bring] illegitimate offspring!

Violence

21. Tashbetz Responsa 2:8 (Rabbi Simeon ben Zemah Duran, Algier, 1361-1444)

In this case he should divorce her and pay the amount stipulated in the *ketubah* since we maintain that "she was given [to her husband] to live but not to suffer pain [*Ketubot* 61a]¹... and even regarding one who prohibits his wife from doing things that are not so distressing to her, we say that he should divorce her and pay the *ketubah* sum... how much more so when he causes her suffering on a regular basis that we should say he should divorce her and pay the amount specified in the *ketubah* because "no one can live with a serpent in the same basket" [*Ketubot* 77a]... "a crookedness not to be straightened" [Ecclesiastes 1:15]... What benefit does a woman reap from a husband who is making her miserable and fights daily? *And even to force him to divorce should be learned from a kal vahomer [an inference a fortiori]*

¹ The Tashbetz is of the opinion that a husband's responsibility is to ensure that his wife benefits from marriage to him, certainly not to harm her in any form, whether emotionally or physically.

from a man who has polyp [Ketubot 77a], if a divorce is compelled due to foul mouth odor, is there not all the more reason to compel if the wife's life is endangered?!... And even though it says in the responsa of some of the greatest Aharonim [later authorities; i.e. the sages that preceded the Tashbetz] may they rest in peace, that we do not compel a divorce in these cases, we are not mere reed cutters in the meadow; and regarding matters that depend on reason, the judge has no choice but to decide based on what he sees with his own eyes.² It is possible that they [the earlier sages] were not referring to cases such as this where there is great anguish, and even more so if he starves her. If she was theirs [if one of the rabbis' own daughter remained an agunah], they would not say so. And the Rashba, may he rest in peace, wrote in a responsum as we did.

22. Tzitz Eli'ezer Responsa, Vol. 6, chapter 42, chapter 3 (Rabbi Eli'ezer Waldenberg, Israel 1917-2006)

There are, in my humble opinion, *halakhic* reasons to obligate the husband and also to compel him to give his wife a divorce, given the constant situation in which the wife finds herself in, as long as she is near him, due to his bad behavior and cruelty towards his wife. This is akin to "if a divorce is compelled due to foul mouth odor, is there not all the more reason to compel if the wife's life is endangered?" [see the Tashbetz above].

Therefore, in the case of a woman's fear of death such as exists here, *there is no room* even for extra-cautionary sake³ *to be stringent and not to compel the husband to divorce her at the risk of endangering her life*, and we have a well established principle that "one should be more stringent regarding physical danger than ritual prohibitions" [*Hullin* 10a]. To those who want to be overly pious and not compel [the husband to give the wife a divorce] we must read the words of the Tashbetz: "If she was theirs, they would not say so"... Needless to say, in such a case the claim made by the woman that "he is repulsive to me" is clear and based on objective criteria, *and all authorities, both Rishonim and Aharonim, are of the opinion that one compels a divorce...* From all the above, in my humble opinion, *the right thing is to rule that the husband must be compelled to divorce his wife with a get*, and he is also required to pay the sum specified in the *ketubah*.

² This sentence means: we are not simple people, but rabbis, and regarding matters that depend on reason; the *dayan* must decide based on what he sees and does not require the agreement of earlier sages.

³ There were times when a *get* was declared valid by one rabbi or *Beit Din* by means of lenient interpretation, but was deemed questionable by a more stringent, extra cautious rabbi who would declare the *get* invalid on the grounds that the lenient ruling would lead to a situation of adultery and *mamzerut*.

Opposition to compelling divorce when conditions are stipulated

23. Maharshdam Responsa - *Even Ha'Ezer*, chapter 41 (Rabbi Samuel di Medina, Salonika, 1506-1589)

We say that a divorce must surely be compelled without the stipulated condition fulfilled when that condition is almost impossible to fulfill [such as the person who gives a divorce to his wife on the condition that she will not visit her father's home, which is a condition that will certainly not be fulfilled]. However, in our opinion, there is no doubt that when the *condition* is of a different type, and *is easy to fulfill*, if someone compels a divorce without it, this increases the amount of illegitimate offspring.

Mistaken Transaction [*Mekah Ta'ut*]

24. *Ketubot*, chapter 7, *mishnayot* 7, 9

[7] If a man betrothed a woman on condition that she was not subject to any vows and she was found to be under a vow, her betrothal is invalid. If he married her unconditionally and she was found to be subject to a vow, she may be divorced without receiving her *ketubah*. [If he betrothed her] on condition that she has no bodily defects, and she was found to have such defects, her betrothal is invalid. If he married her unconditionally and she was found to have such defects, she may be divorced without receiving her *ketubah*. All defects that disqualify priests, also disqualify women.

[9] If bodily defects appear in a man [the court] may not compel him to divorce. Rabbi Simeon ben Gamaliel said, "When is this so? In small defects, but in large defects, (the court) compels him to divorce."

25. Babylonian Talmud, *Baba Kama* 110b-111a

Why should a deceased brother's widow, upon becoming bound to the brother in law afflicted with skin boils not be released without a *halitzah*, for surely she would not have consented to betroth herself [to her first husband] upon this understanding?⁴ – In that case we all can bear witness that she was quite prepared to accept any conditions [e.g., boils], as we learn from Reish Lakish; for Reish Lakish said: *it is a better* [for a woman] *to dwell as two* [be married] *than to dwell in widowhood* [*tav lemeitav tandu milemeitav armelu*].

⁴ That in event of his death and in a state of childlessness from her first marriage, she would be relegated to marry his brother

26. Rashi, *ibid.* s.v. *deminahh niha lah*
She is comfortable getting betrothed to the first one [the brother who became her husband] who is whole, even though the uncertainty remains, that if he dies she will have to be with his brother.
27. Responsa *Ein Yitzhak*, Vol. 1, *Even Ha'Ezer* 24 (Rabbi Isaac Elhanan Spektor, 1817, Russia – 1896, Lithuania)
In fact, though we found the rationale that it is a better [for a woman] to dwell as two in various places in the Talmud... this is only in cases in which one cannot compel the divorce. But in cases in which he can be compelled to divorce... if she did not know, the betrothal itself is considered a mistaken transaction.
28. Responsa *Iggerot Moshe*, *Even Ha'Ezer* 1, chapter 79 (Rabbi Moshe Feinstein, 1895, Russia – 1986, United States)
[1] Regarding the wife who marries her husband and right after the wedding she discovers that he is impotent. He could not consummate the marriage nor penetrate all, since he could not approach that place. This was obviously so before the betrothal, as the very night that he married her he couldn't perform. This is so according to medical science. And specialists treated him with different medicines which didn't help him at all, and in their opinion he cannot be cured. And the woman is young, and needs to get married, and the husband didn't want to divorce her and fled town, and it is impossible to get a bill of divorce from him. *Can she be set free by annulling the kiddushin*,⁵ since had she known that he cannot be intimate, she surely would not have married him! She married with that intention and there isn't even a minority of women who would agree to such a marriage, since all women are meticulous about this. Maybe a very small minority exists, for example, women who want to be supported, if it is a woman who cannot earn money for her support and can find no other husband, and such very rare cases. *Therefore it is necessary to rule in this case that it was a mistaken transaction and the kiddushin must be annulled.*
[2] There are many women who would not agree to marry a man even with a small bodily defect, and the vast majority would not agree if he had a big defect... even though Reish Lakish's opinion that "it is a better [for a woman] to dwell as two" is clear-cut, the possibility should be taken into account that maybe they [the women] would agree.

⁵ *Kiddushin* (literally, sanctification) is the first part of the marriage ceremony (in ancient times it took place a whole year before the *huppah*), in which a transaction takes place - hence the annulment implies confiscating the *kiddushin* money.

29. Responsa *Iggerot Moshe, Even Ha'Ezer* 1, chapter 80
Regarding the issue of mental illness, is it considered a big defect that could annul the betrothal... A specialist wrote in his files in 1938 that he [the husband] was completely crazy, walked around naked and lost whatever one gave him... this is the kind of defect that makes intimacy impossible, since one cannot live with him, and therefore he would be compelled to divorce [his wife]. It follows, that if she did not know that he had a mental illness, or even if she knew but thought he was completely cured, and after they got married she realized that he was not completely cured and as a result of that illness he was totally unbalanced and became completely crazy after the wedding, *it should be ruled a case of mistaken transaction law and the betrothal should be annulled.*

Annulment

Rabban Gamliel's edict

30. *Mishnah Gittin*, chapter 4, *mishnayot* 1-2

If a man sent a bill of divorce to his wife and then overtook the messenger after him and said to him "The bill of divorce I gave to you is void", it thereby becomes void. If he reached his wife first or sent another messenger to her and said to her "The bill of divorce that I have sent to you is void", it thereby becomes void. But if he or the messenger reached her after the bill of divorce came into her hand, he can no longer render it void. Originally [the husband] used to set up a court elsewhere to cancel [the get] but Rabban Gamliel the Elder ordained that they should not do so *mipney tikun olam* [=for the sake of societal order].

31. Babylonian Talmud, *Gittin* 33a

What does *mipney tikun olam* refer to? — R. Johanan said: "*for the benefit of mamzerim*". Resh Lakish said: "*for the benefit of agunot*". R. Johanan said "*for the benefit of mamzerim*" ... since she, not knowing [that the Get is cancelled] might go and marry again, and bear *mamzerim*. Reish Lakish said "*for the benefit of agunot*" ... since she hearing and knowing [that the Get was cancelled] would remain unmarried, and we must take into account the benefit of *agunot*.

Our Rabbis have taught: If [the husband] did render it [the *get*] void, it is void [thereby cancelling the divorce], according to Rabbi [Judah, the Prince]. Rabbi Simeon ben Gamliel says that he cannot render it

void... because if that is the case, what authority does the court have [to sanction Jewish marriages]? Is there a case where, according to the Torah a divorce is rendered void, and yet, we allow a married woman to live with another man because of [our concern regarding] "what authority does the court have"? Yes. *Whoever sanctifies [a woman] does so on the basis of the Sages' approval; therefore the Sages annulled his betrothal* [withdrew their sanction of the original marriage so that she was free to remarry].

32. Rashi *ibid*, [he sanctifies] on the basis of the Sages' approval
The kiddushin is valid according to the laws of Moses and Israel as applied by the Sages, and they declared that they would annul any betrothal in Israel when there is such a *get*. Hence [in this case] it is annulled, as he betrothed her under that condition [Rashi considers that the marriage was conditional on the Sages approval].

33. Rashi *ibid*, therefore the Sages annulled his *kiddushin*

As anyone who sanctifies [a marriage] relies on rabbinic approval, since he says [recites the formula at the time of *kiddushin*] "according to the laws of Moses and Israel".

34. Babylonian Talmud, *Yebamot* 110a
A man once betrothed a girl in Naresh while she was a minor, and, [when she attained her majority] he placed her upon the bridal chair. Another man came and snatched her away from him. Though Rav's disciples, Rabbi Beruna and Rabbi Hananel, were present on the occasion, they did not require the girl to obtain a *get* from the second man! Rabbi Papa said: At Naresh they married [first] and then placed [the bride] upon the bridal chair. Rabbi Ashi said: *He acted improperly therefore they treated him improperly, and the Sages annulled his kiddushin.*

35. The Ritba's novellae (Rabbi Yom Tov Ibn Ishbili, Spain, ca. 1250 – 1320) on the Babylonian Talmud, *Ketubot* 3b
Whoever sanctifies [a woman] does so on the basis of the Sages' approval, since he says at the time of *kiddushin* "according to the laws of Moses and Israel." In other words, it is as if he had stipulated at *kiddushin* that it should be valid as long as the rabbis accept it and do not object to it.

We can follow up on this and require society's approval, since society can decide to confiscate property of any member of their community. Every rabbinic court in each generation, has the power to confiscate property from its owners, since *Jephtah in his generation is as Samuel*

in his generation ... Society can decree that if someone sanctified [a woman] without the elders' approval, the *kiddushin* was invalid, since the betrothal money was confiscated. They may declare that the woman is entitled to it [the money], so that the man who betrothed her would have no claim on her – since it [the money] was not his, he did not give her anything that belonged to him... Society can do this as a fence [protection] and an enactment, so that no other man [a layperson, not a rabbi] should entice a young woman from a good family and betroth her secretly.

36. Rabbi Eli'ezer Berkowitz (Germany, The United States, Israel, 1900-1992), "Conditional Marriage and Divorce" (in Hebrew), Jerusalem, 1967, pp. 163-164

It would seem that the miserable situation [of *agunot*] in the present leads us to seek for a cure by resorting to an enactment annulling *kiddushin*. This includes the possibility of establishing community approved enactments, with their rabbis' approval, as proposed by Rabbi Moses Al Ashkar. We have Orthodox rabbinic and community organizations today, thank God, in almost every country. There are even contacts between rabbinic and communal organizations in the different countries. Our world has shrunk, and thanks to modern means of transportation people can consult with each other and plan at the national and international levels. Modern technology conquers distances and allows us to plan together for the Jewish people as a whole and establish the necessary enactments for the entire people. This is an aspiration we could not have expected to fulfill ever since the Jewish people left its land; we did not have this ability during all the years of our terrible exile. *The time has come to act for the sake of God and for the sake of the sanctity of His people, Israel.*

37. Rabbi Shlomo Riskin "Yad La'Ishah – The Woman and Divorce according to Jewish Law" (in Hebrew), Efrat, 2004, p. 131

The Chief Rabbinate in Jerusalem should establish an enactment that determines that if the Rabbinic Court orders the husband to divorce his wife and he refuses to do so, and the sanctions imposed by the civil court are not efficient, a special Rabbinic Court will be convened, and it will have the authority to annul the *kiddushin* and thus allow the woman to remarry.

38. Professor Berachyahu Lifshitz, "Bill on Marriage Annulment by the *Knesset*" (in Hebrew), De'ot 31, March 2007

The authority to *annul kiddushin* is in the hands of the Rabbinic Court or the *Kahal* (community), which represents society in each and every place. Its [the *Kahal's*] power is equivalent to that of the High Rabbinic Court. We have found "community enactments" dealing with this issue

that were approved by the rabbis. Therefore, we propose, that the *Knesset*, that is the representative legislative power in Israel, should legislate that the *kiddushin* money will be confiscated from the husband if the Rabbinic Court determined that he must divorce his wife and he has not done so within a year from the ruling.

Preventive Solutions to *get* recalcitrance

Prenuptial agreements

39. Example, from "The Agreement for Mutual Respect"
- This agreement establishes the husband's monetary obligation towards the wife and the wife's similar obligation towards the husband, when one of them sends a notice to the other one regarding his/her desire to separate and 6 to 9 months have elapsed, according to the agreement's stipulations. The language of the section regarding the man's obligation follows:
1. The Man hereby now (*me'achshav*) obligates himself, to make monthly maintenance payments to the Woman in the greater of the following two sums:
 - A. The shekel equivalent of \$1,500 (one thousand five hundred U.S. dollars) according to the representative rate of the dollar published at the time of actual payment.
 - B. A sum constituting 50% (fifty percent) of his mean monthly (net) income of the year preceding the Notification Date.Notwithstanding this obligation of maintenance payments by the Man, the Woman agrees that she will be satisfied with the financial support she receives, as customary and lawful from the date of the Marriage until the expiration of the Period and the Extended Period (if applicable).
 2. This obligation by the Man is not dependent on earnings received by the Woman from a salary, wages, property or any other source, and may not be deducted from any type of debts owed to him by the Woman.
 3. Notwithstanding the Man's obligation to make monthly maintenance payments as set forth in subclause 1, the Man, hereby now (*me'achshav*) waives all lawful rights to income generated by the Woman during the period in which the Woman is entitled to implement/exercise the Obligations, including earnings, bonuses, found money and usufruct.

4. These Obligations are fully valid and enforceable regardless of any action or omission by the Woman.
5. Notwithstanding subclause 4, these Obligations are rescinded if the Woman refuses to terminate the Marriage as defined in clause G' ("*Termination of the Marriage*") or if she or her representative fails to appear in the Beit Din at the designated time without a justifiable reason for such absence.

Conditional marriage

40. Rema, Shulhan Arukh, Even Ha'ezer 157:4
Whoever sanctifies a woman and has an apostate brother, *can betroth her and stipulate by means of double condition* that if the brother should be required to fulfill the levir's duty, the *kiddushin* would be null and void (Rabbi Israel of Brunn).

41. The French Rabbinate (in Freiman, *Seder Kiddushin Ve'Nissuim Leahar Hatimat Hatalmud*, Jerusalem, 1964, p. 390. The condition was proposed in 1907.

You are sanctified to me on condition that you are not left an *agunah* on my account; and if the civil court should decree a divorce, my *kiddushin* shall not be valid; and (you) my wife will be able lawfully to (re-) marry with *huppah* and *kiddushin*.

42. The Constantinople Rabbinate (In *Mahberet Kiddushin al T'nai*, Istanbul, 1924)
They proposed introducing the stipulation of a condition to betrothal and marriage: if the husband should leave his wife for a prolonged period of time without her consent, or refuse to abide by Torah law (by giving a get) or have a mental illness, or should she need to be freed (through *halitzah*) from a recalcitrant levir or one who lost his memory – in all of these cases, the *kiddushin* would be retroactively annulled and the money he gave her as *kiddushin* would be considered a present, and she would not require a divorce from him (the husband) or a *halitzah* from the levir.

43. Rabbi Michael Broyde (in "Suggested Tripartite Document (*Shelo le-Halakhah*)", The Edah Journal, Kislev, 5765 (2004), pp. 21-22

The transcription of the section on conditional marriage follows:
The groom made the following declaration to the bride under the *huppah* (wedding canopy):

"I will betroth and marry you according to the laws of Moses and the people of Israel, subject to the following conditions:

"If I return to live in our marital home with you present at least once in every fifteen months until either you or I die, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) shall remain valid and binding.

"But if I am absent from our joint marital home for fifteen months continuously for whatever reason, even by duress, then our betrothal (*kiddushin*) and our marriage (*nisu'in*) will have been null and void. Our conduct should be like unmarried people sharing a residence, and the blessings recited a nullity.

"I acknowledge that I have effected the above obligation by means of a *kinyan* (formal Jewish transaction) before a *beit din hashuv* (esteemed rabbinic court) as mandated by Jewish law. The above condition is made according to the laws of the Torah, as derived from Numbers, Chapter 32. Even a sexual relationship between us shall not void this condition. My wife shall be believed like one hundred witnesses to testify that I have never voided this condition." [If] she fails to please him because he finds something unseemly about her, he writes her a bill of divorcement, hands it to her and sends her away from his house

***Halakhic* Solutions to *Get* Recalcitrance: Proposed Class Outline for Study Groups – International *Agunah* Day – The Fast of Esther**

The Talmud addresses cases in which the husband disappears and the wife finds herself in a situation in which she has no husband, yet she is not divorced or widowed. Therefore, if she has a sexual relationship with another man and bears children, they will be considered *mamzerim*. This woman is an *agunah*. In our days there are many cases in which a woman is in the same situation due to the husband's refusal to give a *get* - she is called a *mesorevet get*.

This situation is possible because according to Jewish law the husband must divorce his wife of his own free will. Divorce is a voluntary act between the parties, it cannot be obtained by a rabbinic court's declaration, nor can it be one-sided. Some men take advantage of the situation to extort their wife during divorce proceedings and to demand all sorts of conditions in order to give the *get*, some of which are completely illogical.

Since there are thousands of women in this situation in the State of Israel, it is proper for us to examine the issue in depth and understand the background to this problem. It is also proper to study the solutions to deal with the *agunah* problem when it occurs, and the methods to prevent this situation from taking place in the first place. We will deal with the main solutions that have been proposed over the last hundred years in the sources that follow.

1. The legal framework

a) The parties' will

Halakhic divorce institution is not symmetric. This fact emerges from the only verse in the Torah dealing with divorce, which is elucidated in rabbinic literature and by the deciders. Examine the following sources and determine: Who is the active party in a divorce? Is both parties' conformity required?

Source #1; source #6

Rabbeinu Gershom, The Light of the Exile

"Rabbeinu Gershom's decree" was accepted by medieval Ashkenazi Jewry, and this is the basis for accepted *halakhah* in our days. The decree is quoted

in the "Mapa", the Rema's glosses to the Shulhan Arukh – in source #7; examine source #8 as well.

We must stress that the requirement regarding the husband's free will is biblical – *d'oraita* – the legal source of the highest hierarchy, which is akin to the Constitution in our days. On the other hand, the requirement regarding the wife's free will was established at a later stage in Rabbeinu Gershom's decree.

Therefore, we cannot ignore the gulf between the husband and the wife's will in Jewish law. Examine the following sources and determine if this attitude can be justified on the basis of social, financial or other reasons, or if it is basically a chauvinistic attitude. [In Talmudic times a woman went from the father's domain to the husband's domain, and she had no personal sources of income].

Source #2

Source #3

2. Leniencies regarding the *agunah* issue

Our Sages understood the *agunah's* miserable situation.

In the following sources we can distinguish certain rabbinic leniencies [in issues related to testimony] to help free *agunot*.

Source #4

Source#9

Source#10

In the following pages we will indicate some of the *halakhic* solutions to this problem. It is important to note that other solutions have been proposed, and that the conclusions that derive from some of the sources we will bring are not accepted by all the deciders.

2. Solutions to *get* recalcitrance after marriage

a) Coerced divorce

The following *mishnah* presents the concept of "a *get* given under compulsion", that is, the *get* was arranged forcefully. Read the *mishnah*, the *gemara* and Maimonides' ruling. In the light of these sources, what are the conditions that render a *get* that was arranged forcefully valid, according to the *Mishnah* and according to the *Gemara* [the moderator may point out the *Mishnah's* perspective, which considers any *get* compelled by a Rabbinic Court to be valid, as opposed to the *Gemara's* perspective, that requires compulsion "with good legal ground", that is, only when the reasons are *halakhically* acceptable]. Notice Maimonides' legal logic, which justifies compulsion when these conditions apply:

Source #12

Source #15

To summarize this stage:

- Both parties' acquiescence is required to obtain a divorce
- There are cases in which Rabbinic Courts can compel the husband, under certain circumstances, to give a *get*. However, in order for the divorce to take place, it is the husband who has to give the *get*.
- The cases in which the court can compel the husband to give the *get* are cases in which he "wants to observe all of the commandments and to keep away from transgressions", i.e. cases in which Jewish law determines that divorce is necessary.
- Cases in which Jewish law determines that divorce is necessary are known as "grounds for divorce".

Do you think this is an appropriate situation?

Grounds for divorce

When the couple does not agree, a Rabbinic Court has to determine that there is a ground for divorce in order for the divorce to take place. In such cases, it is possible to divorce the wife against her will or to compel the husband to divorce. In this framework, in which the wife's own resolve to get divorced is not sufficient, the following question carries a lot of weight: what situations are considered sufficient reason to compel a divorce by the Rabbinic Court. This issue is very sensitive from the *halakhic* perspective: if the reason is justified, it is possible to compel a divorce; however, if the *get* is compelled for an unjustified reason, it is invalid; the woman remains married and cannot wed on the basis of this *get*. This situation can result in the birth of *mamzerim*, if the woman marries somebody else based on this *get*.

Some cases discussed by the sources follow. Before you read the sources, try to grade the different grounds based on the degree to which they are justified (notice that even if you think all the reasons are justified, they can be graded according to different degrees of severity):

- The husband's occupation is degrading
- The husband is violent towards the wife
- He husband refuses to support his wife
- The wife feels rejection towards her husband
- The husband has a defect the wife considers unbearable.

Compare your conclusions to the following sources (for your information' when the grounds appear in earlier sources, they have wider acceptance. The grounds follow in chronological order – this reflects the scope of their acceptance by deciders).

Source #11

Source#13

In source #18, the Talmud presents a disagreement regarding the law that applies to a man who refuses to support his wife and give her the maintenance payments to which she is entitled. Rav rules that he should be compelled to divorce. Samuel, on the other hand, considers that he should be compelled to support her and not to divorce her. The *Gemara* explains Rav's position by pointing out that a woman is incapable of living with such a man' who is considered as a snake, and therefore divorce should be compelled. We should indicate that most deciders rule that initially the court should try to convince the husband to support his wife. If he refuses, he is then compelled to divorce her – this is a kind of compromise between Rav and Samuel's positions.

The *Tashbetz* in source #21 refers to a case in which the husband is violent towards his wife. We must indicate that there is no sweeping agreement among deciders to compel divorce in cases of domestic violence.

The *Rishonim* [11th to 15th century rabbis] disagree regarding a wife who claims her husband is repulsive to her:

Source #19

Source #20

While Maimonides rules that the husband can be compelled to divorce his wife if she claims he is repulsive to her, Rabbeinu Tam disagreed. Maimonides' opinion was not accepted. (Note should be taken that in *Geonic* times, 7th to 11th centuries, the husband was compelled to divorce in such cases. The *Geonim* enacted a law that was applied for a lengthy period. However, Rabbeinu Tam's ruling was accepted in most of the Jewish Diaspora, and divorce has not been compelled in these cases since then).

We presented various "grounds for divorce". Attention should be paid to the fact that all the grounds apply to the relationship between the husband and the wife. If the wife claims that the husband behaves inappropriately in an area that is not connected to their relationship, this would not be grounds for divorce. This would include, for example, a husband who is a criminal, a husband who sexually abuses somebody else (even the couple's own children), etc.

We have seen so far that divorce is possible when there is mutual consent or when the rabbinic court rules for divorce and even compels one of the parties to obtain the divorce. We have seen that there are grounds for compelling divorce that are acceptable to all deciders, while they disagree as far as other grounds are concerned.

Do you think solutions of this kind, which compel a husband to divorce his wife, should be promoted? Some people claim that compelling a divorce is "violent". What do you think? Is it possible that their claim is justified? How can this solution be developed so that it relates to present day cases?

Unfortunately, an *agunah* who was able to prove that there is a valid "ground for divorce" must deal with another obstacle – a condition that has been stipulated to give the *get*. See source #23.

Notice that the Maharshdam determines that a divorce cannot be compelled when it is contingent on reasonable conditions. What reasonable conditions do you consider that a husband can demand?

What about a case in which the husband demands payment in lieu of the *get*? What about a case in which the husband demands that maintenance payments for his children should be reduced? What if he demands that his children be transferred to the religious school system?

We will now discuss two solutions for cases when the husband is absent, cannot give the *get* or absolutely refuses to do so. These two solutions go to the very foundation of marriage and uproot it. The consequence of applying these methods is marriage annulment. Both parties are considered single again, as though they had never been married. The children are considered offspring of unwed parents. We must indicate that according to Jewish law children born out of wedlock bear no stigma. A lineage defect is the result of forbidden relationships: a *mamzer* – the result of a married woman who committed adultery or was intimate with a relative she is forbidden to be with, and a *hallal* – the result of a *kohen* being intimate with a woman he is forbidden to marry.

b) Mistaken transaction

We mentioned when we discussed compelling divorce that when the husband has defects, he can be compelled to divorce his wife. Read the following sources and explain the proposed legal solution to free the wife in the cases we mentioned. [The idea is that the rabbis can annul *kiddushin* retroactively when, in their opinion, the wife would not have agreed to marry the husband had she known about his severe defect].

Source #28

Source #29

c) Annulment

We will now examine another legal option to which rabbinic court judges can resort. Explain the proposed legal solution. [The idea is that the rabbis have the right to confiscate property. They can determine retroactively that the *kiddushin* monies = the ring, with which the husband sanctified his wife, is confiscated from him. (This is a form of "eminent domain".) Therefore the "transaction" that took place was invalid, the *kiddushin* are annulled and no

get is required. In addition to this, the Sages claim that when the husband said "according to the laws of Moses and Israel" he accepted their authority in the matter of *kiddushin*, as well as their authority to annul *kiddushin*. Notice that the mechanism is completely different from the one applied for "mistaken transaction", but the result is the same].

Rabban Gamliel's edict – see sources #30 to #33.

We should notice that these solutions, that transfer power from the recalcitrant husband to the rabbinic courts, are used very sparingly. Rabbinic courts do not want to take on the power of dissolving the marriage, since the requirement that the husband give a *get* of his own free will is of the highest legal hierarchy, as we indicated from the very beginning.

Do you consider it appropriate to resolve the problem by transferring power to the rabbinic courts, enabling them to rule that the parties were never married?

See proposals for *kiddushin* annulment enactments in sources #37 and #38.

3. Preventive Solutions to get recalcitrance

There are two phases in which problems can arise, as we observed in the previous paragraphs:

(1) A conflict during divorce proceedings prevents the parties from reaching an agreement, and leads to placing conditions. Sometimes rabbinic courts find it difficult to reject these conditions and require a *get*; (2) more extreme cases, in which the husband absolutely refuses to give a *get*, even when the rabbinic court demands that he do so; or when the husband is absent or cannot give a *get*.

As we have seen, it is extremely difficult to find a mechanism that can solve the problem in each of these phases. Therefore, other solutions work on the principle that "an ounce of prevention is worth a pound of cure". Before marriage, when the couple is creating their life together, they can reach proper agreement.

Two mechanism follow: (1) Prenuptial agreements; (2) Conditional marriage
Do both solutions deal with problems in both phases that have been presented?

a) Prenuptial agreements

There is an example in source #39. It is the main clause in the prenuptial agreement known as "The Agreement for Mutual Respect". This is one of the agreements that were formulated in the last few years. Read it and respond: on what mechanism is it based? Which problems, among the most common ones during divorce, does it prevent?

[This is solely a monetary agreement. It is an attempt to encourage the husband indirectly to give a *get* by means of increased maintenance payments. This is not considered an invalid *get* because the husband has the option of paying and not giving the *get*].

The husband agrees, in these paragraphs, to pay his wife a very high sum of money to his wife regularly, every month, no matter what the wife's income is. The wife, on the other hand, waves this obligation as long as the parties live a proper married life. The obligation will take effect and be implemented when the marriage fails and the husband refuses to give a *get*. Thus, the husband undertakes even before the wedding that he will not, God forbid, become a recalcitrant husband, and he obligates himself to monthly maintenance payments if he refuses to give the *get*.

This solution requires couples to sign an agreement to prevent the *agunah* problem before the wedding. What problems can interfere with someone's effort to promote this solution? Will the general public quickly sign such agreements?

Does this proposal solve the problem completely?

b) Conditional marriage

[This agreement affects the very essence of marriage; if applied the marriage itself is contingent on a condition – if it takes place, the marriage was non-existent; in those cases, no *get* is required. Rabbis oppose this solution; it has surfaced again over the last few years in the writings of some deciders]

What situations did those who formulated conditional marriage agreements address?

Source #40 includes a (15th century) condition for a case in which an apostate recalcitrant levir refuses to give *halitzah*. When a married man dies and has no children, the *halitzah* ceremony takes place between the widow and the husband's brother. The woman cannot marry anyone else until after the *halitzah*. A double condition is a condition that is formulated based on *halakhic* requirements, and it indicates first what will happen if the condition is fulfilled and then, what will happen if it is not fulfilled.

Source #41 includes a condition that was proposed when civil divorce was legislated in France. It should be noted that, according to *halakhah*, civil divorce does not terminate a Jewish marriage. A situation ensued whereby husbands divorced their wives solely in keeping with civil law, without arranging for a *get* – in such cases the wife remained an *agunah*.

Source #42 includes the condition of the Constantinople (current day Istanbul) rabbis, in which they define different situations in which it is impossible to obtain a *get*.

Source #43 includes Rabbi Michael Broyde's condition, which can be found in the tripartite agreement that he proposed in 2004, as a theoretical and not as a practical proposal.

What is your opinion regarding this solution? Many rabbis refuse to develop and promote the conditional marriage solution, expressing their reservation that it will undermine the marriage institution – people may cheat on their spouses and count on their marriage being annulled retroactively: what do you think?

It is impossible to understand all the proposals in depth in one session. It is possible to study more by consulting the rest of the sources in this booklet. It is also possible to consult the literature on this subject (you can take advantage of ICAR's library).

We hope you leave this study day with the insight that there are *halakhic* solutions to this problem. Some of these solutions may be rejected (because they are radical, not sufficiently accepted by *halakhic* authorities or not sufficiently proven), but one cannot reject them all. From now on, based on the knowledge you have obtained, you can also be partners in the struggle for *agunot*. As for all the rest: go and learn it!