Ethics of the Agunah Problem

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Introduction

It can be posited that the basis of Jewish ethics is the belief that God created the world, giving humans the gifts of time and of freedom of choice, while creating humankind in the divine image. Without freedom of choice and a sense of time, humans are but slaves, subjugated to a master who is in control of their time and actions.

Such is the *agunah*—the victim of *get*-refusal. When Jews marry in accordance with Orthodox tradition, their union cannot be dissolved through the vehicle of divorce in a manner other than the delivery of a valid *get* from the husband into the hands of the wife. In accordance with Torah law, for the *get* to be valid, ultimately it has to be given by the husband of his own free will. If it is his choice not to divorce his wife (even if she has been awarded a civil divorce in the Diaspora) he is depriving her of the choice to separate herself from her Jewish husband and forces her to maintain the status of an *eshet ish* and all that entails. Time stands still for her. She cannot forge ahead and form a new relationship with a free man—for she is not a free woman. Her biological clock continues to tick, her fertile years inevitably come to an end—while she has no opportunity to exercise her choice to bring children into the world and form a new family unit.[i] The estranged husband, through the abuse of the power given to him by Jewish law, chooses not to allow her to implement her choice of leaving him. The *agunah* is a victim of *get*-refusal, subjugated to her Jewish husband, without control of her time or life-choices.

On a rabbinic level, a man may find himself in a similar position of *get*-refusal. In accordance with *Herem D'Rabbeinu Gershom*, a woman likewise can be divorced "only in accordance with her will."[ii] The situation that remains is that of the necessity for agreement on both sides in order to arrange a divorce. However, negative consequences of a man ignoring rabbinic dictates while going on with his life are for all practical purposes, non-existent. If he chooses to forge a relationship with a single woman, he can form a new family unit—even marry her through *kiddushin*. Indeed, he will be transgressing *Herem D'Rabbeinu Gershom*, but his new wife and children will enjoy complete legitimacy in Jewish law.[iii] Because of this difference, and as a result of the higher number of women who are victims of *get*-refusal—the *iggun* problem is considered to be one of our daughters and not of our sons. It has, perhaps incorrectly, taken on the form of an issue solely of women's status in Jewish society. In actuality, the problem of *get*-refusal is a general Jewish ethical problem, affecting both men and women. It is rooted in a disregard of *kevod haBeriyot*—a Jewish ethic of respect for all those created in the divine image.

A Contemporary Issue[iv]

The Jewish person in today's postmodern world lives simultaneously, to one degree or another, in two worlds—that of democratic Western values and thought while still steeped in, or at least influenced by, the 2,000-year-old Jewish tradition. These two distinct weltanschauungs can manifest themselves in the same individual or social group in accommodative parallelism or at times as a dichotomy.
The Orthodox Jew, more than others, is aware of this ongoing duality. It is brought into sharp relief at life-cycle events for the lay person who is an observant Jew. However, for the society of Orthodoxy as a whole, and for given individuals as well, the potential conflict between our thousands-year-old tradition and law and our personal sensibilities erupts full force in the case of Jewish divorce.
An illustration of this point is the fact that if any Rabbinical Court today—anywhere in the world—were to rule for coercion of a *get* against a recalcitrant husband they could not use physical coercion under any circumstances—for fear of being charged with assault and battery. Although the halakha may allow the rabbis to beat or whip a disobedient person, human rights, societal norms, and most importantly civil law do not allow them to do anything of the sort in their court or out of it. The civil law ties the hands of the Jewish law-makers.
During the last century, the rabbinical establishment in the Diaspora[v] has been aware of the severity of the problem of the "modern-day *agunah*"—the victim of *get*-refusal. Individual rabbis or certain groups have attempted to address the problem.[vi] For example, in the United States the use of a prenuptial agreement for the prevention of *get*-refusal[vii] is not only accepted, but is recommended by recognized authorities within the rabbinical establishment.[viii] In December 1999, 11 roshei yeshiva of Yeshiva University's Rabbi Isaac Elchanan Theological Seminary (RIETS) issued an open call, a "*kol koreh*," which elucidated the *agunah* problem and called on rabbis to erase this blight on the Jewish community by means of signing marrying couples on a halakhic prenuptial agreement:[ix]

A Message to Our Rabbinic Colleagues and Students
The past decades have seen a significance increase in the number of divorces in the Orthodox Jewish Community. In the majority of these situations, the couples act in accordance with Jewish law and provide for the proper delivery and receipt of a Get. Each year, however, there is an accumulation of additional instances in which this is not the case.

We are painfully aware of the problems faced by individuals in our communities tied to undesired marriages. Many of these problems could have been avoided had the couple signed a halakhically and legally valid prenuptial agreement at the time of their marriage. We therefore strongly urge all officiating rabbis to counsel and encourage marrying couples to sign such an agreement.

The increased utilization of prenuptial agreements is a critical step in purging our community of the stressful problem of the modern-day *Agunah* and enabling men and women to remarry without restriction. By encouraging proper halakhic behavior in the sanctification and the dissolution of marriage, we will illustrate that *all* of the Torah's paths are peaceful.

(Signed by: Rabbi Norman Lamm, Rabbi Zevulun Charlap, Rabbi Herschel Schachter, Rabbi Moshe Dovid Tendler, Rabbi Mordechai Willig, Rabbi Yosef Blau, Rabbi Michael Rosensweig, Rabbi Yaakov Neuburger, Rabbi Yonason Sacks, Rabbi Meir Goldwicht, Rabbi Jeremy Weider – Roshei Yeshiva of the Isaac Elchanan Theological Seminary, an affiliate of Yeshiva University, December 1999; Tevet 5760)

In recognition of this intolerable situation, much ink has been spilled in the past few decades regarding the modern-day *agunah* problem. Scholarly articles, both rabbinic and academic, have appeared in print and on the internet.[x] Despite the seeming proliferation of serious discussions as to the seriousness and pervasiveness of the problem—aside from the serious attempts at preventative measures made by some of the establishments of Modern Orthodoxy briefly described above, there exist no rabbinic solutions for the cases of *agunot* who are victims of *get*-refusal today. As far as preventative solutions go, although prenuptial agreements have proven to be successful in nipping recalcitrance in the bud, only specific sectors of Orthodox Jews routinely sign. The vast majority of Jewish women who will need to initiate divorce are unprotected from victimization within accepted parameters of Jewish law.

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Halakha vs. Civil Law in the Diaspora

The decisors of Jewish law throughout the ages were the rabbis. They had, and still have, the authority within the Jewish community to adjudicate, to respond to specific halakhic questions, and to develop the halakha in response to change. From the rabbinic point of view, if one goes back far enough in Jewish history, the source of the rabbi's authority is found "on-high." Each successive rabbi is a link of this chain. However, the fact that the rabbi is an authoritative figure does not mean that he has the power to enforce his rulings. In the Diaspora the power that lies in the rabbi's hands is the power of religious persuasion, leadership of followers, or perhaps social pressure within a defined social group. From the point of view of a congregant or litigant in the
Rabbinical Court
, neither the rabbi himself nor his court has any legal standing. The weakening of communal cohesion and the increase of an individual's mobility, geographically and socially, have contributed to the lack of enforceability of a Bet Din's rulings.

On the other hand, every citizen of a state is under the jurisdiction of the judicial system of that state. The state not only has authority to rule regarding the individual within its borders, it also has the power to enforce those rulings. In many areas, the approach of the halakha and that of civil law will be similar, so as not to cause any discord within the individual or the society that attempts to adhere to both systems of law simultaneously. In some areas the two systems can live in harmony. However, in regard to divorce proceedings, there exist two major inherent differences between the halakha and civil law.

The first difference lies in the necessity to bring forth proof of fault before the court. In democratic countries, as a rule, there is a no-fault option when suing unilaterally for divorce, amongst other grounds. The no-fault divorce proceedings essentially means that the spouse who wants a divorce is not required to prove, or even mention, the other's negative traits or acts. However, when suing for a divorce in a rabbinical court, and the spouse opposes a divorce, the suing party must convince the rabbinical judges that a divorce is necessary in this case by presenting fault in that spouse. Moreover,

the faults that are considered acceptable as grounds for divorce must come from a limited list of legitimate grounds in accordance with the halakha. The fault of the spouse being sued must be proven to the rabbinical judges so that a ruling will be issued, in various degrees of severity, that the spouse must go ahead with the administration of a *get*.

The second inherent difference between the two systems lies in the power, or lack thereof, of the judge in his respective legal system to change the individuals' personal status. While a civil Family Court judge has the authority to rule that the parties in question must divorce, he or she also has the power to issue a decree that transforms both individuals' personal status from married to divorced, or "remarriageable." The judge may do so even against one of the spouses' wishes. However, although a rabbinical court judge has the authority to rule that the parties in question must divorce, he does not have the power to change the individual's personal status through the vehicle of divorce. That power lies solely in the hands of the two parties themselves. In order for a *get* to be valid, Torah law (*d'oraita*) dictates that the husband must place the *get* in the wife's hand out of his own free will;[xi] according to rabbinic ordinance (*d'rabbanan*) the wife must accept the get out of her own will.[xii] A rabbinic judge cannot divorce a wife in the husband's stead. At most he can persuade or even coerce a husband to give his wife a *get*. However, the means at the disposal of today's rabbi to do so are limited.

The combination of both these circumstances in the
Rabbinical Court
—that of the necessity to prove fault before the court and the inherent inability of the
Rabbinical Court
to actually put their own ruling into effect—gives rise to an impossible situation for one who is suing for divorce. Proving fault leads to angering the husband, while lack of proof would lead to the refusal of the Rabbinical Court to arrange the divorce proceedings! The plaintiff is forced to act against his or her own interests. The husband against whom negative claims have been made feels either that lies were perpetrated against him before a most venerable panel of rabbis, or he feels shame at having his unacceptable behavior brought to light. In any case, the husband would most likely retaliate with the ultimate tool he holds—a tool more powerful than the Rabbinical Court itself—refusal to grant the *get* to the wife who dared bring up his faults before the court.

Given the limited power of the rabbis in the Diaspora to ensure the giving of a *get*, the situation of the "modern-day *agunah*" has arisen. The husband may resort to naming a price for his acquiescence or he may simply refuse to give his wife a *get*. The fact that a civil divorce may be in place does not help alleviate this situation.[xiii] The complete imbalance of power—not only between the husband and the wife but also the husband's power over the
Rabbinical Court
—leads to the ethical problem of one individual limiting the freedom of another.

Ethical Concerns of the Sages

Throughout the generations, the sages were sensitive to the needs and rights of individuals. These were viewed through the prism of achieving and maintaining a strong Jewish society. Concerns of "public policy" weighed heavily when ruling—whether in a Responsum or in a *takana*. The *ketuba*, or marriage contract, is a prime example. The explanation found in the Babylonian Talmud for the establishment of the *ketuba*, which was instituted to protect Jewish women as a group, was given as: *Mai ta'ama takinu rabbanan lah ketuba? Shelo tehei kala b'einav l'hotsiah*—For what reason did our sages ordain the *ketuba*? So that it will not be easy in his eyes to cast her out.[xiv]

A fascinating example of "public policy" can be gleaned from two thirteenth-century Responsa. The first was formulated by the sages of Provence,[xv] who refused to permit a man to divorce his wife contrary to her wishes, saying: "The relevant rules were determined for just such a case, that a man shall not divorce his wife without justification, so that he should not come with a complaint whether she is weak or unsteady … for otherwise one will not allow a daughter of Avraham Avinu to remain with her husband, for when he finds a more beautiful woman he will divorce her. And if this is the

case, of what use are the rulings of the sages, when they ruled that one may not divorce his wife unless she acquiesces?"[xvi]

The second Responsum was composed by Rabbeinu Asher,[xvii] and it prevents a woman from getting a divorce when she sues for it, using almost precisely the same language: "If a woman is enabled to get a divorce from her husband, merely by saying: 'I don't want him,' one will not allow a daughter of Avraham Avinu to remain with her husband, as she may well become infatuated with someone else and rebel against her husband."[xviii]

The reason that both these mutually opposite suits are denied is the same. "One will not allow a Jewish woman (a daughter of Avraham Avinu) to remain with her husband," that is, if one enables divorces to be easily attained, one will not have Jewish family units remaining intact. This is the approach that guides the dayanim to this day.

It is noteworthy that the *Herem d'Rabbeinu Gershom* was actually described by the Rosh in quite modern terms. In a Responsum of the Rosh, rule 42, the Rosh explains the enactment of Rabbeinu Gershom as having been intended "to equalize the woman's power with that of the man. Just as a man divorces his wife only of his own free will, so a woman can only be divorced in accordance with her will."[xix]

In actuality the *Herem* leads us to a situation in Judaism that differs from postmodernism's standards of changing personal status. The situation in Jewish tradition today is that just as one cannot be coerced into entering a marriage (meaning that *kiddushin* do not take affect unless both the man and the woman enter into the marriage willingly), one cannot be coerced into leaving a marriage. Both the man and the woman have to agree to dissolve the union and only they have the power to do so. Today, Jewish divorce is enacted solely by agreement of both parties—as opposed to the sensibilities of civil rights and civil liberties.

Although there is evidence from the Responsa that the halakhic decisors did, at times, base their rulings on ethical and societal standards, none of the tenets listed directly above, or other concerns of "public policy" serve to alleviate or are even palliative to the problem today. In fact, selected "public policy" concerns serve to exacerbate the problem.[xx] In a *Rabbinical Court*, these established standards may outweigh any interest to preserve the individual's rights to a life unfettered by an unwanted personal status.

A Contemporary Rabbinic Problem

In this generation, Rabbi Moshe Boczko[xxi] identified the unethical situation of *get*-refusal from a rabbi's point of view:

Thus, from the point of view of general fairness, it is difficult to comprehend that Hazal created several halakhot that the husband is obligated to divorce his wife and the authority is not given to the *Rabbinical Court* to implement this rule (ruling). And anyone who does not want to listen to the words of the sages can ignore them (literally: whistle at them), and the woman is obligated to suffer [at the hands] of a bad man that does not obey the ruling…And specifically in a matter so important as is family life, the Rabbinical Court is powerless and every man shall do as he sees fit?! And how is it possible that the sages will rule regarding an individual that he is obligated to divorce and they will not compel him to fulfill that which was imposed upon him?

…Therefore, logic dictates that the Torah delivered the rules of *gittin* (divorce) and *kiddushin* (marriage) into the hands of the sages. In accordance with their rulings (literally—words of their mouths) they (the people) will marry and on their word they will divorce…Meaning, that the Rabbinical Court is given all the means necessary to execute the ruling so that family life in Israel will not be abandoned.[xxii]

Treatment

The ethic of guarding stable family units is still central to Jewish society. However, the criterion of the stable Jewish family unit has undergone somewhat of a metamorphosis in the last generation or two. With the rising incidence of divorce, the challenge is divorcing in a manner that will maintain all of the family members' mental and emotional health so that new family relationships can be formed—both between the former spouses as co-parents of joint children and in the building of new independent families.

In order to rectify the *agunah* problem and eliminate unethical behavior on the part of a recalcitrant spouse in a manner commensurate with Jewish law, the very root of the problem must be treated. That being the imbalance of power on two levels: between the husband and the wife as well as the husband's power over the

Rabbinical Court

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Further halakhic solutions must be developed and accepted by responsible men and women of the halakha—those who understand the intertwining of the complexities of our dual existence as citizens of the postmodern world from within our strong beliefs as God-fearing Jews.

[i] If a woman were to have intimate relations with a man other than the man still considered to be her husband, she would be committing adultery according to halakha. Any children born from such a union would be considered *mamzerim* and would be excluded from marrying within the general community of *Am Yisrael*.

[ii] Decreed in *Herem D'Rabbeinu Gershom* (Enactment of Rabbeinu Gershom). See *Shut HaRosh* 42.

[iii] Rabbeinu Gershom wisely included an "escape clause" from his own enactment: *Heter Meah Rabbanim.* In extreme cases, where it is agreed by 100 rabbis that it is warranted, a man may take on a second wife—thus diverting back to the original biblical law. (This would include situations where a wife lies comatose for years or suffers from a severe mental illness or committed adultery and was refusing to accept a *get.* No such arrangement exists for the opposite case (the taking on of a second husband), since it would be in transgression of biblical law.

[iv] The basis of this section was published previously in Rachel Levmore and Daniel Clarke, "The Prenuptial Agreement of Mutual Respect, Get and English Law," *Jewish Law* (Dec. 2008); http://www.jlaw.com/Articles/getAndEnglishLaw.pdf.

[v] There is a misconception that since the Israeli Rabbinical Courts have power to levy sanctions against recalcitrant husbands, and that there is no *agunah* problem in Israel. Quite the contrary: Cases drag on for years. There is a policy of pacification of the husband on the part of the judges in the *Rabbinical Court*, and dayanim are reluctant to use their powers for fear of causing a *get meuseh*, a coerced *get*, which is invalid. Israeli *ra'avads* themselves have cried out portraying the problem as severe. See Rav Eliyahu Bakshi Doron, "*Kakh Nitan Liftor Et Be'ayat Mesuravot ha-Get*," *Meimad* (Av–Elul 5755): 8–9 (introduction); Rav Shear-Yeshuv Cohen, "Coercion of a Get in Our Times," *Techumin* 11, pp. 195–202.

[vi] For an historical overview of the development in the greater Diaspora of prenuptial agreements for the prevention of *get*-refusal, which address the problem, see Rachel Levmore, *Minee Einayikh MeDim'ah: Heskemei Kedam Nissuin L'Miniyat Seiruv Get*, Mosdot Ariel and the Council of Young Israel Rabbis: Jerusalem 2009; Rachel Levmore, "*Get*-Refusal in the United States and One Method of Prevention: Prenuptial Agreements," *Women in Judaism* [ed. Tova Cohen], Ramat Gan: Bar Ilan University, 2001.

[vii] The agreement that is in most widespread use in the United States is that which is recommended by the Rabbinical Council of America and its affiliated Rabbinical Court—the Bet Din of America. The Binding Arbitration Agreement can be found on the Bet Din's website at http://www.bethdin.org/forms-publications.asp.

[viii] There have been various decisions made by rabbinic organizations to implement the signing of prenuptial agreements, such as several resolutions of the Rabbinical Council of America. See the latest resolution at http://www.rabbis.org/news/article.cfm?id=100772.

[ix] Published in *The Jewish Press* on Feb. 25th, 2000, p. 28; "Chained Women Could Have Used Prenuptial Pacts," *Forward*, Feb. 25th, 2000; It appears on the site of the Rabbinical Council of America at http://www.rabbis.org/Prenuptial_Agreement.cfm.

[x] Note the publication dates of a selection of examples appearing in English:

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Breitowitz, Irving, *Between Civil and Religious Law: The Plight of the Agunah in American Society*, Greenwood Press, 1993.

Broyde, Michael J., *Marriage, Divorce, and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America*, Ktav, New Jersey 2001.

Dick, Judah, "Is an Agreement to Deliver or Accept a Get in the Event of a Civil Divorce Halakhically Feasible?" *Tradition* , Vol. 21 No. 2, (Summer 1983), pp. 91–106.

Greenberg-Kobrin, Michelle, "Civil Enforceability of Religious Prenuptial Agreements," *Columbia Journal of Law and Social Problems*, Vol. 32 No. 4 (Summer 1999), pp. 359–399.

Globe, Leah Ain, *The Dead End: Divorce Proceedings in Israel*, Jerusalem 1981.

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Lamm, Norman, "Forward," *The Prenuptial Agreement, Halakhic and Pastoral Considerations*, (ed. B. Herring & K. Auman), New Jersey, 1996.

Lamm, Norman, "Recent Additions to the Ketubah—a Halakhic Critique," *Tradition*, Vol.2, No.1, 1959, pp. 93–118.

Levmore, Rachel, "Conflict of Legislations?" *Shalom: The European Jewish Times*, Vol. 41 (Spring 2004), http://www.shalom-magazine.com/.

Levmore, Rachel, "Rabbinic Responses in Favor of Prenuptial Agreements," *Tradition* 42:1 (Spring 2009), pp. 29–49.

Levmore, Rachel, "*Get*-Refusal and the Agreement for Mutual Respect: Israel Today," *Hakirah* 9 (Winter 2010), pp. 173–190.

Riskin, Shlomo, *Women and Jewish Divorce: The Rebellious Wife, the Agunah and the Right of Women to Initiate Divorce in Jewish Law*. A Halakhic Solution, New Jersey 5788/1989.

Weiss, Avraham, "The Modern Day Agunah: In Retrospect and Prospect," *The Prenuptial Agreement, Halakhic and Pastoral Considerations*, (ed. B. Herring & K. Auman), New Jersey, 1996.

[xi] B.T. *Yebamot* 112b ; Rambam *Hilkhot Girushin* 1:2.

[xii] *Herem d'Rabbeinu Gershom*: see *Shulhan Arukh, Even haEzer* 119:6, *Divrei HaRama*.

[xiii] In fact, with a civil divorce in place the situation may be much worse. The man is then free to remarry civilly, while able to arrange a Jewish marriage, since according to Torah law he may have more than one wife simultaneously. The woman, in that situation may be able to remarry civilly, but is prohibited halakhically from joining in any kind of union with another man. Any children born of such a union would be categorized as *mamzerim*.

[xiv] B.T. *Yebamot* 69a, and many others.

[xv] The vast majority of Responsa of the rabbis of Provence are the collection of responsa of the Sages of Provence in the period of the RaShbA in the thirteenth century and in the succeeding generation. The other Responsa are those of the *geonim*, the Rif, the Rabi (*Ba'al Eshkol*), the Ra'avad, and the RaShbA.

[xvi] *The Responsa of the Rabbis of Provence*, Part I, 63, section opening *'od sha'al*, and its continuation: "…who ruled that one shall not divorce his wife unless she and her relatives and the seven elders of the town agree," etc.

[xvii]Rabbi Asher ben Yehiel, the Rosh, died in the year 1327 in Toledo, Spain. He had been appointed rabbi of the large city of Toledo. After the death of the RaShbA, the Rosh was considered the leading halakhic authority in Spain.

[xviii] *Responsa of the Rosh*, Rule 43, part 8, section beginning "Answer": "Moreover I say that the *geonim* who formulated this regulation … did so in accordance with that generation, when it seemed to them to meet current requirements for Jewish women. Now, the case seems to be the opposite, Jewish women in the present generation are conceited; if the wife can bring herself out from under her husband's jurisdiction, saying: *I do not want him*, you will not leave a daughter of Avraham Avinu remaining with her husband, for they will prefer another man and rebel against their husbands; for this reason it is best to distance oneself from coercion."

[xix] *Shut HaRosh* 42.

[xx] As an example see the *Shach*, *Gevurat Anashim* 49, where Rabbi Shabtai Cohen (Poland 1621–1662) explicitly ruled against the coercion of a *get* at any time, for fear of creating *mamzerim* by doing so. The Israeli Rabbinical Courts view this opinion as carrying great weight.

[xxi] Rav Moshe Boczko, former Rosh Yeshivat Heichal Eliyahu, which was founded in Montreux, Switzerland. In 1985 Rav Moshe Boczko, rosh yeshiva at the time, made *aliya* together with the yeshiva and turned it into a Yeshivat Hesder.

[xxii] Moshe Boczko**,** "*Bedin get meuseh—siccum limudim b'yeshivat heichal eliyahu beperek af al pi v'hameidir."*