

THE PLIGHT OF THE AGUNAH AND A SUMMARY OF POSSIBLE SOLUTIONS

by Rebbetzin Leah Kohn

Rabbi Dr. Yitzchak Breitowitz

The problem of the agunah -- the "chained" or "anchored" wife -- is a serious one, though it is not as prevalent as many Jewish feminists maintain. The term "agunah" appears in the Talmud primarily in connection with a husband who disappeared or was missing in action. While such agunot (plural of agunah) certainly exist in this day and age as well (consider the Holocaust or the Israeli soldiers who are MIA's), the primary use of the term today refers to a woman who cannot obtain a religious divorce (a "get") even after her marriage has been civilly terminated and hence is prohibited from marrying others. Husbands sometimes withhold such a divorce out of malice or spite or an attempt to extort money or concessions in the areas of child support, custody, visitation, or marital property. Whatever the reason, the withholding of a "get" can be a source of great anguish to a woman, and it is incumbent upon the halachic community to do whatever it can within the framework of halacha to enable these unfortunate women to rebuild their lives anew.

THE FUNDAMENTALS OF JEWISH DIVORCE LAW

To understand the nature of the problem and why solutions are not easily found, it is necessary to explore some of the dynamics of the Jewish law of divorce. Briefly, this law consists of the following propositions:

A halachically-valid marriage may be terminated only by the death of either spouse, or by the husband (or his agent) delivering to the wife (or her agent) a specially prepared document known as a "get." A civil divorce has absolutely no validity in the eyes of Jewish law.

If a woman attempts to marry without obtaining a get, the second marriage is null and void, the relationship is adulterous, and any children born from that union are tainted with the irreversible stigma of "mamzer" (illegitimacy -- note that a child born out of wedlock is not a mamzer but a child born from an adulterous relationship is, and cannot marry anyone except another mamzer or a convert, and in either case their children all continue to be mamzerim.)

A get must be authorized by the husband. Even the most eminent rabbinic court cannot (except in the rarest of circumstances) terminate, dissolve, or annul a marriage. Moreover, the husband's authorization must be without duress or compulsion. If the husband's consent was obtained by such

duress, the get is termed a "get meusah" (coerced get) and is invalid (but see below).

Under specifically defined circumstances such as abuse, abandonment, non-support, refusal to cohabit, a Jewish rabbinic court known as a beit din, pursuant to a petition or complaint filed by the wife, may order the husband to authorize the writing of the get. Note that even here, the beit din does not terminate the marriage but merely orders the husband to do so.

If, and only if, the duly qualified beit din issues such an order, the restrictions on get meusah are inapplicable and the order may be enforced even by physical force. Thus, an identical instance of force or compulsion that would invalidate a get in one instance, i.e., no order of beit din, may be totally permissible and appropriate in another, i.e., such an order was obtained.

WHAT CANNOT BE DONE

Any halachically-acceptable solution must work within these parameters. Thus, proposals that call for the recognition of civil divorce, or that would allow a woman to give a get to her husband, or that would allow a beit din to annul a marriage without a get (kiddushei ta'ut), or that would allow the beit din to write and issue a get on behalf of the husband without the husband's consent or authorization (get zikui), or that would attempt to secure that consent by duress or compulsion (except as stated in the paragraph above) will by definition fail to solve the problem because none of these methods terminates a marriage halachically.

There is a beit din operating out of New York that seeks to release agunot by either annulling the marriage on the grounds of fraud or mistake, or by acting as the husband's agent in writing a get in spite of his vociferous objections to the contrary. This beit din has received much positive coverage in the popular media and is often touted as a savior for agunot. In light of this widespread misconception, it is important to note that the rulings and general approach of this beit din have been roundly condemned and rejected by virtually all reputable halachic authorities in the world and its decisions are held to be without any validity whatsoever.

One may resent halacha or decline to follow it, as regrettably so many Jews have decided to do, but it is fraudulent to claim that halacha allows certain things that it simply does not. The requirement that a Jewish marriage be terminated by a get, and that a get may be authorized only by the husband, is stated explicitly in the Torah, is reaffirmed countless times in the Talmud, and is not open to legitimate debate. One may of course raise the question of why it is that only the husband can authorize the get, and here admittedly our understanding is limited. Perhaps the Torah requires that a marriage be terminated the same way it is created -- by the husband's giving something to his wife. Perhaps the Torah took away the woman's right to divorce the man because it was more confident of her superior ability to stabilize and improve a relationship and did not want to give her a quick and easy exit. We really don't know, but to the believing Jew, this ultimately makes no difference. The Written and Oral Torah of Hashem establish the parameters within which this problem must be addressed, and any "solution" to a halachic problem that is anti-halachic is by

definition illegitimate. (Note also that at least since the 11th century, Jewish divorce requires mutual consent, so that if a woman refuses to receive a get, a man can be in the state of igun as well.)

WHAT CAN BE DONE?

In Israel, rabbinical courts are empowered by the secular law to deal with all issues of marriage and divorce. Thus, in the State of Israel, if a man was ordered by a beit din to give a get to his wife and he refuses, he may be imprisoned until he complies. (Note that this is no panacea -- some men who refuse to comply are already serving prison sentences. In one case, a man remained in jail for over thirty years for refusing to give a get to his wife until he eventually died.) Other sanctions include revocation of driver's license or passport, termination or denial of employment. These sanctions appear to coerce, but because they are efforts to enforce the decision of a beit din, they constitute halachically-acceptable mechanisms.

Outside of Israel, the decision of a beit din are generally not enforceable by the secular courts. A beit din may issue an order but there is no particular means to back it up. Even there, however, the beit din does have the power to excommunicate the recalcitrant husband; synagogues can and should exclude him from membership and honors (including, for example, attending his son's Bar Mitzva). Admittedly, bans of excommunication issued by one beit din are often routinely ignored by other groups and thus don't have real bite. As a result, batei din are often reluctant to even issue the cherem (excommunication order) but nevertheless, the potential for a powerful and effective remedy is clearly there.

Some authorities have advocated a pre-nuptial agreement signed at or before the wedding in which the parties agree to submit their marital disputes to a beit din and abide by its decisions. According to secular law, this would constitute an arbitration agreement. Such agreements are legally enforceable by the imposition of fines or even imprisonment. Thus, by the expedient of such an agreement even the decisions of a beit din outside of the State of Israel could be civilly enforced. (Such an agreement would be totally superfluous for couples residing in Israel since the decisions of a beit din are enforceable even in the absence of an agreement.)

An alternative type of pre-nuptial agreement -- which can either stand alone or be signed together with the one mentioned above -- and one that would be effective and useful in Israel as well -- is an agreement that stipulates that for the period that husband and wife will not be living under the same roof, husband will pay wife X amount of dollars per day to cover her support needs until such time as the marriage is halachically terminated by a get or death. Such a legally-enforceable obligation creates a powerful incentive to grant a get in order to terminate what may be a significant financial liability of spousal support.

(Of course pre-nuptial agreements work only for parties who signed them and provide no relief for agunot who failed to sign such agreement. Moreover, some rabbinic authorities are reluctant to introduce the signing of such an agreement at weddings on the grounds that it introduces thoughts

of divorce at a time when parties should be pledging to each other lifelong fidelity and commitment. It should be noted, however, that the standard ketubah that is signed at every halachic marriage makes reference to financial compensation in the event of divorce and, in any case, these agreements do not have to be signed at the wedding. They can be signed before or afterwards.)

In the State of New York there is a law that essentially provides that a husband will be unable to even obtain a civil divorce unless he removes the impediments to his wife's ability to remarry. Similar laws exist in the Republic of South Africa and Canada. This also creates a legal incentive to give his wife a get. (According to poskim, the enactment of this type of law should be encouraged elsewhere, but to date it has not been widely enacted.)

A second statutory enactment -- applicable only in the State of New York -- provides that when a secular court determines the amount of alimony a husband must pay his wife or how marital assets should be divided, it may take into account the husband's failure to grant a get as a basis for decision. Essentially, a judge may state, for example, that a husband's alimony obligation is \$1000 a week until a get is executed and \$500 thereafter. Eminent halachic authorities have raised serious questions as to whether a get granted pursuant to such an order would be valid, but strong support for validity may be inferred from a decision of R. Moshe Feinstein, zatzal.

An extremely important tool in helping agunot and potential mamzerim rests on the simple idea that only a marriage that is halachically valid requires a get for its termination. In many cases, a marriage may be found to be halachically invalid, particularly if it was performed under Conservative or Reform auspices, because of irregularities in the ceremony and the absence of kosher witnesses (male, Jewish, unrelated to each other or to the bride and groom, and observant of the mitzvot). This has been a lifesaver to countless ba'alei teshuva (newly observant) who are the progeny of second marriages whose mothers did not obtain gittin (plural of get) from their first husbands. (Again, it is important to emphasize that the invalidation of a marriage does not result in the offspring of that marriage being tainted with mamzerut -- they are simply children born out-of-wedlock who in the eyes of halacha have no disability.)

Finally, there are various "informal" methods of pressure that may be employed (I am not referring to the use of "goons," mafia or violence): Boycotts, shunning, etc., all have their place. In one instance, the women of a particular community refused to go to the mikveh until a man gave a get to his wife. The get was delivered within a week!

Having surveyed the variety of responses that might avail women in their plight, one might be tempted to ask: "If things are so good, why are they so bad?" One reason might be that some women are indeed not pursuing their remedies under the system. A second reason might be that, particularly outside of the State of Israel, it is sometimes difficult to find a beit din that will assume jurisdiction of the case. In both Israel and the United States, batei din are sometimes overly reluctant to order the granting of a get, preferring to encourage reconciliation and shalom bayit, laudable

goals but sometimes unrealistic. Batei din are also reluctant to utilize and impose the sanctions they have at their disposal: For example, cherem is rarely employed, and the Israeli batei din rarely impose imprisonment. The Jewish community itself often does not respect, obey and support the decisions of the batei din; they will continue to give a recalcitrant husband synagogue honors, community recognition and the like, which in turn makes a beit din less likely to impose sanctions that will be ignored. Sometimes the husband cannot be found or no longer affiliates with the Jewish community, so the purely "religious" sanctions prove ineffective. Too few jurisdictions have something like the New York and South African get law and too few couples have pre-nuptial agreements. The point is, there are things that can be legitimately done to help women and these avenues should be pursued vigorously, but it is irresponsible -- although well-intentioned -- to use annulment or get zikui, mechanisms that may, G-d forbid, greatly increase the proliferation of mamzerut and the transgressions of adultery. The attempted "cure" is worse than the "illness."

A final point : Ultimately the agunah problem will be resolved only when human beings learn to relate to each other with respect and decency even in the painful situation of a divorce. We must educate our children in how to build good, solid committed relationships but, at the same time, they must also learn that there is a right way even in saying "good-bye."

Women in Judaism, Copyright (c) 2000 by Mrs. Leah Kohn and ProjectGenesis, Inc.