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Agunah
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Summary

According to the Jewish law, *halakhab*, a husband has to give a *get*, a bill of divorce to terminate a marriage. This does not always happen, and the woman gets trapped. She becomes an *agunah*. She is neither really married nor divorced and cannot remarry. The present thesis focuses on the *agunah* with a recalcitrant husband, who refuses to give her a *get*.

In Israel, the family law is personal and applied according to every individual's religious belonging. Thus, for the Jewish sector of the population, the *halakhab* is the law of the land, applied regardless of if the individual in question is religious or not. The rabbinical courts have exclusive jurisdiction over all in matters of marriage and divorce. The thesis describes what problems a woman, and especially an *agunah* can encounter in the Israeli divorce process.

The thesis also describes and analyses solutions to the *agunah* problem. Within the framework of the existing system of family law in Israel, the rabbinical courts have the possibility of using far-reaching sanctions against a recalcitrant husband. However, they quite seldom do. A possible way of strengthening the *agunah* can be seen in the development recently started in the civil courts. "Infringement of a woman's personal autonomy" has been recognized as an actionable ground under the Israeli tort law. Another method to counter the *agunah* problem that has proved useful is the prenuptial agreement. However, it is an inducement; its purpose is to put pressure on the recalcitrant husband to give a *get*. In spite of the pressure the husband can refuse to give a *get* within the existing framework of *halakhab*. The thesis therefore moves on to exploring the possibility of a civil, secular, marriage and divorce legislation. The civil marriage would reduce the question of *agunah* to be a problem only for a woman who she sees herself as a subject to religious law. Civil marriage and divorce legislation would put Israel on equal foot with other Western countries

Suggestions outside the framework of Jewish law will however never totally solve the problem of the *agunah*. For observant Jews, the *agunah* question needs a halakhic solution, that seek to solve the problem by finding other ways of terminating a marriage than the *get*, by expanding or reinterpret the halakhic framework. It means that radical changes would have to be made in what is now normative Jewish law. The present thesis describes and analyses several suggested solutions. They are all creative and they all have considerable basis in the *halakhab*. However, the all lack a general support from the halakhic authorities. An important question to ask is who, if anybody has the power to change normative Jewish law today. Who is able to interpret the *halakhab* today, in a way that becomes normative for world Jewry? The answer the thesis gives is that it seems to be the Rabbinat of Israel. Even if it is not guaranteed that an enactment from the Israeli rabbinat would have that authority, it is the only option that exists.

Abbreviations

ACRI	The Association for Civil Rights in Israel
CE	Common Era (“ <i>anno domini</i> ”)
Lit.	Literally
LSI	Laws of the State of Israel
NIS	New Israeli Shekel
R	Rabbi
RCA	The Rabbinical Council of America

1 Introduction

1.1 General introduction

The State of Israel is in many respects a modern, Western state. When it comes to family law however, it has more in common with its traditional Middle Eastern neighbors. Family law is not territorial; it does not apply to every citizen within the country. Rather, the family law is personal and, applied according to the individual's personal status based on every individual's religious belonging. This arrangement gives the religious communities a considerable power over the lives of their adherents. It can lead to a conflict between the in many cases secularized citizen and the religious legal system, whose authority ultimately is based on God. It can be perceived as religious coercion, and many critics point out discriminatory provisions in the bodies of religious law. This is true for the Jewish citizens as well as for the Muslim and Christian citizens of Israel.

In this paper, I will focus on the Jewish sector of society. Within the Jewish sector, there is a critique against the monopoly of Orthodoxy, through the Chief Rabbinate in the interpretation of the family law. The Israeli, Jewish population is quite heterogeneous, movements and groups like the Reform and Conservative Jews criticize that they cannot even perform their own marriages without sanction and registration from the official Israeli Rabbinate.

In the area of marriages and divorces, especially women encounter problems. I intend to look at the case of the plight of the *agunah*, the “anchored” woman (pl. *agunot*), who cannot get out of a marriage that does not function any longer. In Jewish law, *halakhab*, the husband has to give the woman a divorce, by presenting her a *get*, a letter of divorce. This can be problematic, may it be because the husband disappeared, got killed without witnesses, or simply refuses to divorce her. My emphasis will be on the latter case. A woman whose husband refuses to give her a *get* can find herself in a world of legal, physical, psychological and emotional limbo. She is neither married nor divorced and she cannot remarry. Any children she has with another man are considered “bastards” (*mamzerim*) and are outcasts from Jewish society¹.

1.2 The purpose of the study

The purpose of the study is to describe the system of family law and the divorce procedure in Israel. I will look into what problems a woman may encounter, especially in the case her husband refuses to give her a divorce. I will also examine suggested solutions the problem of the *agunah*. I intend to look at solutions that exist and in use today as well as suggested solutions for the future.

¹ For an explanation of the term *mamzer*, see section 2.1.1.

Since the *halakhab* not only is the family law of the State of Israel, but also used by Jewish communities around the world, it is necessary to examine also solutions found to the problem in other parts of the world. Here I look at the United States, because quite a few of the halakhic authorities of today are found there. The United States, and especially the New York State, is also an interesting example because of the legislation that has been passed to help *agunot*. This is a model, which has been followed also by other countries, like Australia.

1.3 An outline of the work

In short, my text can be divided into three parts. It describes Jewish law and how it can be reinterpreted to find solutions to the *agunah* problem (chapters 2, 5 and 6). It also describes the situation in Israel today. This includes the *halakhab* that is applied in the rabbinical courts, but also solutions outside the courts, such as using the civil courts to sue for damages and a possible future civil marriage (chapters 3, 4 and 9). Thirdly, there is also a part about how state legislation and intervention has been used in the United States as an attempt to improve the situation for the *agunah* (chapter 7).

In chapter 2, I will look at the *halakhab*, the Jewish law². I will present the *halakhot*, the Jewish laws pertaining to divorce and the specific case of the *agunah*. The orthodox community around the world uses those sources.³ It is also, as described in chapter 3, the law of the land in Israel in matters of marriage and divorce. However, a majority of the world's Jewry is not orthodox. Therefore I will complement the presentation of Jewish law with an overview what how the *halakhab* has developed in the Conservative and Reform communities.

In chapter 3, I will give a general background to the system of family law in Israel. The Israeli parliament has given the jurisdiction over matters of marriage and divorce to the rabbinical courts, the religious tribunals, which apply Jewish law to the cases. At the same time, the civil courts have parallel jurisdiction to matters ancillary to the divorce. This creates a tension and a ground for using the two court systems to obtain advantages in a divorce process.

In chapter 4, I will describe the divorce process and what problems a woman encounters. We will see how the rabbinical courts apply the *halakhab*. We will

² *Halakhah* is usually translated into "Jewish Law". It includes areas like civil and criminal law, as well as areas relating to ritual food preparation, holiday observance, etcetera, which are not thought of as "law" in a Western discourse where religion is separated from the state. The term *Mishpat Ivri* literally means Jewish Law, and is sometimes used to denote the part of *halakhah* that governs relationships in human society, i.e. what is included in the *corpus juris* of other contemporary legal systems. (Elon 1999, Glossary of terms and abbreviations.) In my work I will use the terms Jewish law and *halakhah* interchangeably.

³ For the orthodox Jews outside the State of Israel, the *halakhah* is not the only Family Law. There is also the secular, civil law of the land. A person who does not want to consider herself as bound by the *halakhah*, can use the civil law for matters of marriage and divorce, just as she can choose not to observe the Sabbath day, or to keep the *kosher* dietary laws.

see how there are problems, for instance husbands blackmailing their wives before actually granting them the divorce by signing the bill of divorce, the *get*. I will also depict how the situation of the *agunah*, is (or is not) solved in Israel today. Then I will move on to study how the civil courts have been used to put pressure on the recalcitrant husband, by suits for damages. I will also look at the use of prenuptial agreements, a preventive measure that is becoming more common among religious couples in Israel today.

The prenuptial agreement is a measure to reduce the *agunah* problem. It puts economical pressure on the husband to make him deliver the *get*. The prenuptial agreement is useful also outside Israel. Since it is to its nature a contractual agreement, it does not need the sanction of any state but relies on the civil legal system for its enforcement. In chapter 5 I will look at some different types of prenuptial agreements, and see if they help the *agunah* and if the halakhic authorities have accepted them.

In chapter 6, I will have a look at the different solutions to the *agunah* problem, suggested within the halakhic framework. Unlike the prenuptial agreement, those attempts try to solve the problem once and for all, by circumventing the requirement for the husband to give the *get* of his free will. I will look at proposals presented by leading modern Jewish scholars, who suggested possible changes, developments and alternative interpretations of the *halakhab*. Solutions within the *halakhab* could of course be applied not only in Israel, but also within Jewish communities around the world. I will base this chapter on material from progressive forces within modern Orthodox Judaism⁴. Prominent scholars that have advanced solutions are Emanuel Rackman, Irwin Haut and Shlomo Riskin. However, also more traditional orthodox authorities like R. Moshe Feinstein has dealt with the *agunah* problem in a creative way.

Chapter 7 is about *halakhab* in a non-Jewish surrounding, outside Israel. New York State has created two special “*get* laws” with the aim to resolve *agunah* cases. This is a state intervention in a religious divorce. I want to see how the experiences from the United States can be used to improve the situation for the *agunah* in Israel.

Finally, before my concluding analysis, I want to discuss some other future solutions that could ease the plight of the *agunot* specifically in Israel. They are outside the framework of Jewish law. A suggestion that has been made by, among others, the Association for Civil Rights in Israel (ACRI) is to create a civil law of marriages and divorce. There is also other civil legislation advocated by organizations dealing with the *agunah*, which could improve the situation of the *agunah*, without totally abolishing the power of the rabbinical courts.

⁴ Modern orthodoxy is a stream within Orthodox Judaism that strives to show that Torah “can cope with modernity”. For a definition of modern orthodoxy from inside, from one of its better-known rabbis, see Rackman 1995:63-64. The quote is taken from there.

1.4 Methodology and material

My study is a case study of *agunot* in Israel. To the extent that it is necessary it touches on *agunot* outside Israel as well. It is not based on any particular theory, but aims more to describe a problematic question in Israeli law, and see what solutions could be found.

I will critically analyze and evaluate some of the major modern proposals to the *agunah* problem. I am not a scholar in *halakhab*, so I cannot evaluate the suggestions from a halakhic point of view. Instead, I want to use two other criteria:

1. If the suggested solution offers relief to the *agunah*.
2. If the method has been accepted by contemporary halakhic authorities as halakhically valid.

Since this is not a work of *halakhab*, my primary halakhic sources have been few. Instead, I have chosen to look at proposals that have been discussed in the orthodox world for many years. The sources, both of suggestions and major criticism, are in many cases articles from American orthodox magazines, such as "Tradition". I have also used books by orthodox rabbis who devoted a lot of their writing to the *agunah* problem, such as Michael Broyde and J. David Bleich. Very little of this material can be considered "neutral" or merely descriptive. They all aim to advocate (or discourage) the use of a particular method to solve the *agunah* problem. However, this is very much the aim of the paper, to compare and analyze those different opinions. When it comes to evaluating to which extent the suggested methods actually help the *agunah* I have used material from Israeli organizations working to help the *agunah*, such as *Yad L'Isha*, *Mavoi Satum* and the International Women's Human Rights Watch.

Since the discussion about solutions within the framework of *halakhab* is of interest both in Israel and for orthodox Jews elsewhere in the world, a lot of material has been available in English. The sources of information about Israel have also to a large extent been in English. In addition to volumes introducing the Israeli legal system like *Introduction to the Law of Israel*⁵, the Israel Law Review (published in English by the Hebrew University) has been of good help. However, some material I have used, like the proposal to a civil Israeli marriage and divorce law, has been in Hebrew.⁶

I would have wanted to read and use more court cases, and other material, from and about the rabbinical courts. Unfortunately, that has not been available to me. The court cases that are published are only published in Hebrew. To go through that is beyond the format of this paper. Statistics are hardly available at all.

The conflict between the individual and the religious law can very fruitfully be analyzed in terms of Human Rights. This is true also about the *agunah*

⁵ Shapira and DeWitt-Arar 1995.

⁶ ACRI 2001.

problem.⁷ However, Human Rights in a formal sense are outside the scope of my paper. When it comes to Jewish law, Human Rights are not a concept. By that I do not mean that Jewish law would be opposed to Human Rights. Rather, they are an external concern that does not particularly matter, since the *halakhab* is guided by its own internal priorities and concerns. Modern parameters for what constitutes good legislation do not necessarily apply on the religious law. When it comes to the secular Israeli law, Human Rights are very much a concept. The High Court of Justice often refers to general legal principles and Human Rights in their review of the courts. However, the area of marriage and divorce is the exclusive domain of the rabbinical courts. Israel made reservations to its ratification of the International Covenant on Civil and Political Rights, where it reserved the right to apply the religious law in matters of personal status, even if this law is inconsistent with the covenant.⁸ It is not even clear that the Israeli Basic Laws guaranteeing basic civil rights apply on matters of marriage and divorce.⁹ Thus marriage and divorce are matters strictly kept aside for the religious law. However, the criticism is of course very much formulated in a Human Rights discourse.

1.5 Definition of the term *agunah*

1.5.1 Definitions

An *agunah* (lit. tied) is a married woman who for whatsoever reason is separated from her husband and cannot remarry, because she cannot obtain a divorce from him. This might be because it is unknown whether he is still alive, where he is, or because he refuses to deliver a *get*.¹⁰

Traditionally, the *agunah* was a Jewish woman whose husband had disappeared, whose whereabouts were unknown and who might even be dead, but without firm evidence that this was the case. Today, it is common to use the term *agunah* also for a *mesurevet get* (pl. *mesuravot get*), a Jewish women whose husband refuses to give a *get*, a bill of divorce.¹¹ Today, the problem with the recalcitrant husband is more frequent than the problem with the missing husband.¹²

⁷ See for instance Shenhav in *Justice* 1999:28-31.

⁸ Lapidoth and Ahimeir 1999:22.

⁹ Elon et al. 1999:415.

¹⁰ Ben-Zion (Benno) Schereschewsky: *Agunah* in *Encyclopedia Judeica* and Biale 1984:102, 113. The term *agunah* is also applied to a *yevamah* if she cannot obtain either marriage, or *halizah* from the *levir*, or if it is unknown whether he is still alive. (A *yevamah* is “a levirate widow”; the widow of a man who died childless and was survived by a brother. The widow is then bound to the brother-in-law, who has to either marry her or release her through a ceremony called *halizah*.)

¹¹ Lichtman: January 7, 2000.

¹² The rabbinical courts claim that there are only about 200 *mesuravot get* in Israel. They also claim that it is not all the time the same 200 women. Some cases are settled and new cases are added in a dynamic system. They do not know of any women who waited 10 years or more. Activists in the field dispute these figures, and claim them to be higher, but since the rabbinical courts do not keep statistics concerning *mesuravot get*, there is not any way to know the exact figures. *Mavoi Satum* notes that in 1997 alone, nearly 700 women were sent to the High Rabbinical Court in Jerusalem. This court was specially created for women

Yad L'Isba's definition of an *agunah* is any woman who is living apart from her husband for a significant period of time and whose husband refuses to give her a *get*.¹³ Most authors apply the term *agunah* to a woman who wants to get out of marriage, but cannot, regardless of the reason.¹⁴ However, the rabbinical courts have the opinion that a *mesurevet get* is woman who, according to the rabbinical courts is entitled to a *get*, but does not receive one. Many women who consider themselves as *agunot* or *mesuravot get* in Israel today, are women who feel that their marriage *de facto* ended, and who want a *de jure* termination to it as well. The understanding of Jewish law found in the rabbinical courts does not even agree to label these women as *agunot* or *mesuravot get*, and even less to actually give them a divorce.¹⁵ My work will be focused on the *mesurevet get* and the problem with the recalcitrant husband. I will use the terms *agunah* and *mesurevet get* interchangeably.

Behind the usage of the terms, there is a bigger, ideological debate of the right of the woman to exit a marriage. Is she allowed to initiate a divorce at all? Can she be divorced against her husband's will only of certain halakhic grounds or faults (like her husband's impotence) are at hand? Or should the woman maybe have the right to be divorced just because she is tired of her husband and maybe wants to marry somebody else? Those questions are also indicators of a power struggle. Who is to determine when a woman's marriage is over? Should there be e.g. financial sanctions that could be implemented by a civil court if the husband does not agree to give a *get*? Or should only the *bet din*¹⁶ be allowed to discretionary try if the *agunah* is entitled to be released? We will get back to those questions in the analyses. In general, organizations and lawyers working to free *agunot* tend to advocate solutions closer to a "no-fault" method, where the power of the *batei din* is circumvented.¹⁷ Orthodox rabbis and halakhic scholars, on the other hand are more careful, and advocate solutions that retain the discretionary power of the *batei din*.¹⁸

Michael Broyde has created terminology for the different models of right to exit from a marriage. He calls marriages with unilateral exit rights "partnerships". When mutual consent is required, he refers to it as a "domestic cooperation".¹⁹ The later model can have exceptions, in the form of fault in one of the parties, which allows for divorce without mutual consent. Another factor is if the role of the *bet din* is merely procedural, or if it involves substantive discretion.²⁰

whose cases were open for more than two years in the regional rabbinical courts and had not been resolved. Lichtman, January 7, 2000.

¹³ Lichtman, January 7, 2000.

¹⁴ See for instance Bleich 1977:154.

¹⁵ Broyde 2001:8.

¹⁶ *Bet din*, pl. *batei din*, is Hebrew for a rabbinical court.

¹⁷ See for instance Weiss 1999.

¹⁸ See for instance Malinowitz 1997:23. One the major flaws R. Malinowitz finds in the 1992 "New York *Get* Law" is that: "the law helps women obtaining a *Get* when there has not been any finding whatsoever by any halakhic body that a *Get* is either warranted or appropriate".

¹⁹ Broyde 2001:16.

²⁰ Broyde 2001:28.

1.5.2. *Agunot* – the missing husband

The case of the husband who disappeared and whose whereabouts are unknown is not very common today. Modern technology certainly did make it easier to track down *involuntarily* disappeared people all over the earth. Even if husbands who *voluntarily* fled abroad to avoid giving a *get* are included, there are only 15 women in this category of *agunot* in Israel, according to the Rabbinate of Israel.²¹

There is also a problem with a man who is missing and *presumed* dead. In Jewish law, there is not any presumption of death from absence of the husband after a certain number of years. Therefore, a woman whose husband goes missing remains married to him forever, as she cannot be presumed to be a widow. There has to be witnesses and their testimony has to include direct evidence of death, for the man to be declared dead. However, the *halakhab* has developed certain relaxations in the rules of evidence in the case of a missing husband who is presumed to be dead. The requirements concerning the witnesses are less strict than in other cases. One witness is enough. The testimonies of a woman, a minor or words heard in passing in the conversation of non-Jews are all valid. So is the testimony of the wife herself, unless it is known that their relationship was very bad, or if there was a situation of war.²²

The requirement demanding direct evidence remains firm. This has often become a problem in cases of presumed death under circumstances of mass killings, without any survivors to bear witness. The prime example is of course the Holocaust. Also the disaster after the terror attack on the World Trade Center, September 11, 2001 gave rise to this kind of problems. Ten cases of missing men presumed dead were handled by the Union of Orthodox Rabbis. They examined if the evidence was enough to declare their wives widows. In an other case, a Hasidic²³ court ruled that a man who managed to make a number of cell phone calls after the plane struck the tower in which he was working, was to be considered dead. They said that it was proved by the phone calls that the man was present at a place where nobody could have survived. Rabbi Shmuel Vozner, a leading halakhic judge of Bnei Brak in Israel, has also ruled that DNA could be used as evidence for the purposes of identifying a dead person.²⁴

I will not look further in to the case of the *agunah* with the missing husband. However, I think it is interesting to see how Jewish law developed certain leniencies in this case to prevent the woman from being chained to a dead marriage. The relaxation in the rules of evidence is such an example.

²¹ Lichtman, January 7, 2000.

²² Biale 1984:104-108.

²³ Hasidism is a movement within Judaism, and one branch of what is often referred to as “ultra-orthodoxy”.

²⁴ Ha-Aretz , Jan. 11 2002.

2 *Halakhah* - the Jewish Law

2.1 Basic provisions of marriage and divorce

2.1.1 Marriage

To fully understand the problems involved in a divorce in Jewish law, we first need to look briefly into the meaning of marriage. Marriage in Judaism has a contractual foundation. The rabbi who performs the ceremony is not involved in the actual creation of the marriage, but merely supervises so that all the legal formalities are complied with.

On a Torah level, from the written text of the Bible (or what the rabbis of the Talmud²⁵ could interpret from the written Bible) a marriage can be entered into in three ways: with money, with a deed or with intercourse.²⁶ The rabbis of the Talmud later considered the method of marriage by intercourse as not desirable. It is not the way a marriage should be created, but if it is created that way, *ex post facto*, it remains valid, because the rabbis cannot expressively outlaw a practice mandated by the written Torah.

One of the halakhic terms for marriage is *kiddushin*, consecration. It refers to the consecration of the bride to her husband. In concrete terms that means a prohibition of sexual relations for the woman with any other male than her husband.²⁷ Sexual relations between a married woman and Jewish man outside marriage, is the core of the concept of adultery in Jewish law. This is manifested in the concept of *mamzerim*, usually translated as “bastards”. However, it is a narrower concept, and it refers only to a child born out of a relation between a married Jewish woman and a Jewish man, other than her husband. The status, or rather the stigma, of being a *mamzer* has serious consequences. A *mamzer* is not allowed to marry any other Jew than another *mamzer*²⁸, and is thus a kind of outcast within the Jewish nation. The fear of *mamzerim* is what makes the rabbis cautious about women and divorce, because if the divorce is not enacted in a proper way, the woman is not really divorced. A relation with another man then means adultery and the offspring is to be considered as *mamzerim*. This, as we shall see, keeps the rabbis from pressuring the husband to set his wife free, and is a major contributing factor to why the concept of *agunah* at all exists.

²⁵ The *Talmud* is a compilation of *Mishna*, the oral tradition from the *Tannaitic* period, codified in 200 C.E. and the *Gemarah*, the rabbinical commentary of the *Mishna*, from the *Amoraic* period, 220-500 C.E.

²⁶ *Mishna Kiddushin 1:1*.

²⁷ For men, polygamy is permitted both under Biblical and Talmudic law, and prohibited only by a *takkanah* by Rabbenu Gershom in the eleventh century.

²⁸ Deuteronomy 23:3.

2.1.2 Basic provisions of divorce

A marriage, according to the *halakhab*, is terminated in two ways: by the recorded death of a spouse, or by the giving (and acceptance) of a *get*. Despite the contractual foundation, mutual consent was originally not required for a divorce, but legislated in a *takanah*, enactment, by Rabbenu Gershom in the eleventh century. Technically under Jewish law, the rabbinical court does not need to be involved in the divorce proceedings, unless it is necessary to compel one of the parties to participate. However, the complexities of the formal requirements of the *get* led to the custom of rabbinical supervision.

The principal outline of the divorce procedure is quite clear already from the Torah. Deuteronomy 24:1 describes how a man divorces his wife.

She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her and sends her away from his house. (Deuteronomy 24:1)

The initiative on the Torah level is all his. However, there has to be grounds for a divorce. He has to find something "obnoxious" about her. The Hebrew term is *ervat davar*²⁹, the meaning of which is later discussed by the rabbis of the Talmud (below). If the husband finds something obnoxious with her, he writes to her. In the Torah it is called a *sefer keritut* (book of separation) and later in rabbinic writings, it is called a *get*. The husband then gives her the *get* and sends her away.

In the Talmud, the rabbis disagreed on the interpretation of the term *ervat davar*. The rabbi Shammai interprets it in a literal way, involving physical nakedness. Divorce is only appropriate in the case of adultery of the wife. The rabbis Hillel and Akiva interpret it more figuratively. Hillel held that even minimal faults of the wife are grounds for divorce, while Akiva had the view that divorce is permitted even in the complete absence of fault on the part of the wife, it is enough that he found somebody more beautiful. As in most disputes, Hillel's opinion is followed today. What constitutes a minimal fault is decided according to the subjective discretion of the husband.³⁰

On a Torah level, the husband has the right to divorce without his wife's consent, except in two cases. Deuteronomy 22:28-29 states that if an unmarried woman is raped, the rapist has to marry her, and he is prohibited from divorcing her. Likewise, Deuteronomy 22:13-19 states that a groom, who falsely accuses his bride of adultery after their betrothal, may never divorce her. The rabbis increased the number of cases in which a prohibition of divorce applies.³¹ It is not clear if the woman at all had any right to divorce on a Torah level. If so, it was restricted to cases of hard fault.³²

²⁹ Literally in Hebrew it means something involving nakedness.

³⁰ Amram 1968: 32-33, Biale 1984:73-79.

³¹ Amram 1968:46.

³² Broyde 2001:17.

2.1.3 *Ketubah*

The *ketubah* is essentially a prenuptial agreement, presented by the husband to the wife at the wedding. In the *ketubah*, the husband accepts certain financial obligations to his wife, during the marriage, but also more importantly; in the case of a divorce. Without the *ketubah*, the couple is not allowed to continue living together.³³

The *ketubah* is by the majority opinion considered provided by a rabbinic decree. It is a first step towards increased protection of the woman, and less unilateral power for the man. It made divorce less easy for the husband, by obligating him financially to her, but it provides the wife with a certain protection and safety after a divorce as well. The *ketubah* was only paid to her if the divorce was not considered her “fault”. If the wife was considered a *moredet* (“rebellious wife”, who refused sexual relations with her husband), or insisted on divorce against her husband’s will, she would lose her right to protection of the *ketubah*.³⁴

2.1.4 Her grounds for divorce

Already in the Talmudic period it was interpreted that if the husband refuses to give the wife a *get*, she can appeal to the court that, in certain cases, can rule that she has grounds for divorce. The husband is then obligated to grant her the divorce. It is still required that the man issues the *get* out of his own will. Objective factors have to support the wife’s claim. The *Mishna* states several grounds for divorce, and later authorities added to them.³⁵ In some of those instances the woman would receive the full alimony stated in the *ketubah*, while other times she lost it.³⁶

1. If the husband becomes afflicted with a loathsome **disease** after the marriage or if the disease was unknown before the marriage it is a ground for divorce. Also skin diseases, major blemishes and bad odor from his nose were grounds for divorce. The husband’s **occupation** could be a ground for divorce as well, if his occupation was to gather the dung of dogs, to forge copper or if he was a tanner. There was even a discussion among the rabbis about if she could change her mind. If she agreed to these conditions before the marriage, could she change her mind if she comes to see that she is unable to stand them? The majority of the sages held that she must accept these conditions even if she cannot stand them, since she originally accepted them. The only exception is the skin disease.³⁷
2. In the case of **impotence** of the husband it is noteworthy that the burden of evidence is on the husband, to contest her allegations. If he cannot, then she has a right to divorce. This is also true if he is sterile.

³³ Riskin 1989:18.

³⁴ Other offenses leading to the loss of the *ketubah* includes giving the husband food from which there has not been taken any tithe, and having sexual relations during the period when the wife is considered ritually unclean due to menstruation. Amram 1968:123.

³⁵ *Talmud Bavli, Ketubot 77a and Shulkhan Arukh Even ha Ezer 154.*

³⁶ Breitowitz 1993:42.

³⁷ Riskin 1989: 9 ff.

3. The woman has a right to **sexual satisfaction**. The rabbis even instituted legislation regarding the minimum number of times for intercourse, depending on the husband's occupation. If this right is denied her, she can go to the *bet din* and exercise her right to divorce.
4. If he does not support her.
5. If he forces her to violate Jewish law.
6. Even if a Jewish man became an **apostate**, the marriage was considered binding. The wife still needs a *get* to be divorced with a *get*. However, his apostasy was deemed a sufficient ground for divorce.³⁸
7. The medieval commentators added additional objective grounds for divorce. **Physical abuse** is one. If the husband refuses to obey the order of the court to stop beating his wife, he can be forced to divorce her. He can also be forced to divorce her if he visits **prostitutes**.

If the court ruled that she should be given the *get*, they could take measures to enforce this decision as well. There were different opinions as to how far such measures could go. Some authorities went as far as corporal punishment, while others were more cautious. Some rabbis made a distinction between *kefir* (we force), cases in which the recalcitrant husband could be forced by physical threats and *yotzee* (he shall or must) cases in which no other measures of sanction than maybe public proclamation of disobedience, or a trade boycott against him could be used.³⁹

2.2 Development towards equality

As we have seen, the basic provisions for divorce are, from a gender perspective, quite unequal. From the woman's point of view, the provisions are problematic in two ways. On the one hand, her position in the marriage is quite insecure, since the man easily can divorce her, although the *ketubah* is an attempt to protect the woman from being divorced against her will. She, on the other hand, cannot easily get out of a marriage that has failed. Several attempts were made to solve this inequality. They can be divided into two categories. Attempts in the first category strived to make it easier for the wife to obtain divorce, while attempts in the second category made it harder for the man to divorce his wife, thus giving the wife more security in the marriage. In Broyde's terminology, the attempts in the first category strived towards unilateral exit rights and a "partnership". The attempts in the second category aimed at requiring mutual consent and a "domestic cooperation".⁴⁰ I will account for both categories, although I think for the purpose of solving the *agunah* problem of today, the former is more interesting.

2.2.1 The *moredet* and a woman's right to divorce without grounds

As we have seen above, the *Mishna* gave the wife the right to take initiative to a divorce. If she could prove certain objective physical or occupational

³⁸ Amram 1968:75.

³⁹ Breitowitz 1993:42-43.

⁴⁰ Broyde 2001:16. See chapter 1.5.1.

problems, the court could force the husband to divorce her. But what if she did not have legally justifiable grounds, if she “only” disliked him and wanted out of the marriage, if she had a subjective claim that he was repulsive to her.

The *halakbab* has dealt with this question in the context of the question of the *moredet*. The *moredet* is a “rebellious” wife who refuses sexual relations with her husband in order to gain something she wants from him, within the marriage. The *moredet* in the original sense of the word does not want a divorce.⁴¹ She is punished by subtraction from her *ketubah*, until the entire *ketubah* is gone, after a system of private and public warnings.⁴² If she has not changed her mind, the husband has to divorce her the moment the *ketubah* is consumed, since a couple is prohibited of living together without a *ketubah*.⁴³

The tradition recorded in the *Jerusalem Talmud*⁴⁴ did not consider a woman who wanted a divorce without “objective reasons” a *moredet*, but solved the problem by using a stipulation in the marriage contract, ensuring either party a divorce imposed by the court, if one party found the other repulsive. Since the divorce still has to be given by the husband, the Talmud provides that he is struck by an agent of the court until he declares that this is his will, in case he would refuse to live up to the stipulations in the marriage contract.⁴⁵ In the *Cairo Genizah*⁴⁶ two *ketubot* were found, containing stipulations regarding divorce, similar to what was stated in the Jerusalem Talmud.⁴⁷ Another passage in the Jerusalem Talmud states that she in this case of divorce is allowed to take half of the alimony she was granted in the *ketubah*, although she actually is the one who initiated the divorce.⁴⁸

The *Babylonian Talmud* discusses the motives of a wife’s refusal to engage in sexual relations in *Ketubot* 63b.⁴⁹

What type of woman is in the category of *moredet*? Amemar says, it is the woman who says “I want to remain married, but I am rebelling to spite my husband”. However if she says “he is repulsive to me” we do not force her. Mar Zutra says we force her. (*Ketubot* 63b)

The passage discusses if a woman who wants a divorce without “objective reasons” is to be considered a *moredet*. The actual meaning and implications of this passage are debated. This passage (and also some others on the same topic) can be interpreted in different ways. One way is to give her a divorce -

⁴¹ Riskin 1989:12.

⁴² Amram 1968:124, Riskin 1989:16.

⁴³ Riskin 1989:18.

⁴⁴ The Talmudic commentary on the *Mishna* was done in two places, in Palestine and in Babylonia at approximately the same time. They are parallel developments of the same material. They differ in regards of what *Mishna* they choose to comment. The Babylonian Talmud for instance, does not comment on laws only relevant to the land of Israel to the extent the Jerusalem Talmud does.

⁴⁵ Riskin 1989:29-30.

⁴⁶ A *genizah* is a deposit of discarded religious documents that cannot be disposed of because of what it contains, e.g. the name of the Deity. The *genizah* in Cairo contained 300.000 documents, primarily from the tenth to the thirteenth century.

⁴⁷ Riskin 1989:79.

⁴⁸ Riskin 1989: 31.

⁴⁹ Haut 1983:50, Riskin 1989:50.

with or without a waiting period, with or without her alimony, even if the husband is reluctant. However the passages can also be interpreted as if she is just another version of the *moredet*, who is punished for her rebellion. As we will see below, Rabbenu Tam later chose the stricter approach, which has been dominant into our days. Shlomo Riskin⁵⁰ means that Amemar's statement leaves the door open for a liberal interpretation of the Talmudic law, an interpretation that forces the husband to give her an immediate divorce, and even her *ketubah*.⁵¹

The *Gaonim*⁵² chose the more lenient approach. In a responsum⁵³ from ca. 760 C.E., Rav Yehudai Gaon writes the *Gemarab* says that when a woman wants a divorce against the will of her husband, she has to wait for twelve months, but that this was not the custom at the time of his writing. "We obligate the husband to divorce her, and if he does not do so, we place him under the ban until he does it" However the Yehuda Gaon does keep a waiting period of a week or two, hoping that the wife would change her mind.⁵⁴ Thus Yehudai Gaon must have interpreted the law of the Babylonian Talmud as allowing a woman divorce against the will of the husband although he recommends an even more lenient policy. Yehudai Gaon does not mention the *ketubah*.

Other *Gaonim*, such as the author of the *Halakhot Gedolot*, and the Natronai Gaon, confirm that she is granted an immediate divorce and elaborates on what she is allowed to keep of the dowry. The Amram Gaon stated that she is also entitled to her basic alimony provided for her in the *ketubah*.⁵⁵ The Sherira Gaon confirmed all what the previously mentioned *Gaonim* had enacted. He also clarified that the wife in addition to the dowry and the basic alimony of the *ketubah*, the wife also was entitled to property she brought into the marriage and for which her husband had assumed responsibility.⁵⁶ There are texts that indicate that some *Gaonim* held a different view; that the wife who wants a divorce without having grounds, has to forfeit most of her monetary rights, including parts of her dowry. Riskin holds, however, that this was a minority view.⁵⁷

This series of enactments by the *Gaonim*, is known as the *dina de-metiva* (the law of the academies). In those enactments, the authority of the courts to compel the husband to divorce his wife upon the wife's subjective claim that he was repulsive to her was definitely confirmed. The *Gaonim* eliminated the twelve-

⁵⁰ Shlomo Riskin is the rabbi of Efrat. He wrote a whole book, *Women and Jewish Divorce*, about the *moredet*, and how the *halakhah* should re-institute the decrees of the *Gaonim* today. Although this is not what he formally recommends, it is very much what his research points towards.

⁵¹ Riskin 1989:42.

⁵² The *Gaonim* were the heads of the Babylonian Academies and the authoritative interpreters of the Talmudic law, 600-1000 C.E.

⁵³ *Responsum*, pl. *responsa*. (In Hebrew *tshuvah*, pl. *tshuvot*.) *Responsa* is a written answer given by a halakhic decisor on a specific question in a specific case.

⁵⁴ Riskin 1989: 48.

⁵⁵ Riskin 1989:54.

⁵⁶ Riskin 1989: 56-60, Haut 1983:51.

⁵⁷ Riskin 1989:62.

month waiting period, and gave the woman the right to keep her basic alimony.

The practical outcome was divorce on demand by either party, i.e. either husband or wife could cause the termination of the marriage by obtaining a divorce against the will of the other. Actually, the woman had a slightly better position than the man. If a man claimed that his wife was repulsive to him, he could divorce her only if she was given the money provided for her in the *ketubah*. If she on the other hand found her husband repulsive, the court could force the husband into granting her a divorce. She did not need to pay him anything; on the contrary she was entitled to the basic provisions in the *ketubah*! The court enforced the woman's right to leave the marriage, either by applying sanctions on the husband to make deliver the *get*, or by annulling the marriage.⁵⁸

For reasons that are not totally clear, the enactments of the *Gaonim* fell into disuse. For their successors, the *Rishonim*⁵⁹ there were two issues to be discussed regarding the validity of the rules from the enactments of the *Gaonim*:

1. Was the coerced bill of divorce Talmudic or Gaonic? If it was Talmudic then it still had to be accepted, even if the Gaonic decrees had expired.
2. If it was Gaonic, then the validity on a coerced bill of divorce depended on the acceptance of the scholar of the right of the *Gaonim* to legislate in this area.

Maimonides held that the Gaonic decrees in general were no longer in effect, because they did not spread to a majority of the Jewish people. Nevertheless, Maimonides maintained that a woman still has a right to an immediate divorce with the help of the rabbis, with physical pressure on the husband if needed. This was so because Maimonides held that the provision for a coerced divorce was of Talmudic, and not Gaonic origin, based on the statement of Amemar in the Babylonian Talmud.⁶⁰ This right to a coerced divorce does not however include a right to the *ketubah*. Maimonides therefore held that a woman who sues for divorce on account of aversion to her husband loses her *ketubah*. It is interesting to note that with Maimonides opinion, the positions of the husband and the wife are more equal than with the enactments of the *Gaonim*. He can divorce her against her will, but then he has to pay her all the alimony provided for her in the *ketubah*. She can also divorce him against his will, but then she does not any longer have any right to anything in the *ketubah*.

The interpretation of Maimonides that marriage is a “partnership” (in Broyde's terms) with the right to a no-fault divorce for both parties remained the normative *halakbab* of Yemen.⁶¹ The scholars of Ashkenaz⁶² held different

⁵⁸ Broyde 2001:19.

⁵⁹ The *Rishonim* were the early commentators on the Talmud, following the *Gaonim*, from approximately 1000 C.E.

⁶⁰ Maimonides: *Mishneh Torah, Hilkhoh Ishut 14:8-14*.

⁶¹ Broyde 2001:20.

⁶² Ashkenaz is the European Jewry.

opinions. *Nahmanides* believed that the *Gaonim* introduced the coerced bill of divorce, but accepts the validity of the Gaonic decrees.⁶³ *Ibn Aderet* accepted the Gaonic legislative authority in general, but states that because of the immoral conditions of his generation, this particular decree was canceled. *Rashba* forbade the coercion of a husband to grant a divorce, because he insisted that the Talmud never mentioned such a thing.⁶⁴

The most influential scholar came to be Rabbenu Tam. He held that the Talmud never legislated coerced divorce, and that the *Gaonim* did not have the right to institute a practice of coerced divorce. The practical result of Rabbenu Tam's interpretation of the Talmudic precedent was that Jewish courts did not divorce the wife on the basis of her claiming: "He is repulsive to me". Apparently once Rabbenu Tam raised an objection to the imposed divorce, few authorities dared to oppose him.⁶⁵ This became the normative *halakhab* for Ashkenazic Jews. The husband could divorce the wife "on-demand", with payment of the *ketubah*. For the women, the situation was like it had been before, only if certain objective physical or occupational problems were proven, the court could force the husband to divorce the wife.

The *Shulkhan Arukh*⁶⁶ recognizes that there is a coerced divorce, but only if the wife has an *amatla*, "reasonable basis" for her claim. Examples of such claims are

"if she says that he does not follow a proper path, or that he squanders money, etc. – then we judge her according to the law which the Gaonim decreed." (*Shulkhan Arukh, Even ha-Ezer* 77:2)

Also if she can show that she was deceived into marrying him, he can be forced to give her a divorce.⁶⁷ If she is granted divorce, she is allowed to take her dowry. This is the normative *halakhab* for the Sephardic⁶⁸ Jews.

2.2.2 Rabbenu Gershom and mutual consent

In Germany during the eleventh century, another enactment, commonly known as the *herem*, ban of *Rabbenu Gershom of Mainz*, also accomplished increased equality, but here it was by removing the right of the husband to divorce his wife against her will. Rabbenu Gershom ruled that the wife's consent is necessary, unless she has transgressed the Torah. If he nevertheless divorced her against her will, his penalty was excommunication. The practical outcome was that divorce became a truly contractual agreement, and that

⁶³ Riskin 1989:111-113.

⁶⁴ Riskin 1989:120.

⁶⁵ Riskin 1989:93-108.

⁶⁶ The *Shulkhan Arukh* ("The set table") by Rav Yosef Karo 1488-1575, is a codification of the normative *halakhah*. Although Karo was Sephardic authority it is normative also for Ashkenazic Jews, because R. Moshe Isserles added Ashkenazic comments, and the *Shulkhan Arukh* thus became the accepted normative practice of *halakhah* for both Sephardic and Ashkenazic Jewry.

⁶⁷ Karo: *Shulkhan Arukh, Even ha-Ezer* 77:2. Translation in Riskin 1989:130.

⁶⁸ The Sephardic Jews stem from Spain, from which they were expelled in 1492. Thereafter they spread to mainly the countries of the Middle East.

mutual consent was required.⁶⁹ As much as this created equality, it also limited the possibility of any divorce at all. Rabbenu Gershom decreed against polygamy as well.

Rabbenu Gershom's decree is a remarkable, since it actually prohibits something allowed in the Torah. It is an example of the power the Rabbis actually can have. The decrees were accepted as law by a self-constituted council composed of Jews from many countries, and it became normative *halakhab* for the Ashkenazic Jews.

The *Shulkhan Arukh* does not mention the need for the woman to accept the *get*, and it has reservations to the ban on polygamy. Therefore, the decrees of Rabbenu Gershom are not considered normative *halakhab* for the Sephardic Jews. However, the Sephardic Jews did develop a tradition to include the two bans of Rabbenu Gershom in a prenuptial agreement. So even if the Sephardic Jews do not accept the decrees of Rabbenu Gershom, at least they did accept the underlying idea.⁷⁰

Maimonides does not mention the decrees either⁷¹, which means that the Yemenite Jews, who go by Maimonides, did not think it necessary for the woman to accept the *get*. They accepted polygamy as well. However, the Chief Rabbinate of Israel enacted decrees in 1950, making Rabbenu Gershom's decrees the normative *halakhab* for all Jews.⁷² Some Sephardic authorities, like the former chief rabbi of Israel, Ovadia Yosef, still calls for the Sephardic community to follow their own tradition.⁷³

2.2.3 Is there a male *agunah*?

According to Rabbenu Gershom, the woman's consent is necessary. She needs to accept the *get*, just as the husband has to deliver it for a divorce to be valid. If she does not accept the *get*, the husband can go to the *bet din*. If grounds for divorce exist the *bet din* can order a woman to accept the *get*, just as they can order a man to deliver a *get*. The *bet din* may then decide that the grounds are strong enough, for the wife to be compelled, and maybe even sanctioned if she does not follow the *bet din*'s decision. The *halakhab* is not uniform regarding what is considered grounds for a husband to receive a divorce against his wife's will. However, they are more or less the same as when a wife can ask the court to order a divorce; for example lack of fulfillment of spousal obligations or infertility.⁷⁴

In cases where the wife refuses, before or after the *bet din* ordered her to accept the *get*, the husband also has another a legal possibility, if he can show grounds

⁶⁹ It is worth noting that Rabbenu Gershom himself accepted the gaonic decree. Thus, his position seems to have given women a *better* position than men, for they could ask for a divorce without the husband's consent, but they could not themselves be divorced against their will! Haut 1983:55.

⁷⁰ Eliash 1983:373.

⁷¹ Amram 1968:52-53.

⁷² Elon 1994:833.

⁷³ Eliash 1983:68.

⁷⁴ *Shulkhan Arukh, Even ha Ezer* chapters 66-154. Malinowitz 1994:9.

for a divorce. The husband can divorce the wife against her will, if the ban of Rabbenu Gershom is circumvented.⁷⁵ However, this requires the permission of a hundred rabbis, *heter me'ab rabbanim*. That permission will suspend the ban for the husband, making it possible to take another wife. He is then required to deposit a *get* for his wife with the *bet din*, so it is available for her when she chooses to accept it.⁷⁶

He may also try to obtain a *get zikui*.⁷⁷ *Get zikui* can be translated as “constructive agency”. The halakhic principle behind it is that if a certain thing is thought to be to the unmitigated benefit of somebody, this benefit may be imposed on this individual, even without her informed consent. In the area of divorce, the application of the principle would be for the *bet din* to issue or accept a *get* in the place of the husband or wife, because this can be said to be an unmitigated benefit for the husband/wife. A *get zikui* could be used against a woman who refuses to accept her husband’s *get*. A court might accept the *get* on her behalf, since it could be considered more advantageous for her to be able to remarry, lest she might commit adultery. Also in this case the husband deposits a *get* with the *bet din*, available for her. He is then free to remarry.⁷⁸

The husband can also commit bigamy. The explanation for this is that the prohibition of bigamy after all only is rabbinic. On a Torah level, a bigamous marriage is still valid. The rabbis did not have the power to invalidate something valid in the Torah, even if they could circumvent the practice, and punish it with excommunication. Even if excommunication might be difficult for a practicing, observant Jew, it is not very deterring for a totally secular person. It is not as for a woman, whose children will be stigmatized as *mamzerim*.

To sum up, the inequality for between a man and a woman with a recalcitrant spouse is twofold. Firstly, if the husband has halakhically valid grounds, he has the chance of receiving a permission to remarry. He can receive such permission even if the wife did not accept the *get* after warnings, compelling orders and sanctions from the *bet din*. This possibility does not exist for a woman. If the husband refuses to issue the *get*, in spite of sanctions from the *bet din*, she is stuck. Secondly, if a husband remarries without a valid divorce he is not considered as committing adultery. His children with the second woman will not be *mamzerim*. On the contrary, the marriage might even be considered as valid on a Torah level, although he will be punished with excommunication for violating a rabbinic prohibition. In the state of Israel, he will also be guilty of bigamy according to the modern penal code. Thus, we can talk about a male *agunah*, if he cannot show grounds for a divorce. However, since a man cannot commit adultery, the consequences of being an “*agunah*” are not as severe for him as for a woman.

⁷⁵ Haut 1983:56 and Malinowitz 1994:9.

⁷⁶ This still happens in Israel today. The estimated numbers vary from 12 (Broyde 2001:24) to 20-25 (Lichtman January 7, 2000) every year. In the Israeli criminal legislation that prohibits bigamy, this constitutes an exception. Penal law (1977) sections 176-180 (LSI special volume) which replaced the Penal Law Amendment (Bigamy) law of 1959.

⁷⁷ See chapter 6.6 for a more thorough analysis of the *get zikui*.

⁷⁸ Porter 1995:124.

2.3 Will of the man to issue the *get*

The man who divorces is not like the woman who is divorced, because the woman is divorced with her consent or against her will, while the man divorces only with his free will. (*Talmud Bavli, Yevamot* 112b)

If the *get* is not given with free will, but under duress, it is a *get me'useh*, a forced *get*, which is void.⁷⁹ The rabbis did not want to risk being lenient with a forced divorce. If the *get* is void, the woman remains a married woman. In spite of this, Jewish law has come up with some criteria for when a *get* delivered under pressure is not to be considered forced.⁸⁰

1. The pressure is not sufficiently coercive to invalidate a subsequent *get*. An example of this is organizing a boycott against a recalcitrant husband.
2. The sanction is not applied for refusal to deliver a *get*, but for something else, even if giving the *get* would remove the sanction. This is called indirect pressure. The cause for applying the sanction must however be legitimate under Jewish law. This is why a *get*, delivered in exchange for avoiding paying e.g. child custody, is not void. The pay obligation to pay the child support would have existed anyway, independent of the *get*.
3. A reasonable alternative exists, which the recalcitrant spouse can choose if he insists on not delivering the *get*. If a prenuptial agreement includes economical sanctions against a recalcitrant husband, they must not be higher than “reasonable”, otherwise the *get* will be considered void, since the husband does not have a realistic option of choosing the penalties instead of delivering the *get*.

The opinions on self-imposed sanctions, for instance in a prenuptial agreement, vary among halakhic authorities. Some hold that something self-imposed never can constitute coercion. Others mean that since the recalcitrant spouse always can choose the sanction instead (provided that the sanction is reasonable) the *get* cannot be considered forced. Yet others mean that the mere existence of a sanction constitutes a pressure that will invalidate the *get*.⁸¹

As described above, Jewish law recognizes a number of cases where the court can compel the husband to deliver a *get*. In the Talmud⁸², there is a list of grounds for which coercion is permitted. As described above, in normative *halakhab* today, only a limited number of grounds are *kofin*, giving the rabbis the right to use coercion.⁸³ The later *posikim*, have stated that compulsion is only permitted in cases distinctly stated in the *Talmud*.⁸⁴

⁷⁹ *Talmud Bavli, Gittin* 88b.

⁸⁰ Breitowitz 1993: 20-33.

⁸¹ Breitowitz 1993:21, 28.

⁸² *Talmud Bavli, Ketubot* 77a.

⁸³ Breitowitz 1993:34.

⁸⁴ *Shulkhan Arukh, Even ha-Ezer* 154:21 and the comments by Rama, R. Moshe Isserles.

The Talmud says "They subject him to pressure until he says I am willing"⁸⁵ This appears to be a paradox: on the one hand the *get* has to be issued out of the husband's free will, on the other hand, the court can force him to divorce his wife. The answer is that in cases where the *halakhab* compels divorce, sanctions may be applied, without invalidating the *get*. Maimonides formulated the solution. The way out of the dilemma was to create a "legal fiction, designed to reconcile the rigorous requirements of Jewish divorce law with justice for the wife"⁸⁶.

And why is not this *get* null and void, since it is a product of duress? Because duress applies only to him who is compelled to do something which the Torah does not oblige him to, for example somebody who is lashed until he consents to sell something or to give away a gift. On the other hand, he whose evil inclination induces him to violate a commandment...and who is lashed until he does what he is obligated to do cannot be regarded as a victim of duress, rather he brought it on himself, by submitting to his evil inclination. If he wants too be of the Israelites and obey the commandments... it is only his evil inclination that overwhelmed him- once he is lashed until his inclination is weakened...it is the same as if he had given the *get* voluntarily. (Maimonides: *Mishne Torah, Hilkehot Gerushin* (Laws of divorce) 2:20.

Maimonides says that if the man refuses to issue a *get*, he should be stricken until he wants to. This does not constitute *anus*, coercion. Maimonides explains that the evil inclination attacked the husband in question, and prevents him from doing the right thing, the *mitzvah* to issue the *get*, which is what he really wants to do. The fact that the man wants to remain in the Jewish community testifies that his true will is to perform the *mitzvah*. By applying force, the court is only helping the man to overcome his evil inclination and permitting his true, good will to emerge.

The beating produces a "*kosher*" *get* if the beating is carried out after a decision by the *bet din*, and the *bet din* has proper authorization in the *halakhab*. Even if non-Jews beat him, the *get* will be "*kosher*", since this is only considered enforcement of an authorized decision by the *bet din* that grounds for divorce are at hand, and that the husband should be put under pressure. If the non-Jewish court on its own forces the husband to write the *get* when halakhic grounds to force the man exist, it was valid according to Torah law, but was disqualified by rabbinical enactment.⁸⁷

2.4 The power of the rabbis to invalidate a marriage, valid under Torah law

The husband could deliver the *get* to his wife with a messenger. According to the ancient law, he could then at any time revoke his *get*, without even telling her. It was enough that he did it in the presence of witnesses. This practice could have tragic consequences; the woman might remarry and have children

⁸⁵ *Talmud Bavli, Yevamot* 106a.

⁸⁶ Haut 1999:51.

⁸⁷ Maimonides: *Mishneh Torah, Hilkehot Gerushin* ("Laws of divorce") 2:20.

without knowing that her divorce was revoked. That would mean that she would be considered an adulteress and her children *mamzerim*. R. Gamliel the Elder decided that the husband did not have this right any longer, in order to promote public welfare.⁸⁸ He circumvented a right the husband had from the Torah with a rabbinical decree. Later generations of scholars discussed the implications of this in the Talmud⁸⁹. It was the opinion of Judah ha Nasi that the *get* was canceled, since a rabbinical decree could not abrogate Torah law. R. Simeon ben Gamliel on the other hand, insisted that the *get* was not canceled. For what point would there otherwise be to the legislation, if it cannot change things? If the husband still can cancel the *get*, it would undermine the legislative authority.

The Babylonian *Amoraim*⁹⁰ did not decide the matter by stating that rabbinic legislation can supersede Torah law. Instead they said that the rabbis were given the power to dissolve marriages, since marriages are entered subject to conditions laid down by the Torah and by the rabbis.⁹¹ A marriage is concluded with the approval of the rabbis and the halakhic authorities. They may declare that under certain conditions they do not consent. In such a case it is as if the marriage never happened. It is considered void *ab initio*. Thus the decree does not uproot Torah law or give effect to an invalid divorce. The marriage was nullified, i.e. did never exist.⁹²

The Jerusalem Talmud had the opinion that the Sages had the authority to change Torah law. According to their view, the marriage was not annulled *ab initio*, but dissolved.⁹³

Also the Babylonian *Amoraim* recognized a right for the rabbis to annul marriages, even without the premise that the marriage was entered subject to their approval. However, this right to annul was restricted to cases of improper conduct; such as when the marriage took place after duress or coercion.⁹⁴ In those cases, the marriages did not have the consent of sages at all (due to defects in the marriage) and could therefore not be subject to the conditions laid down by the rabbis.

According to the Talmud, there are thus cases in which the rabbis have the right to annul the marriage. They are restricted to the cases of the canceled *get*, and improper conducted marriage, entered into under duress or after abduction.

⁸⁸ *Mishna Gittin* 4:1.

⁸⁹ *Talmud Bavli Gittin* 33a, *Yevamot* 90b.

⁹⁰ The *Babylonian Amoraim* were scholars discussing material from the *Mishna* in the academies of Babylonia from 200 until 500 C.E.

⁹¹ *Talmud Bavli Gittin* 33a.

⁹² *Elon* 1994:632-33.

⁹³ *Elon* 1994: 634-36.

⁹⁴ *Elon* 1994:636, *Talmud Bavli, Bava Batra* 48b.

2.5 Reform, reconstructionist and conservative perspectives

The *reform* rabbinate does not require a *get* in order to perform a marriage for a Jew who has been previously married. A civil divorce is enough. The reform movement “is concerned more for equality than for tradition” as Blu Greenberg puts it⁹⁵.

The *reconstructionist* movement does use a *get*, but in the case of a woman whose husband refuses to give her a *get*, a reconstructionist *bet din* simply gives her a document that states that she is free to remarry anyway. Thus, also the reconstructionists “solved” the problem by freeing the woman on the expense of the *halakhab*.

The *conservative* rabbis do require a *get*. The conservative movement has worked hard to find solutions to the *agunah* problem, and yet remain faithful to tradition. In 1954, under leadership of Rabbi Saul Lieberman, the idea of an appendage to the *ketubah* was introduced. The appendage would contain a clause stating that if the marriage ends in a civil divorce and either spouse refuses to participate in the *get* procedures, the other may summon the recalcitrant part to appear before the *bet din*, which could decide if grounds for divorce were at hand. The parties would, by means of the appendage, be bound by the rabbinical court’s decision. If the recalcitrant party does not respond to the summons, or refuses to carry out the decision of the *bet din*, the *bet din* could, according to the appendage, impose compensation, which Lieberman hoped would be enforced by the secular courts as a civil contract. This so-called “Lieberman clause” was rejected by most orthodox rabbis⁹⁶, among them Norman Lamm, as invalid, since the amount of damages was not spelled out, and thus the contract was halakhically invalid because it was indeterminate and vague, a so-called *asmakhta*.⁹⁷ The orthodox authorities also pointed out that to avoid the problem of a “forced *get*” the financial sanction could only be used if a competent rabbinical court declared the man required to give his wife a *get*.⁹⁸

In 1967, Rabbi Eliezer Berkovits brought forward a suggestion⁹⁹ of annulment of the marriage by the rabbinic authorities, if certain conditions, stipulated in a separate prenuptial agreement, were not met. The husband stipulates at the time of the marriage that if he does not acquiesce to the rabbinical court’s demand to grant his wife a religious divorce, the marriage will be nullified retroactively. There is not any need for enforcement of sanctions by a civil court.¹⁰⁰

⁹⁵ Greenberg 1981: 135.

⁹⁶ Meiselman 1995: 65-67.

⁹⁷ Lamm 1959. s. 93-119.

⁹⁸ Meiselman 1995: 65-67.

⁹⁹ In the book “*T’nai be-nisuin u-ve-get*” (Conditional clauses in marriage and divorce agreements).

¹⁰⁰ Greenberg 1981:137.

The proposal was essentially based on an idea of an automatic Jewish divorce in case of a civil divorce, presented in France in 1884, by a Rabbi Michael Weil. Weil thought that the contemporary rabbis had the power to annul any marriage. However, the orthodox rabbinic authorities immediately rejected this proposal and asserted that a Jewish marriage can only be terminated by a Jewish divorce, or the death of one of the parties.¹⁰¹ The orthodox rabbis maintained their opinion also in 1967 on the grounds that conditional marriages are rendered invalid by the consummation of the marriage. However, the conservative rabbinate in 1968 voted in favor of accepting Berkovits's proposal.¹⁰²

It is noteworthy that Berkovits belongs to the orthodox stream of Judaism, and when he presented his proposal, he intended it for the orthodox community. Initially, he also had the support of an orthodox *posek*¹⁰³, R. Yechezkel Yaakov Weinberg, who eventually withdrew it.

Today, the solution used by conservative is to annul marriages, *havka'at kiddushin*, based on cases in the Talmud. In short, the idea is that all Jewish betrothals are done with the consent of the rabbis. The annulment consists of the rabbis removing this consent if the recalcitrant husband refuses to grant a *get*. This differs from Berkovits's solution described above, in that no additional conditions or agreements need to be signed.¹⁰⁴ Again, orthodox authorities have criticized this.¹⁰⁵

2.6 Summary and conclusion

The *halakhab* is pluralistic. Many different opinions are recorded in the sources, as long as they have any rabbinic support, including minority opinions. This makes the *halakhab* full of alternative solutions to a problem like the *agunah* problem. However, after the great codifications of Maimonides and Karo, the diversity started to decrease. In the *Shulchan Arukh*, two or three views are usually cited, of which one or two are considered normative. Other opinions are removed from the domain of normativity.¹⁰⁶ Enacting minority opinions, or opinions contrary to the big codifications, is, as we will see, very difficult.

In this chapter I have presented Jewish law of divorce. I have especially focused on the issues

- How can a marriage be terminated, and
- Who can terminate it?

The presumption is that the husband has the power to initiate a marriage and also to initiate the divorce, which cannot take place without his free will. In different periods and different communities, this presumption has been

¹⁰¹ Meiselman 1995: 61.

¹⁰² Meiselman 1995: 64-65.

¹⁰³ A *posek* (pl. *poskim*) is a halakhic legislator.

¹⁰⁴ Greenberg 1981:137-38.

¹⁰⁵ See discussion below, chapter 6.1.

¹⁰⁶ Lipstadt and Berger 1998:111.

challenged. In the *halakhab* there is a variety of different models of divorce. The one closest to the modern, Western concept is probably the *Gaonic* model of both man and woman having right to a no-fault divorce on demand. However, the model that became normative in European Jewry and later also in the state of Israel is different. It is a model with mutual consent or forced divorce if there is a fault.

The mutual consent has been less important for the man. There are remedies available for the husband with a recalcitrant wife, while the wife does not have a way out of *igun*¹⁰⁷ if her husband refuses her a *get*, even after the rabbinical court compelled him to deliver one. This is a basic inequality in normative Jewish law, which is even more stressed by the fact that that her children outside marriage will be considered *mamzerim*, unable to marry other Jews. His offspring outside marriage will not have such problems.

I have also given a survey of how progressive forms of Judaism solved the *agunah* problem. Both the reform and reconstructionist movements have solved the problem on the expense of *halakhab*. The reform rabbinate does not require a *get* since a civil divorce is enough. The reconstructionist movement does use a *get*, but in the case of a woman whose husband refuses to give her a *get*, a reconstructionist *bet din* simply gives her a document that states that she is free to remarry anyway.

The conservative movement considers itself as loyal to *halakhab*. However, they reinterpret *halakhab*, or are at least open to use halakhic methods that have not previously been considered normative. It is interesting to see how the methods they have used for the better part of the 19th century, now are discussed in orthodox circles as well. An example of this, as we shall see further on, is the prenuptial agreement.

¹⁰⁷ The state of being an *agunah*.

3 Family Law in the State of Israel

3.1 The jurisdiction of the rabbinical courts

The State of Israel is defined as the state of the Jewish people, and as a Jewish and democratic state. Religion in general, and Judaism in particular, holds a formal status in several areas. Most significant is the rule of religious laws over the area of family law, which means that matters concerning personal status are determined according to the religious affiliation of the parties involved in the case.

Already during the Ottoman period, the jurisdiction over matters regarding personal status was in the hands of the courts of the recognized religious communities, the *millet*. Today, there are fourteen recognized religious communities with own tribunals. In addition to Orthodox Judaism¹⁰⁸ there is the Bahai, Druze and Muslim communities. The Christian recognized communities are the Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Syrian Catholic, Chaldean Uniate, Greek Catholic-Melchite, Maronite, Syrian Orthodox and Episcopal-Evangelical communities. The Druze community was recognized in 1962, the Episcopal-Evangelical in 1970 and the Bahai in 1971. Those do not have their own tribunals.¹⁰⁹ There is a separate law for every community, defining the jurisdiction, the extent of which varies from community to community. The Muslim courts have the broadest jurisdiction, which e.g. includes determination of paternity.¹¹⁰ The personal law of a foreign [non-Jewish] citizen is that of his or her state. For an unrecognized community, without any recognized religious courts, it is unclear what law applies to personal status. It probably is his or her religious law (if such exists), applied in a civil court. There have not been any rulings on Israeli citizens belonging to unrecognized communities.¹¹¹

Also after Turkey replaced the *shari'a*¹¹² in other areas of law with the *Code Napoleon*, the jurisdiction over personal status remained with the religious courts and this state of affairs continued during the British mandate.¹¹³ The definition of “matters of personal status” still used today, is the one in the Palestine Order in Council, i.e. the mandatory legislation.¹¹⁴

¹⁰⁸ The Chief Rabbinate is the sole Jewish religious authority in the State of Israel, according to the *Chief Rabbinate of Israel Law* (1980), 34 LSI 97.

¹⁰⁹ Lapidoth and Ahimeir 1999:21.

¹¹⁰ Shapira and DeWitt-Arar, 1995:76-78.

¹¹¹ Shapira and DeWitt-Arar 1995:77.

¹¹² *Shari'a* is the Muslim religious law.

¹¹³ For a more detail account of the legislative history, see Chigier 1967.

¹¹⁴ Shapira and DeWitt-Arar, 1995:76.

After the establishment of the State of Israel the *Knesset*¹¹⁵ decided to leave the legal situation concerning personal status intact. In a deal, known as the "status quo" agreement, struck between the secular Zionist government of David Ben-Gurion and the religious parties of the time, compromise arrangements were made regarding secularism and religion in Israel.¹¹⁶ Among other things, the status quo agreement provided for the Sabbath as the official holiday; *kasbrut* in all state institutions; and a two-track educational system where Jews have the choice of sending their children to a state controlled religious or secular school. Application of religious law in marriage and divorce proceedings, as well as in other matters of personal status, was also included in the status quo, as was the jurisdiction of the rabbinical courts in those matters.¹¹⁷

Originally, the jurisdiction of the rabbinical courts was broader than it is today. Matters of personal status included adoption, inheritance, wills and legacies. Those matters have been removed from the list of matters included in personal status by the Israeli legislature. The Succession Law of 1965¹¹⁸, for example, now regulates succession and inheritance. Also, paternity falls outside the category of personal status for most religious communities, with the exception of the Muslim, as mentioned above.¹¹⁹ The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law¹²⁰ could also be seen as narrowing down the area of personal status under the jurisdiction of the rabbinical courts, because after the enactment of that law, the rabbinical courts retain exclusive jurisdiction in matters of marriage and divorce only. Meanwhile, the Muslim and Christian courts have retained the full jurisdictional powers they had during Ottoman and British times.¹²¹

For the Jewish sector of society, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law gives the rabbinical courts exclusive jurisdiction over all Jews who are nationals or residents in the country, in matters of marriage and divorce¹²². When a divorce suit is filed in a rabbinical court, the rabbinical court has exclusive jurisdiction in matters *connected* to that suit as well, such as child support, custody and maintenance.¹²³ This is called "the rule of connection".

Unconnected to a divorce suit, a wife's claim for maintenance can be handled either in the rabbinical court or the civil court, depending on the wife's

¹¹⁵ The *Knesset* is the Israeli Parliament.

¹¹⁶ See Liebman and Don-Yehiya 1984:31-40.

¹¹⁷ Lapidoth and Ahimeir 1999: 10, n. 36 and Liebman and Don-Yehiya 1984:38.

¹¹⁸ 19 LSI 58.

¹¹⁹ Shapira and DeWitt-Arar, 1995:77.

¹²⁰ Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953. 7 LSI 139.

¹²¹ Cohn 1959 [No page number].

¹²² "Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive Jurisdiction of rabbinical courts." Section 1, Rabbinical Courts Jurisdiction Law.

¹²³ "Where a suit for divorce between Jews have been filed in a rabbinical court, whether by the wife or by the husband, a rabbinical court shall have exclusive jurisdiction in any matter connected with such a suit, including maintenance for the wife and for the children of the couple." Sec. 3 Rabbinical Courts Jurisdiction Law.

unilateral choice.¹²⁴ If not connected to a divorce suit, matters concerning maintenance of minor children or claims for their custody are under *concurrent* jurisdiction of the rabbinical and the civil courts. This means that the rabbinical courts have jurisdictions only if both of the litigants agreed to this. Otherwise the jurisdiction is with the civil courts.

The Court for Family Matters Law states that the Court for Family Matters has the authority to deal with any matter within concurrent jurisdiction as long as no other court deals with it.¹²⁵ Even if the matter is later connected to a divorce suit before the rabbinical court, the matter stays with the civil court. The legislation tries to avoid duplication. A case cannot be based on an identical cause of action in the two systems. If it is ongoing in one court, it cannot be opened in the other. Neither can it be restarted in a civil court if it already has been decided in a religious court. However, if a rabbinical court never decided in the case, and the plaintiff decided to withdraw her action and then sue in the civil court, this is sufficient for the civil court to get jurisdiction.¹²⁶

The rule of connection in section 3 of the Rabbinical Courts Jurisdiction Law was created to promote efficiency in divorce disputes, by giving the rabbinical courts comprehensive jurisdiction.¹²⁷ However, if a suit is brought to a civil court *before* the matter is connected to a divorce suit, it remains within the jurisdiction of the civil court even after the connection is made. This, in combination with the two systems applying different laws, has given the rule of connection a potential for abuse, which made it infamous. It has made possible a problematic phenomenon known as the “race for jurisdiction” or “the race to the courts”. It is a strategic behavior from the litigants to maximize their chances. Each litigant hurries to sue before the court they think will decide in favor of him or her. If the wife sues for custody of the children in a civil court before the husband sues in the rabbinical court, the civil court has the authority to deal with the case, and the rabbinical court has not. On the other hand, if the husband sues for divorce and custody before she reaches the civil court, both matters will be dealt with by the rabbinical court due to the rule of connection in section 3 of the Rabbinical Courts Jurisdiction Law. This may have serious consequences for the wife, also regarding her chances to receive a *get*, as she might lose some of her bargaining power if the matter is adjudicated before a rabbinical court.

The rabbinical courts apply Jewish law, while the civil courts apply civil law. The principle behind this is that in matters of personal status, “the law follows

¹²⁴ “Where a Jewish wife sues her Jewish husband or his estate for maintenance in a rabbinical court, otherwise than in connection with divorce, the plea of the defendant that a rabbinical court has no jurisdiction in the matter shall not be heard.” Section 4, Rabbinical Courts Jurisdiction Law.

¹²⁵ This rule was previously found in the Courts Law of 1957, section 18(2). In 1995, a secular court for family matters was established by *The Court for Family Matters Law*. By this establishment all matters in the civil court system, previously dealt with by several tribunals and courts were brought together in one unified court. The division of jurisdiction between the religious and the civil courts was not changed.

¹²⁶ Hecht 1967:494-95.

¹²⁷ Rosen-Zvi 1989:359.

the judge”¹²⁸, unless the legislature decided otherwise¹²⁹. It is in general considered more favorable for the woman to use the civil court and for the man to use the religious court.¹³⁰ This is so because different outlooks on values of family life and morals guide the courts. Rabbinical courts are inclined to be very judgmental towards a wife who “misbehaved” e.g. having had an extramarital relationship. This could make her unfit in the eyes of the rabbinical courts as a custodian, while the opposite case does not necessarily disqualify the husband.¹³¹ The awarded maintenance is also usually higher in the civil courts, and the rabbinical courts usually do not award a provisional maintenance. The fact that the proceedings in the rabbinical court take longer time favors the debtor, i.e. the husband, and prejudices the wife who usually is the economically weaker party. Also other approaches regarding maintenance, property issues, inter-spousal agreements and communal property issues tend to favor the husband before the wife in the rabbinical courts.¹³²

However, it may happen that it is in the wife’s interest to litigate in the rabbinical courts. In the matter of custody of the children for instance, the rabbinical courts tend to favor the parent who can ensure a religious upbringing. This may be the mother, in which case she has an interest in maneuvering the case before the rabbinical court. Nevertheless, sometimes the husband demands from the wife, as a condition for the *get*, that the ancillary matters are moved from the civil court to the rabbinical court, on the assumption that they will reward her less. This is a mild form of the extortion that I will describe in detail below, in chapter 4.4.

The race to the courts as described above, has led to serious problems within the Israeli system for family litigation between spouses. Both parties try to get what they can. Neither spouse wants to risk their advantage if they give a chance to the other party or wait to settle amicably instead of suing swiftly. Suspicion prevails and the gap between the spouses widens in a time of particular sensitivity. The legal system gives an incentive to litigation, driving the spouses down a path of no return.¹³³

3.2 Applicable law

The general principle in matters of personal status is that “the law follows the judge”¹³⁴, unless the legislature decided otherwise¹³⁵. The 1953 law explicitly states that the law to apply in matters of marriage and divorce is *halakhab*, the religious law.¹³⁶ Brayahu Lifshitz, associate professor of Jewish Law at the

¹²⁸ Rosen-Zvi 1989:351.

¹²⁹ See the Bavli case, below.

¹³⁰ Halperin-Kaddari 1994:39, and Rosen-Zvi 1989:352.

¹³¹ Halperin-Kaddari 1994:39.

¹³² Rosen-Zvi 1989: 352-59.

¹³³ Rosen-Zvi 1989:379-84.

¹³⁴ Rosen-Zvi 1989: 351.

¹³⁵ See the Bavli case, below.

¹³⁶ “Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.” Section 2, Rabbinical Courts Jurisdiction Law.

Hebrew University of Jerusalem, calls this “incorporation by reference”.¹³⁷ The legislator does not have any responsibility for the substantive law; neither does it have the possibility to change it. It is the concern of the legitimate legal institution of the religious system. State legislation cannot actually change the *halakhab*¹³⁸. The *halakhab* follows its own internal system for creating norms.

Pinhas Schiffman, associate professor of Family Law at the Hebrew University of Jerusalem, uses a metaphor in which the law of Israel in the area of personal law is likened to a mirror, which only reflects the religious law, and does not contain anything of it. However, he notes that this is changing. It is only in the field of marriage and divorce that the “religious law continues to reign supreme.” Other fields of personal status law have been “conquered” by secular law.¹³⁹

The state can order the rabbinical courts not to apply certain halakhic norms, by imposing criminal sanctions.¹⁴⁰ The state has done this with underage marriages¹⁴¹, bigamous marriages¹⁴² and divorces against the wife’s will¹⁴³. It can also impose application of civil law in certain areas. As Eliav Shochetman, professor of Jewish Law at the Hebrew University of Jerusalem, puts it: “a secular legislator could [not] abrogate a religious law *qua* religious law, but rather that the law could be abrogated *qua* state law.”¹⁴⁴

The judicature has in some instances circumvented the rabbinical court’s application of Jewish law by passing civil laws in the area of personal status. The rabbinical courts do, according to decisions of the Supreme Court, have to comply with these laws enacted by the Knesset. Examples of such laws, that cannot be ignored even if they are contrary to the *halakhab*, are the Succession Law of 1965, and The Women’s Equal Rights Law of 1951¹⁴⁵. Israeli case law has also given a broad interpretation to this territorial legislation. Today most monetary and matrimonial property matters are excluded from the category of matters of personal status; instead the Spouses (Property Relations) Law of 1973 governs these issues.¹⁴⁶ However, as we have seen above, the jurisdiction is still with the rabbinical courts, which means they have to apply civil law in these cases. There is a difference in application of the law by the civil courts and by the religious courts. The two court systems have their own rules of

¹³⁷ Lifshitz 1990:508.

¹³⁸ This is true unless the interpreters of the *halakhab* for some reason actually want to incorporate secular law into the body of religious norms. The only example of this that can be found in the Rabbinical Courts’ of Israel practice are the law of the state governing tenant protection. They were considered binding on the rabbinical courts by the rabbinical courts themselves due to the principle in Jewish Law that elected representatives of the community may pass valid legislation in certain areas. See Shochetman 1990:526-28.

¹³⁹ Schiffman 1990:538.

¹⁴⁰ Shochetman 1990:525-26.

¹⁴¹ Marriage Age Law, 1950. 4 LSI 158.

¹⁴² Penal law 1977, sections 176-180 (LSI special volume), which replaced the Penal Law Amendment (Bigamy) Law of 1959.

¹⁴³ Penal Law 1977, section 181. This offense was first established in the Women’s Equal Rights Law of 1951.

¹⁴⁴ Shochetman 1990:526.

¹⁴⁵ LSI 5:171.

¹⁴⁶ Halperin-Kaddari 1994:38.

procedure and evidence. They also have different approaches to applying rules of private international law. This creates differences in approach, method and sometimes in the actual content of the judgment.¹⁴⁷

The Supreme Court has also ruled that the religious courts have to apply general legal principles derived from Israel's legal system, even if those rights are not prescribed explicitly by law¹⁴⁸. In these principles, the Supreme Court includes Human Rights¹⁴⁹.

For mixed couples or couples who are not subject to any recognized religious law, the Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969¹⁵⁰, regulates a civil divorce. This law recognizes one single ground for divorce, namely the mutual consent of the spouses.¹⁵¹

3.3 Orthodox monopoly

The Chief Rabbinate of the State of Israel controls the rabbinical courts.¹⁵² The Chief Rabbinate is orthodox, and thus, the law applied in the rabbinical courts is the orthodox interpretation of the *halakhab*. While non-Jewish religious institutions do benefit from the support and recognition by the state, they have for instance their own courts; reform and conservative Jewish congregations cannot even perform weddings. In fact, it is the non-orthodox streams of Judaism that are discriminated against.¹⁵³

The right to perform marriages has been tried in 1982 by the Supreme Court in the case of "Movement for Progressive Judaism".¹⁵⁴ The Movement for Progressive Judaism made a request on the basis of freedom of religion that two reform rabbis would be recognized for the celebration and registration of marriage. The Supreme Court however, turned down the request with the motivation that it did not have the authority to change the 1953 law, but this has to be done by the Knesset.

3.4 Control of the rabbinical courts

The Supreme Court of Israel sits as the highest court of appeal but also as the High Court of Justice when it supervises and reviews decisions by lower courts. In matters under the jurisdiction of the rabbinical courts the Supreme Court has supervisory but not appellate authority. Only the Rabbinical Court

¹⁴⁷ Lifshitz 1990:508-9.

¹⁴⁸ The *Bavli-case* (48 (II) P.D. 1994, p. 221), see below.

¹⁴⁹ The *Lev-case* (48 (II) P.D. 1994, p. 491), see below.

¹⁵⁰ 23 *LSI* 274.

¹⁵¹ Sec. 5 (c) Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law, 1969.

¹⁵² The Chief Rabbinate is the sole Jewish religious authority in the State of Israel, according to the *Chief Rabbinate of Israel Law* (1980), 34 *LSI* 97.

¹⁵³ Only about 20% of the Jewish population are observant, but many more do accept the orthodox tradition and dominance. (Liebman and Don-Yehia 1983:19).

¹⁵⁴ H.C. 47/82, *Movement for Progressive Judaism v. Minister for Religious Affairs*, 43(2) P.D. 661, *The Jerusalem Post Law Reports* 103.

of Appeals, whose decision is final, can hear appeals from the rabbinical courts. The High Court of Justice can never change the rabbinical court's decision in substance. Only in cases in which a party believes that the rabbinical court has deviated from its authority¹⁵⁵ or violated basic principles of natural justice can a petition be given to the High Court of Justice, which can order the rabbinical court to reconsider the matter. Also if the religious courts disregard a provision of a law of the Knesset addressed to them, the decision by the religious court may be set aside by the Supreme Court, because of excess of jurisdiction.¹⁵⁶

Although, as mentioned, the religious tribunals are in principle autonomous and may apply their respective legal system, Israel's Supreme Court has decided that these tribunals have to comply with certain laws of the State. Moreover, they also have to apply general legal principles derived from the basic values of Israel's legal system, including human rights. This was decided in two high-profile cases quite recently.

The *Bavli-case*¹⁵⁷ was a divorce case, in which the Supreme Court ruled that there is a presumption of equal partnership of spouses in property acquired by one of them during the marriage. The religious courts have to judge in conformity with this presumption. The Supreme Court ruled that principle of community property in a marriage could be applied on the Bavlis, although they got married before the provisions in the Spouses (Property Relations) Law entered into force. This was so because the foundation of Spouses (Property Relations) Law is the principle of equality, binding on all courts (except for the rabbinical courts dealing with matters regarding marriages and divorces in a narrow sense), pursuant to the Women's Equal Rights Law of 1951. The groundbreaking with this case was that Chief Justice Barak stated that all religious courts must apply general civil *law as interpreted by the Supreme Court* whenever they have jurisdiction over accompanying civil matters that do not involve matters of marriage and divorce. He claimed that this is motivated by "normative harmony" and coherence.

Barak's decision in the Bavli case has been heavily criticized. Justice Elon means, among other things, that the Bavli case could have gotten the same substantial outcome without Justice Barak's revolutionary statements. The latter rises in Justice Elon's eyes, unnecessary legal and social tensions around the place of Jewish law in the Israeli legal system and starts an ideological battle with the rabbinical courts.¹⁵⁸ However, others, like Dr. Ruth Halperin-Kaddari, from the Bar Ilan University, have seen merits with this judgment. Halperin-Kaddari writes that theoretically at least, both civil and religious courts now

¹⁵⁵ A woman had to appeal to the High Court of Justice to overturn a rabbinical court order forbidding her from allowing another man to enter her home. The woman had been separated from her husband for three years, he refused to give her a divorce, but was he himself living with another woman. The rabbinical courts considered her behavior sinful and corruptive for the children. The High Court of Justice issued a permanent injunction, ruling that it was outside the jurisdiction of the rabbinical courts if the woman was seeing another man. Cited in Frankel 1999: 28.

¹⁵⁶ Elon 1999:26.

¹⁵⁷ 48 (II) P.D. 1994, p. 221, summarized in Elon 1999:404-409.

¹⁵⁸ See e.g. Elon 1999:409-21.

have to apply civil law, and the same interpretation of the civil law, to matters connected to divorce.¹⁵⁹ This might be a way to stop the race to the courts described above.

In the *Lev-case*¹⁶⁰ the Supreme Court limited the power of the religious court to prohibit a party to leave the country. The reason was the right to freedom of movement.

3.5 Summary and conclusions

The rabbinical courts in Israel have jurisdiction over matters of marriage and divorce because the parliament has given it to them. The source of authority is secular. However, the rabbinical courts are free to apply the religious law whenever they have jurisdiction. The state can in principle not change the contents of the law, but only diminish the jurisdiction.

The secular legislator will never be able to change the halakhic rules regarding *agunot*. What it can do is to move the entire jurisdiction over marriage and divorce from the hands of the rabbinical court by a civil marriage and divorce law. This would help those who do not really care about the rules of Orthodox Judaism. However, it would still not give relief to the religious *agunot*.

Creating a civil marriage and divorce law is something only the Knesset can do. In spite of stating that the rabbinical courts in their decisions have to comply with human rights standards, the Supreme Court did not consider that it had the authority to change the 1953 law in the question of giving progressive streams of Judaism the right to perform marriages.

The race to the courts, or rather the systematic disadvantage for women in the rabbinical courts, which causes the race, is a problem. To move the ancillary questions to the civil courts would be a way of strengthening women, at least financially.

A further consequence of the orthodox monopoly is that alternative solutions to the *agunah* problem will not have any effect in Israel. Alternative solutions would still not have been an option for religious orthodox women, although it might have helped women from other streams of Judaism.

¹⁵⁹ Halperin-Kaddari 1994:40.

¹⁶⁰ 48 (II) P.D. 1994, p. 491, summarized in Elon 1999:413-14.

4 *Agunot* in the State of Israel

Jewish law and the Israeli rabbinical courts allow for divorce by consent. If the parties agree, they can be divorced without waiting any time at all. A great majority of divorces in Israel are by mutual consent. The problems arise when there is not any agreement, when one party simply refuses to divorce.

Problems may also arise when the terms demanded by a party to agree are not acceptable to the other party. If a woman wants to divorce her husband, and he does not agree, she must petition the rabbinical courts to decide whether she has grounds for divorce.

4.1 The divorce process in the rabbinical courts

When a divorce suit is filed with the court and the couple does not reach an agreement concerning the divorce, usually the court still recommends reconciliation, and urges the couple to work for *shalom bayit*, “peace of the house”. This happens even if the woman insists on a divorce, even after domestic violence. The attempts of reconciliation can go on for a long time, especially if one party insists that he is interested in achieving *shalom bayit*.¹⁶¹ Declining to take part in reconciliation attempts may slow down the speed of the process.

Once the court decides that the time for reconciliation has run out, they investigate if the woman has grounds for divorce, and how strong they are. One possibility is that they just reject the suit. This happens if the court does not find sufficient cause for recommending a divorce against the will of one spouse. In that case the rabbinical courts do not even consider the woman an *agunah*, or a *mesurevet get*.

If they do find grounds for a divorce, they order the husband to divorce the woman. This order can be phrased in different ways. Basically, the rabbinical courts use four different levels of ordering, ranging from a recommendation to a compelling of a divorce. Depending on the severity of the order, different sanctions can be used, to make the husband comply with the verdict of the rabbinical court. The four levels are enumerated in the Rabbinical Courts [Enforcement of Divorce Decrees] Law¹⁶², section 1b. They are, in order of increasing severity: *hatsa’a* (recommendation), *mitzvah* (duty), *huva/hayyav* (obligation) and *kefiyyat get* (compelling or imposing of a *get*). In their judgments, the judges might use different terms as well.

Formally, the rabbinical courts have the right to enforce compliance with their verdict regardless of what language is used for the order of the *get*.¹⁶³ They are,

¹⁶¹ Lichtman 2000:11.

¹⁶² *Hok batei din rabbaniyim kiyum piskei din shel gerushin*. The Rabbinical Courts (Enforcement of Divorce Decrees) Law 1951 [Hebrew].

¹⁶³ *Ibid*, section 1b. To use the sanction of imprisonment, the order to give a *get* must be *kefiyyat get*. (Section 2).

however careful not to use sanctions too often. This goes back to the Talmudic distinction between *kofin* (“we force”), cases in which the recalcitrant husband could be forced by physical threats, and *yotzee* (he shall or must”) cases in which no other measures of sanction than maybe public proclamation of disobedience, or a trade boycott against him could be used.¹⁶⁴ If a sanction is applied when there is not any halakhic ground, the result may be a forced *get*, which is void.

If the court rules that it is a *mitzvah* for the man to give a *get*, it is not a very strong recommendation from the court. It cannot be followed by any sanctions against a recalcitrant spouse, except for putting financial pressure on him, by deciding on higher alimony payments to the wife. To support his wife is always an obligation for the husband, so this economical pressure does not render the *get* invalid. The rabbinical courts in Israel have ruled that the husband can be obligated to pay \$250 a day until he delivers the *get*.¹⁶⁵ If the wife is the recalcitrant party, the court can decide on reducing or cutting alimony payments to her.¹⁶⁶ Financial pressure is however not always so efficient. If the husband does not have a regular income, he cannot pay a higher alimony anyway. Likewise a very wealthy recalcitrant husband remains unaffected by an obligation to pay higher alimony.

If the court rules that the recalcitrant spouse is obliged to write (or receive) a *get*¹⁶⁷, the obligation can be sanctioned with measures like revoking driver’s license, passport etc. from the recalcitrant spouse. The fourth possibility, *kefiyyat get*, is the strongest. If the court imposes or compels a divorce on the recalcitrant spouse, this decision can be sanctioned by imprisonment, and even, ultimately, with solitary confinement.

4.2 Grounds for divorce in the rabbinical courts

The rabbinical courts in Israel have refused to accept the view of Maimonides. The wife’s claim that the husband is repulsive to her is not enough. The Israeli rabbinical courts follow the *Shulkhan Arukh* and demand a substantive ground for her seeking a *get*. In some cases, the rabbinical courts actually have used the husband’s repulsiveness to his wife as a ground. However, it has then been stated alongside other grounds, usually grounds considered substantive according to the *Shulkhan Arukh*.¹⁶⁸

Yad L’Isba, an organization working to help *agunot*, claims to have been successful in convincing the rabbinical courts to order husbands to give their wives a *get* even on the grounds of emotional abuse or desertion.¹⁶⁹ However, there are many cases in which the rabbinical courts have not forced the husband to give the *get*. In one case the rabbinical court held that when the

¹⁶⁴ Breitowitz 1993:42-43. See chapter 2.1.4.

¹⁶⁵ Breitowitz 1993:133.

¹⁶⁶ Frishtik 1991: 147.

¹⁶⁷ *Huva, hayyav lehgaresh* in Hebrew.

¹⁶⁸ Haut 1983:86-87.

¹⁶⁹ Susan Weiss interviewed in Lichtberg 2000, *In Jerusalem Magazine*, January 7.

husband has had sexual relations with prostitutes, it is not enough grounds for divorce, since he expressed remorse. The court merely suggested that he should divorce his wife.¹⁷⁰ In a case when the husband had extramarital relations and was violent, the court *recommended* (the lowest level of ordering) him to give a *get*, but did not find grounds to obligate or compel him, unless he was warned before.¹⁷¹

Physical abuse is not necessarily considered a ground for imposing a divorce. Domestic violence is often ignored if a man says he wants *shalom bayit*.¹⁷² In several cases, the rabbinical courts have ruled that physical abuse only justified a ruling *obligating* (the third level of ordering) the husband to divorce the wife.¹⁷³ The practice of the rabbinical courts is to compel a *get* only if the husband's violence is extreme, repeated and he has been warned before.¹⁷⁴ Only if her life is threatened the rabbinical judges tend to rule in favor of compelling (the fourth level of ordering) a divorce.¹⁷⁵

Since May 1999, the rabbinical courts also have the power to issue protective orders, forbidding violent husbands from coming near their wives. The rabbinical courts have issued very few such orders. In comparison, three to four protective orders are issued daily by the civil courts.¹⁷⁶

4.3 Compulsory *get* and sanctions against a recalcitrant spouse

Given that the grounds exist, Jewish law permits the rabbinical courts to force the husband to give his wife a *get*. However, even if the court compels a divorce, the husband may ignore this court order, unless the court will enforce a sanction. Therefore, the Rabbinical Courts [Enforcement of Divorce Decrees] Law gives the rabbinical court a number of possible sanctions to enforce their verdict. In 1995, the Knesset passed an amendment, expanding the powers of the rabbinical courts to enforce decisions under this law.

Section two states the mildest sanctions. If a husband refuses to give his wife a *get*, the courts can take away his driver's license, freeze his bank accounts, prevent him from leaving the country, suspend any professional licenses he may have and stop him from being elected to certain positions in society.

If the rabbinical court ordered the husband to give a *get* using the highest level of coercion, *kefiyyat get*, and the sanction can be prison, up to five years, with a possibility to extend the imprisonment for another five years.¹⁷⁷ If, after 30 days after the rabbinical court gave its order to the husband to deliver the *get*,

¹⁷⁰ 8 *Piskei Din Rabbaniyim* 254, cited in Weiss 1999:58, n. 47.

¹⁷¹ Higher Rabbinical Court file 830/5355-1995, cited in Weiss 1999:58, n.47.

¹⁷² Lichtman 2000: *In Jerusalem Magazine*, January 7.

¹⁷³ Frishtik, 1991:162, 167.

¹⁷⁴ Weiss 1999:58, n. 47.

¹⁷⁵ Frishtik, 1991:162, 167.

¹⁷⁶ Lichtman 2000 January 7.

¹⁷⁷ Section 2, The Rabbinical Courts [Enforcement of Divorce Decrees] Law.

he still did not comply, the rabbinical court can have a hearing about imposing sanctions.¹⁷⁸ If they decide to do so, after 60 days the rabbinical court may apply to the Attorney General that the recalcitrant party will be imprisoned. The Attorney General then decides whether or not to apply to the District Court. If he does, it is then up to the discretion of the District Court to decide whether or not to imprison the recalcitrant spouse.¹⁷⁹ The process to implement a sanction is thus very long. It comprises three stages; first one religious in the rabbinical court, followed by two secular stages. However, it was recently change to shorten the process. Before, the application to the Attorney General could not be done before six months had passed instead of 60 days.

The moment the recalcitrant husband gives the *get* he is released. The aim of this provision under section 6 in the 1953 law is purely coercive and cannot function as a punishment. However, if there is even a remote chance that imprisonment or continued imprisonment would make the recalcitrant spouse change his or her mind, the measure should be taken.¹⁸⁰

According to the rabbinical courts' own statistics, in January 1998, the sanctions under the Rabbinical Courts [Enforcement of Divorce Decrees Law] have been imposed 106 times in three years. In Haifa, the possibility of imposing sanctions was used quite frequently, 30 times, but in Tel Aviv, the court used this power only twice.¹⁸¹ It has achieved the desired goal - divorce - in 43 cases.¹⁸² Imprisonment as a sanction against recalcitrant husbands, is only used in about one or two cases every year.¹⁸³ In practice, the couple has to have been separated for at least seven years, in addition to which the woman has to show that the man is impotent, gay or violent, for this sanction to be used by the rabbinical court.¹⁸⁴ Eight recalcitrant husbands are now in prison in Israel for refusing to give their wives a religious divorce.¹⁸⁵

There are some 20 cases of recalcitrant husbands who are in prison for offenses unrelated to refusal to give a *get*.¹⁸⁶ For a long time, it was a problem that the threat of imprisonment did not have any effect on those recalcitrant husbands, since they were already in jail for committing a crime, or simply because being in prison did not disturb them at all.¹⁸⁷ Therefore, in 2000, the Knesset passed an amendment which now permits the rabbinical courts to recommend, among other things, that prisoners who refuse to give their wives a *get* should be denied canteen and visitor privileges. If these methods do not work within 30 days, the recalcitrant husbands may be sent to solitary

¹⁷⁸ Section 4, The Rabbinical Courts [Enforcement of Divorce Decrees] Law.

¹⁷⁹ Sec. 6, Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 1953.

¹⁸⁰ Attorney-General v. Yehie and Orah Avraham, (1968) (I) 22 P.D. 29. Summarized in Gouldman 1968: 318-19.

¹⁸¹ Weiss 1999:65, n. 79.

¹⁸² Lichtman 2000 *In Jerusalem Magazine* January 7.

¹⁸³ Shenhav in Porter 1995:37.

¹⁸⁴ Gross 1999:40.

¹⁸⁵ International Jewish Women's Human Rights Watch, Fall 2001 Newsletter No. 11.

¹⁸⁶ Lichtman 2000 *In Jerusalem Magazine* January 7.

¹⁸⁷ Shava 1976:122.

confinement for up to five days, renewable after seven days out.¹⁸⁸ If they however still refuses to give it to her, there is according to the Israeli law or normative *halakhab* of today, nothing the court can do.

The sanctions can also be used against a woman who refuses to comply with a judgment compelling her to accept a *get*. It has been very unusual that imprisonment is used against a woman. Instead the husband is granted a permission to marry another wife. However, Israel's Chief Rabbi, Meir Yisrael Lau, recently declared that a woman could be sent to jail if she continues to refuse accepting a *get*.¹⁸⁹ Lau said that since divorce proceedings were being held up by a monetary dispute, permission to remarry, as the man had requested, should not be given. Permission to remarry for a man with a recalcitrant wife should only be given if "extenuating circumstances of a compelling nature that prevent her from doing so, such as insanity or her disappearance for an extended period of time" are at hand.¹⁹⁰

4.4 Extortion

The husband may say he is willing to give his wife a *get*, but that he just objects to her terms. He can set the terms of the divorce. Especially if the wife does not have any grounds according to *halakhab*, she is totally left out to his power. It is not uncommon that the husband uses the rules of Jewish law to extort money from his wife. He withholds the *get* in order to extort money from the wife as a price for the *get*.¹⁹¹ Custody of the children is sometimes also extorted from the wife in return for the *get*.

The rabbinical court may even encourage the woman to give in to her husband's demands for the children or marital property, or to waive child support in return for the *get*.¹⁹² Susan Weiss, attorney and director of *Yad L'Isha*, knows of a case in where the court said it had a fund from which it would pay NIS 5,000 of the sum to help her settle, as a response to the wife's claim that she could not afford paying her husband what he demanded to give her the *get*. Weiss means that the court could have applied sanctions on this man, but instead it became a party to extortion.¹⁹³

Another form of extortion is the indemnification contracts.¹⁹⁴ Indemnification contracts are contracts made between the husband and the wife that the wife agrees to reimburse the man for any future support – like child support – that the court obligates the husband to pay.

¹⁸⁸ International Jewish Women's Human Rights Watch, Newsletter No.11.

¹⁸⁹ "Women who refuse bill of divorce can go to jail" Jerusalem Post, March 13, 2002.

¹⁹⁰ Shava 1976: 121.

¹⁹¹ See e.g. Shenhav in *Justice*, 1999:28.

¹⁹² Lipstadt and Berger 1998:102.

¹⁹³ Lichtman, January 7 2000.

¹⁹⁴ Mavoi Satum's Platform for Legal and Halakhic Reform.

4.5 Criticism against the rabbinical courts

There are eleven rabbinical courts in Israel. There is also a Rabbinical High Court, which sits in Jerusalem. The courts are staffed with 94 *dayanim*, rabbinical court judges. The *dayanim*'s salaries and work conditions are parallel to judges in the magistrate's court. The ten High Court judges have salaries and work conditions matching those of the justices of the Supreme Court. Appointments are until retirement at 70. To be a *dayan*, candidates have to pass five written exams and one oral, conducted by the Chief Rabbinate. The candidates are chosen by an appointment committee consisting of ten members under the chair of the Minister for Religious Affairs. The other members of the committee are the two Chief Rabbis, two Knesset members, two *dayanim* and two lawyers from the Israeli bar association.¹⁹⁵

The process in the rabbinical courts is heavily criticized for not being efficient and actually contributing to the plight of the *agunot*. In some cases the target of the criticism is the court procedure. Hearings in the court are not transcribed and there are not any formal, verbatim protocols. The rabbinical courts use a scribe, who summarizes proceedings, instead of tapes.¹⁹⁶ The rabbinical courts do not publish their decisions.¹⁹⁷ Thus, lawyers and activists working with *agunot* have reports of individual cases, but not any real overall picture of the situation. The decisions issued by the courts are often very short, without any explanation upon what grounds they are based. This is of course a problem for the lawyers who cannot argue against the decision.¹⁹⁸

In other cases, the criticism against the rabbinical court focuses more on substantial problems in the system itself. Those appointed are usually ultra-orthodox.¹⁹⁹ The judges are untrained in civil law and do not have a secular education.²⁰⁰ In yet other cases, actual factual matters, like the accessibility of the court are criticized. The official hours of the rabbinical courts are Sundays to Thursdays, from 9 a.m. to 2 p.m., with a half-hour break in the middle.²⁰¹ In spite of this, the rabbinical courts are criticized for not having regular working hours.²⁰² Furthermore, the rabbinical courts are criticized for lacking authority in the courtroom²⁰³ and for lacking in privacy.²⁰⁴

It is said however, that in the recent years the rabbinical courts, under the leadership of general director Rabbi Eliyahu Ben-Dahan, have taken steps towards improve the situation. The statistics are better, the decisions are typed

¹⁹⁵ Lichtman 2000:11.

¹⁹⁶ Lichtman 2000 *In Jerusalem Magazine*, January 7.

¹⁹⁷ Lichtman 2000 *In Jerusalem Magazine*, January 7.

¹⁹⁸ Ariel Rosen-Zvi, cited in Frankel 1999:29 and Lichtman 2000 *In Jerusalem Magazine*, January 7.

¹⁹⁹ Lichtman 2000:11.

²⁰⁰ Lichtman 2000 *In Jerusalem Magazine*, January 7.

²⁰¹ Lichtman 2000:11.

²⁰² Alice Shalvi, cited in Frankel 1999: 29.

²⁰³ Ariel Rosen-Zvi, cited in Frankel 1999: 29.

²⁰⁴ Alice Shalvi, cited in Frankel 1999: 29.

and computers have been introduced.²⁰⁵ A special High Rabbinical Court in Jerusalem has been established, with *dayanim* trained to deal with the difficult cases from around the country. There are plans for a similar court in Tel Aviv. This court was specially created for women whose cases were open for more than two years in the regional rabbinical courts and had not yet been resolved.²⁰⁶

Female rabbinical pleaders, *toanot* (sg. *toenet*) have also improved the situation in the rabbinical courts. Since ten years back, it has been possible for a woman to study the *halakhab* in order to be a *toenet* since ten years back. The increase in Orthodox learning for women has created a group of women who know the sources and can challenge the *dayanim* on their interpretations. Before that, only rabbis and lawyers could appear before the courts. In January 2000, a female rabbinical court advocate was appointed to serve on the rabbinical court administration, as a coordinator for matters dealing with *agunot*. She has, among other things, the authority to move cases from the local rabbinical courts to the special court for *agunot* in Jerusalem, to hire private detectives to track down disappeared husbands and to advise *dayanim* on how to rule.²⁰⁷

4.6 Recourses through the civil courts

In January 2001, the Jerusalem Family Court handed down a landmark decision, holding that a woman whose husband had refused to give her a *get* for over ten years could sue him for damages.²⁰⁸ The woman had sued her husband, on account of the injury she suffered from his recalcitrance to give her a *get*, even though he was required to do so in a rabbinical court. The husband motioned for summary dismissal, based primarily on two arguments. The first argument was that there is not any cause of action in tort in the State of Israel with respect to the recalcitrance of a husband to give a *get*; and the second, that this concerns a subject that by its nature and substance lies in the exclusive jurisdiction of the rabbinical courts.

The judge in the case, Judge Greenberger swiftly dismissed the argument of lack of jurisdiction. He pointed out that the wife in her claim did not ask the court to require the husband to give a *get* or to implement any sanctions against him to force him to give her a *get*. The claim was for monetary compensation only.

Judge Greenberger also found the lawsuit to have a cause of action under Israeli tort law. As a ground for this he stated: “in my opinion these various infringements combine to form one central cause of action in tort [...] infringement of a woman's personal autonomy caused by depriving her of her ability to determine the continuing course of her life with respect to those issues that are central to the life of any woman.” The central idea here is the woman's right to personal autonomy, which Judge Greenberger found

²⁰⁵ Lichtman 2000, *In Jerusalem Magazine*, January 7.

²⁰⁶ Lichtman 2000, *In Jerusalem Magazine*, January 7.

²⁰⁷ Gross 2000:20.

²⁰⁸ Jerusalem Family Court Case 00/3950, 23.1.01.

manifested in Israel's Basic Laws as well as in the laws of the Torah. To be an *agunah* was thus found by Judge Greenberger to be a compensable injury in accordance with the Tort Ordinance in Israeli law.

The tort law is the law that defines private or civil wrongs or injury. The term “injury” is defined in Section 1 of the Tort Ordinance (Revised Version). The definition is broad and addresses: “Loss of life, loss of property, convenience, bodily welfare or reputation, or a diminution of any of them, and any similar loss or diminution.” Judge Greenberger held that “[u]nlawful infringement of personal feelings as a result of not honoring a person's basic right to shape his life as he wishes constitutes an infringement of the welfare of that person, and it is encompassed by the aforesaid definition of “injury.””

Judge Greenberger also pointed out that many questions regarding this new tort remain unsolved. When, for instance, does the refusal of a husband to give a *get* become “recalcitrance” that entitles the wife to damages? Will the monetary damages be considered by *halakhab* as coercion of the husband that may render the *get* void? The latter does not need to be a problem. Judge Greenberger means that the tort claim can be brought by a wife after she has already been properly given a *get*.

While the Jerusalem Family Court was hearing the husband’s motion to dismiss the tort case, the rabbinical court ruled to jail the husband for 5 years. As a result he finally gave his wife the *get*, but only after the rabbinical court judges included in the terms that the tort case would move to the rabbinical court from Jerusalem Family Court. The husband also demanded that his wife would drop the lawsuit.²⁰⁹

Also outside Israel has refusal to deliver a *get* been found to constitute grounds for civil action. In April 2001, Judge Gartenstein of the New York Supreme Court held that a husband who withholds a *get* is liable for the tort of intentional infliction of emotional distress. A judge in Montreal is currently hearing a claim that the withholding of a *get* restrains a woman from “going on with her life.”²¹⁰

4.7 Prenuptial agreements in Israel

The Chief Rabbinate of Israel has approved the use of prenuptial agreements as an acceptable method for “encouraging” recalcitrant husbands to consent to a *get*. The three largest women’s organizations — *Na'amat*, *WIZO*, and *Emunah* have agreed to draft these agreements at a minimal fee as part of their service to the community.²¹¹

In Israel, the prenuptial agreements do not need to contain provisions aiming at expanding the jurisdiction and power of the rabbinical courts. This is already given by the legislation. Still, the prenuptial agreements have the purpose of

²⁰⁹ <http://www.lind.org.il/features/precedent.htm>. (Last visited 2002-04-30).

²¹⁰ <http://www.lind.org.il/features/precedent.htm>. (Last visited 2002-04-30).

²¹¹ International Jewish Women’s Human Rights Watch, Newsletter No 9.

preventing a situation in which the woman is refused a divorce. Prenuptial agreements in Israel use the halakhic rules of maintenance that obligates the husband to pay alimony to his wife if he refuses to give her a *get*. She could get this through the rabbinical courts as well, although that may be a long process, and the results are not certain.

Professor Ariel Rosen-Zvi has drafted the prenuptial agreement used by the *Na'amat* Women's Organization in Israel²¹². The agreement requires the husband to pay increased spousal maintenance (\$ 1,500 a month or any other sum agreed upon) to his wife if he does not give her a *get*.²¹³ The prenuptial agreement does not reduce the maintenance if the wife has an income of her own. Furthermore, the Rosen-Zvi prenuptial agreement deals with the problem of the Spouses (Property Relations) Law. The prenuptial agreement states that the division of assets may take place before the end of the marriage and the actual giving of the *get*. The division can be done already if the spouses have lived apart for at least six months and one of the parties has filed for a divorce. It can also be done if delaying the balancing of the resources will cause irreparable damage to any of the parties.²¹⁴

A recent study of Israeli couples, ranging from secular to religious, including Israeli-born women and men, as well as new immigrants, who are planning to get married showed that the majority was not interested in signing a prenuptial agreement. The results clearly indicate that young Israeli couples have very little knowledge of the problems of religious divorce and they do not see any need for a prenuptial agreement, which could prevent the problem of the *agunah*. The vast majority of the couples expressed an aversion to the consideration of such an agreement at the time of planning for their wedding, since discussing divorce at such a time would be contrary to the “bonding” of the couple.²¹⁵

4.8 Summary and conclusions

The rabbinical courts are vested with quite far-reaching powers when it comes to sanctioning a recalcitrant husband. However, the courts quite seldom use this legislated power to impose sanctions against husbands who refuse to grant a divorce. The process also tends to take a long time. Instead of handing down a decision, the rabbinical courts return the dispute to the spouses, recommending them to achieve *shalom bayit*, and to work out their problems themselves. This creates problems for the weaker part, usually the woman, who needs a divorce decision to be able to have the common resources divided. In a serious case of domestic violence, or other grave problems within the family, ordering *shalom bayit* can even be dangerous, if it involves sending a wife back to a man who abused her.

²¹² The Rosen-Zvi prenuptial agreement is translated into English by Susan W. Weiss and printed in Weiss 1999, appendix 3.

²¹³ The Rosen-Zvi prenuptial agreement, section 3 (a)-(c).

²¹⁴ *Ibid.* section 2 a (1) and (2).

²¹⁵ International Jewish Women's Human Rights Watch, Summer 2000, Newsletter No. 8.

There is quite a lot of criticism against how the rabbinical courts function. Especially the problems with the procedure are very serious. If lawyers cannot access decisions or get to know the bases and reasoning behind a decision, their chances of protecting their clients decrease. The overall lack of information from the rabbinical court is a problem.

The Israeli civil court decision gives Jewish women a new weapon, which opens up a way to recover monetary damages from recalcitrant husbands. An *agunah's* right to claim damages may prove to be an effective way to pressure recalcitrant men to give a *get*. Hopefully a precedent was set in Judge Greenberger's ruling.

As if being an *agunah* would not be painful enough in itself, the *get* is sometimes used for extortion. One example is the indemnification contracts. The *agunah* support organization *Mavoi Satum* suggests that this kind of agreements should be invalidated on the bases of unconscionability. Reforms and measures to cut off the legal ways for extortion will however only help against the acute symptoms. It can stop the husband from benefiting from his wife being an *agunah*. This is important in itself, but the real bargaining chip in the extortion, his power to refuse her the *get*, can only be addressed with a halakhic reform.

The prenuptial agreement is a good method to try to prevent the *agunah* problem. It is not a comprehensive solution of the problem, but it helps in individual cases. It can also in a contractual way correct other legislation problematic for women. However, it is a problem that not all couples sign a prenuptial agreement before they get married. The majority is not interested in signing a pre nuptial agreement. Many people perceive it as an awkward thing to do just before the marriage. Maybe this can change with the advocacy of the woman's groups and the embracement of prenuptial agreements by the rabbinate.

5 Prenuptial agreements

5. 1 The prenuptial agreement

Methods to deal with the *agunah* problem can be divided into two categories: solutions and inducements.²¹⁶ The inducements are designed to put pressure on the husband to submit to the rabbinical court, the decisions of the rabbinical court, or even to giving a *get* on the wife's demand. The prenuptial agreement is the prime example of an inducement. It does not present any general solution to the *agunah* problem, since it is a contractual agreement between two spouses regarding the terms of *their* marriage. It remains within the framework of the normative *halakhab*, since it still requires the husband to deliver a *get* out of free will. However this is also its advantage, since it makes it easier to accept for the halakhic establishment.²¹⁷

The prenuptial agreements essentially accomplish three things:

- 1 Outside Israel, a Jewish spouse can get a civil divorce and remarry civilly. The prenuptial agreement makes sure that also a religious divorce or at least a *referral to the bet din* will take place. It makes the *agunah problem* outside Israel resemble the *agunah* problem in Israel.
- 2 To accomplish this submission to the *bet din*, or deliverance/acceptance of a *get*, the prenuptial agreement contains an *economical incentive* for the spouses to consent. In orthodox prenuptial agreement, this incentive is usually in the form of an obligation for the husband to pay maintenance to his wife.
- 3 In Israel, some prenuptial agreement also contains provisions aiming at *circumventing the for the woman disadvantageous rules of civil law* regarding e.g. division of property.

How big the incentive is, if it is in the form of maintenance to the wife or not, varies from one prenuptial agreement to another. It also varies exactly what the spouse has to do to avoid the financial burden. Some prenuptial agreements state that it is enough to refer the matter to the *bet din*, others require acceptance of the *bet din*'s decision, while yet others require the actual deliverance/acceptance of a *get* to avoid the financial sanctions.

By imposing the sanctions in form of *mezunot* (maintenance), the sanctions are generally halakhically acceptable. It is an obligation to for a husband to support his wife according to Jewish Law, as long as a *get* has not been issued.²¹⁸ Even increased maintenance seems to be accepted within Jewish Orthodoxy, and is not considered to result in a forced divorce.²¹⁹ Other financial incentives, such as damages or promised payments of indefinite sums of money may result in the invalidation of the *get* for being forced. Maintenance is a measure that the

²¹⁶ Washofsky 1981:146.

²¹⁷ Washofsky 1981:146.

²¹⁸ Broyde 2001: 13.

²¹⁹ Bleich 1981: 174.

rabbinical courts themselves use to put pressure on a recalcitrant husband, if they think that the right grounds for divorce are at hand. Stating the obligation of maintenance already in the prenuptial agreement facilitates for the wife. She does not have to go through what can be a difficult process in the rabbinical court. She is also ensured to get the maintenance, even if she in the eyes of the rabbinical court is to blame for the divorce. In the prenuptial agreement it can also be stated that she is entitled to maintenance, even if she has an income of her own. Without this agreement, the norm in Jewish law is that while the husband is obligated to support her, the wife agrees that her income will go to him.²²⁰ If the wife on the other hand should refuse to receive the *get*, the husband would be freed from this maintenance obligation.²²¹

The prenuptial agreement is a solution to the *agunah* problem that is useful also outside Israel. Since it is to its nature a contractual agreement, it does not need the sanction of any state and it relies on the civil legal system for its enforcement. In the United States, all states will enforce the order of a rabbinical court, after proper notice and compliance with formal requirements.²²² Almost all Orthodox Jewish couples that marry today in the United States are advised to sign a prenuptial agreement.²²³ The Rabbinical Council of America, an organization of Orthodox rabbis unanimously approved a resolution in June 1993, requiring prenuptial agreements in all marriage ceremonies.²²⁴

5.2 Reifying and circumventing agreements

Susan Metzger Weiss²²⁵ divides prenuptial agreements into two categories: reifying and circumventing agreements.²²⁶ The *reifying agreements* have the effect of expanding the jurisdiction and power of the rabbinical courts. They give the *batei din* outside Israel a power over marriage and divorce matching the powers of the rabbinical courts in Israel. The prenuptial agreement thus expands the jurisdiction of the rabbinical court, and gives it a role it would not otherwise have. The main goal of this type of prenuptial agreement is to secure the appearance of the couple before the *bet din*. It is then up to the discretion of the named *bet din* to decide if there are grounds for divorce at hand. This might be a problem for a woman who does not have any grounds, but who simply is tired of him and therefore wants to leave him. The *bet din* does not recognize this as a ground, and will therefore not order the husband to pay the maintenance.²²⁷ The obligation in a reifying agreement like this, sanctioned with the payment of maintenance, is rather to show up before the *bet din* and follow its decision, than actually granting a *get*.²²⁸ It is unclear if this type of

²²⁰ Broyde 2001:67.

²²¹ Broyde 2001:68, n.26.

²²² Broyde 2001:14.

²²³ Weiss 1999:49.

²²⁴ Porter 1995:xv.

²²⁵ Attorney and advocate for *agunot*, founder and administrator of the Max Morrison *Yad L'Isha* Legal Aid Center in Israel.

²²⁶ Weiss 1999:51.

²²⁷ Weiss 1999:64.

²²⁸ Weiss 1999:63.

agreement actually will solve the problem with the recalcitrant husband, because it does not give the woman the right to divorce when she wishes to. Agreeing to submit something to the *bet din* does not mean that the *bet din* will write the *get*, or even compel the husband to write the *get*.²²⁹ Weiss is very critical to this type of agreements. She writes that they “suppress the rising consciousness of women and, as a result, obscure the search for real reform”.²³⁰

The *circumventing agreements* obligate the husband to pay maintenance, or increased maintenance, to the wife until the delivery of the *get*. The only discretion left to the *bet din* is to decide on the factual issue if the husband has given the *get*. In that case the obligation to pay maintenance has ended. In the circumventing prenuptial agreements, the question of the fault becomes irrelevant. It *de facto* creates the divorce-on-demand that does not exist in normative contemporary *halakhab*. However, while creating a divorce-on-demand it still respects the halakhic form, requiring the husband to give the *get* out of his free will.

Weiss recommends the use of the circumventing agreements. Michael Broyde²³¹ means that although this technically is acceptable to Jewish law, it remains a problem that the solution is based on a model of unilateral exit rights from a marriage.²³² However, Broyde is in favor of creating economical incentives to provide for unilateral, no-fault divorce. Using support agreements to put pressure on the husband is acceptable to him. He sees it as “graft[ing] a unilateral no-fault right of divorce onto the technical requirements of the mutual divorce school of thought”²³³.

5.3 Suggested prenuptial agreements

Since the prenuptial agreement is a solution, which is generally accepted by the rabbinical establishment, there are many agreements available. Therefore, it is interesting to see what the differences are between the agreements, and how that effects the situation of the *agunah* in different ways. I choose to look at the prenuptial agreement suggested by the RCA, Ariel Rosen-Zvi and Haskel Lookstein. The RCA agreement is interesting because RCA is a very big and influential organization in American orthodoxy. The Rosen-Zvi and Lookstein prenuptial agreements are interesting because they are very progressive and useful to prevent an *agunah* situation.

²²⁹ Broyde 2001:12, 65.

²³⁰ Weiss 1999:51.

²³¹ Associate professor of law at Emory University and orthodox *dayan* in the *Beth Din* of America.

²³² Broyde 2001:14.

²³³ Broyde 2001:67.

5.3.1 The Rabbinical Council of America

The prenuptial agreement of the Rabbinical Council of America (RCA)²³⁴ consists of two documents, “Prenuptial Agreement, Husband’s Assumption of Obligation” and “Prenuptial Arbitration Agreement between Husband and Wife”, both formulated by R. Mordechai Willig. It has been endorsed by Rabbi Lau, the Ashkenazic Chief Rabbi of Israel, as well as other rabbis like Ovadia Yosef, the former Sephardic Chief Rabbi of Israel. In spite of not really adding anything to the Israeli situation (where the rabbinical courts already have exclusive jurisdiction over marriage and divorce) the Hebrew version of the RCA prenuptial agreement is the most widely endorsed by the Israeli rabbinical establishment.²³⁵

In the “Prenuptial Agreement, Husband’s Assumption of Obligation”, the husband unilaterally accepts the obligation to pay his wife increased support payments if the couple live apart. According to section I, this obligation ceases if the wife refuses to appear before the *bet din*, or if she “fails to abide by the decisions or recommendations by the *beth din*”

In the “Prenuptial Arbitration Agreement between Husband and Wife”, both spouses undertake to refer marital disputes to the *bet din*. The Prenuptial Arbitration Agreement also contains three optional clauses, to be included by mutual consent. Sections III (b) and (c) give the jurisdiction over monetary disputes, child support, visitation rights and custody to the *bet din*. Section III (d) gives the *bet din* right to take “the respective responsibility of the parties for the end of the marriage” into account when dividing the property.

Susan M. Weiss considers the RCA prenuptial agreement to be a reifying agreement, since its result is to expand the power and jurisdiction of the rabbinical court. If the husband is recalcitrant, and the *bet din* decides that the wife does not have any grounds, she will lose the right of support, unless she accepts continuing the marriage.²³⁶ Weiss is also critical to the RCA’s recommendations to authorize the *bet din* also to decide issues of child support, visitation and custody. She points out that litigation of monetary disputes in the *batei din* often harms women.²³⁷ If the husband agrees to deliver the *get*, but the wife still somehow is to blame for the end of the marriage, the *bet din* may take this into account when dividing the property.²³⁸ She fears that husbands may condition their signing of the prenuptial agreement on the acceptance of the *bet din*’s jurisdiction of these ancillary matters.²³⁹ Weiss also fears that the rabbinical courts may take the jurisdiction over matters of marital property, although the couple expressly refrained from giving them jurisdiction. She bases this on Rabbi Willig’s opinion that it is improper to let civil courts litigate

²³⁴ The Rabbinical Council of America is an organization for American rabbis. Its membership is at the moment around 1.200. The prenuptial agreement can be ordered from The Rabbinical Council of America, 305 Seventh Avenue, New York. N.Y. 10001.

²³⁵ Weiss 1999:70.

²³⁶ Weiss 1999:64.

²³⁷ Weiss 1999:66.

²³⁸ Weiss 1999:69.

²³⁹ Weiss 1999:66.

those matters. The *batei din* may hold that the husband's free will has been compromised by the decision of the civil court, or even by the fee for legal representation in the civil courts. Weiss also points out the practice of the Israeli rabbinical courts to encourage the wife to let the rabbinical court use ancillary matters as leverage against the husband, to "buy" herself a *get* by giving in, in other areas.²⁴⁰

In Israel, Weiss warns that the RCA prenuptial agreement may be interpreted as an agreement that the wife will subject to the rabbinical courts also in matters of spousal support and matters ancillary to the divorce, e.g. child support, custody and division of marital property. Indeed, some prenuptial agreements that have been authorized²⁴¹ have included clauses that give the rabbinical courts exclusive jurisdiction over matters ancillary to the divorce. They have also included a clause that obligates the wife to pay spousal support if she refuses to accept the *get*. Weiss considers this unequal as well. She expects the rabbinical courts to be more ready to enforce such a sanction on the woman, since it does not risk prejudicing the *get* as forced.²⁴²

5.3.2 Professor Ariel Rosen-Zvi

This prenuptial agreement²⁴³ is used by the *Na'amat* Women's Organization in Israel, and it is a good example of a circumventing agreement. The agreement requires the husband to pay increased spousal maintenance (\$ 1.500 a month or any other sum agreed upon) to his wife. This obligation starts at the end of a twelve-month separation period or when a rabbinical court decides that the marriage is not viable any longer, or if the marriage is found to be irretrievably broken down.²⁴⁴ The prenuptial agreement does not reduce the maintenance if the wife has an income of her own. The obligation of maintenance ends when the husband actually has given his wife the *get* or if he is prepared to do it, but she refuses to accept it.²⁴⁵

This prenuptial agreement also deals with the problem of the Spouses (Property Relations) Law, which determines that the division of assets takes place only after the divorce is terminated. This law gives even less incentive for the husband to deliver the *get*, since he in addition to stop her from remarrying also can prevent her from getting her share in their property. The prenuptial agreement therefore states that the division of assets may take place before the end of the marriage and the actual giving of the *get*, if the spouses have lived apart for at least six months and one of the parties has filed for a divorce, or if delaying the balancing of the resources will cause irreparable damage to any of the parties.²⁴⁶

²⁴⁰ Weiss 1999:67.

²⁴¹ Authorization is given by a civil or religious court according to § 2 The Spouses (Property Relations) Law, 27 LSI 313.

²⁴² Weiss 1999:70.

²⁴³ The Rosen-Zvi prenuptial agreement is translated into English by Susan Weiss and printed in Weiss 1999, appendix 3.

²⁴⁴ The Rosen-Zvi Prenuptial agreement, section 3 (a)-(c).

²⁴⁵ The Rosen-Zvi Prenuptial agreement, section 4.

²⁴⁶ The Rosen-Zvi Prenuptial agreement, section 2 a (1) and (2).

5.3.3 Haskel Lookstein

R. Lookstein's proposal²⁴⁷ is a circumventing agreement, which limits the cases where the marriage would be terminated halakhically to the cases in which a civil divorce already has been granted. If a civil court has "terminated, dissolved or annulled" the marriage the spouses are bound to deliver/accept the *get* on demand, regardless of fault. Refusal is sanctioned with a court-imposed penalty, which includes payment of all costs to secure the *get*. The agreement mentions "attorney's fees, reasonable incurred by the requesting party to secure the non-compliant party's performance, and damages caused by the demanding party's unwillingness or inability to marry pending delivery and acceptance of a "get"". The agreement does not expressly state that it needs to be the *bet din* that enforces the sanctions of the agreement. Possibly it could also be a civil court.

Weiss' analysis of the Lookstein prenuptial agreement is that it might be difficult to implement, since the amount of damages is not specified. How can a court for instance calculate the damages for her inability to remarry? Weiss also think it would be a problem to get American courts to actually enforce such a vague contract.²⁴⁸ Broyde's criticism is that a suggestion like this would do away with the autonomy of Jewish law, and just make the *bet din* follow whatever a civil court decides. Broyde finds this problematic; Jewish divorce would be reduced to a "pale ritual".²⁴⁹

5.4 Summary and Conclusion

Prenuptial agreement agreements do not reinterpret the *halakhab* in any radical way. The man still has to give the *get* out of his own will. The prenuptial agreement merely put some pressure on him. The prenuptial agreement is therefore a method that has been accepted by the halakhic authorities today.

The prenuptial agreement is a solution to the *agunah* problem that is useful also outside Israel. Since it is to its nature a contractual agreement, it does not need the sanction of any state but relies on the civil legal system for its enforcement.

The premarital agreement does not solve the *agunah* problem, but it improves the situation for the women who signed them, by reducing the risks of being left an *agunah* and the subject of extortion. For most women it is a useful protection. However, there will always be husbands who are too rich or poor to be effected by a financial obligation. If he is rich, they will not harm him, neither if he is poor, since he will not be able to pay them anyway. In addition, there will always be some people who did not sign a prenuptial agreement. As we saw in chapter 4.7, there are many who do not in Israel. For them, this method does not have any implications and does not bring about any improvements. The Rabbinical Council of America requires prenuptial

²⁴⁷ The Lookstein prenuptial agreement is printed in Weiss 1999, appendix 7. Rabbi Haskel Lookstein is the rabbi of *Kehillat Jeshurun* in Manhattan.

²⁴⁸ Weiss 1999:79.

²⁴⁹ Broyde 2001:62.

agreements in all marriage ceremonies. That would be a good practice to introduce in Israel as well.

There are many different prenuptial agreements. In general, the circumventing agreements will be more favorable to the woman, since they do not put any discretionary power in the hands of the *bet din*. The reifying agreements, on the other hand, tend to give women a feeling of safety that is not quite true. A guaranteed submission to the *bet din*, is not a guaranteed *get*.

6. Modern halakhic solutions

Methods for dealing with the *agunah* problem within the framework of the *halakhab* can be divided into two categories: inducements and solutions.²⁵⁰ While the inducements aim to put pressure on the husband to deliver a *get* within the existing halakhic framework, the solutions seek to solve the problem by finding other ways of terminating a marriage than by the *get*. The solutions seek to remove the power of the husband to leave his wife an *agunah*, by expanding or reinterpret the halakhic framework. If this were to be accomplished, it would be a more radical and efficient way of dealing with the problem. On the other hand, this would also mean that radical changes would have to be made in what is now normative Jewish law. Radical change has so far met with opposition from the halakhic authorities.²⁵¹

6.1 *Havka'at kiddushin* - Annulment

6.1.1 Annulment in theory

Annulment is an often-mentioned solution to the *agunah* problem. It is theoretically endorsed by several scholars²⁵² and even put into practice by the orthodox *Beit Din Zedek LiBaiot Agunot* in New York. It is also the solution used by the conservative movement.²⁵³ The foundation for the modern theory of annulment is the cases in the Talmud discussed above, chapter 2.4. According to the Talmud, the cases of annulment are

1. The case of the canceled *get*.
2. An improperly conducted marriage effected under duress or abduction. Those cases involve fraud or coercion, present already in the marriage ceremony. The informed consent of the woman was not at hand.

If the Rabbis still have the power to annul marriages improperly initiated was debated through the history of *halakhab*. Since the Middle Ages, the application of the principles of annulment usually has been restricted to cases mentioned in the Talmud. Both R. Yosef Karo and R. Moshe Isserles, the Sephardic respectively Ashkenazic authority in the *Shulchan Arukh*, see the cases in the Talmud as *ad hoc* in character and not applicable on other cases.

The case with the canceled *get* gave the principle that all Jewish marriages are conditioned to the consent of the rabbis. This is something that men take upon themselves at the time of the wedding. The rabbis of the Talmud added this principle to the *halakhab* and gave only one case of such a condition (the case with the husband who cancels the *get* without informing his wife). In the same way, maybe rabbis of today could add other rules, and make marriages subject

²⁵⁰ Washofsky 1981:146.

²⁵¹ Washofsky 1981:146.

²⁵² Elon 1994:879.

²⁵³ See above, 2.5.

to annulment upon breaking those added rules.²⁵⁴ This is, however, not at all normative *halakhab*. On the contrary, the dominant trend in *halakhab* has been to reject the practice of *havka'at kiddushin*.

6.1.2 Rabbi Moshe Feinstein

Moshe Feinstein was a traditional orthodox rabbi in the United States. His opinions on matters of *halakhab* are of enormous importance for orthodoxy today. He enjoys a respect and status few challenge. R. Feinstein published a collection of *tshvot*, responsa, to difficult cases that he dealt with. In spite of not being liberal, his solutions to problems of *agunot* are creative and flexible. He resorted to annulment only after attempts to secure a *get* from the husband. R. Feinstein did permit *agunot* to remarry without a *get* if there was a material defect in the marriage ceremony, especially if the witnesses had not been orthodox. In that case he ruled that the couple never had been married. He also annulled marriages if the husband at the time of the marriage had hidden facts from his wife who would have led her to reject him. Rabbi Feinstein ruled that these marriages were grounded in *kiddushei ta'ut*, error. These cases concern problems present already at the time of the wedding, not problems appearing during the course of the marriage. R. Feinstein also limited the application of annulments to cases where the woman had left the husband immediately. If she had continued to live with him after the discovery, it was more problematic to consider the marriage void.²⁵⁵ The *halakhab* has a strong presumption that if the couple has a sexual relationship and the intent to be married, it either heals the shortcomings of the original marriage, or creates a new marriage by intercourse.²⁵⁶ However, if the woman is unaware that her marriage is void or unaware that the sexual relationship creates a valid marriage, she cannot be said to have the intent to recreate a marriage. The intent is essential, at least according to R. Feinstein.²⁵⁷

One case involved an impotent man. There was not any medical solution to his problem. He refused to give his wife a divorce and abandoned her without a *get*. R. Feinstein accepted a doctor's certificate as evidence that the man had been impotent already at the time of the wedding. His ruling was that since it was impossible to make the man give a *get*, the marriage was annulled.²⁵⁸ Another man was of limited mental capacity, what the Talmud calls a *shoteh*. This mental defect made him unable to give his wife a *get*. The wife was not aware of this at the time of the wedding. R. Feinstein ruled that had she known of the defect, she never would have agreed to marry. For this reason the marriage was annulled.²⁵⁹ What is especially interesting with this case is that although the woman was aware of the man's actual mental defect, she was unaware of the consequences, i.e. the inability to issue a *get*, and it was in this respect informed consent was lacking.

²⁵⁴ Hauptman 1998:112-114.

²⁵⁵ Feinstein, *Iggrot Moshe on Even ha Ezer* 4:113.

²⁵⁶ Intercourse can constitute the marital act, see chapter 2.1.1.

²⁵⁷ Broyde 2001: 101-102.

²⁵⁸ Feinstein, Moshe: *Iggrot Moshe on Even ha Ezer*, no. 1:79.

²⁵⁹ Feinstein, Moshe: *Iggrot Moshe on Even ha Ezer*, no. 1:80.

In a third case in which a woman who married a bisexual man, Rabbi Feinstein ruled that the marriage was to be considered a void transaction because it was based on error. In this case, Rabbi Feinstein discussed the halakhic presumption that a woman prefers any man, even a “defect” man to not having any man at all. He states that the presumption still exists, reality has not changed since Talmudic times, but “ It is certain to us that no woman would desire to marry a man as disgusting, repugnant, and embarrassing as this.”²⁶⁰ R. Feinstein’s opinion seems to be that the presumption is just a presumption, which can be refuted in any case where it is shown to be untrue, due to the personalities and circumstances. In another responsum, R. Feinstein states that this presumption is not applicable to non-religious people.²⁶¹

R. Feinstein also used *kiddushei ta’ut* in a case where a husband became insane after the marriage, but had been similarly ill prior to the marriage, although he appeared to be cured at the time of the wedding.²⁶² In yet another case, the husband concealed for his wife that he spent time in hospital before they got married. Rabbi Feinstein ruled that the marriage contract was based on fraud, and thus that there was not any need for a *get*.²⁶³

6.1.3 A practical attempt to annul marriages

Rabbi Emanuel Rackman, rector of Bar-Ilan University has for a long time been working to find creative halakhic solutions to the *agunah* problem. In 1996 he set up his own *bet din*, *Beit Din Zedek LiBaiot Agunot* in New York, together with Rabbi Moses Morgenstern and in association with an organization working for *agunot*, the “AGUNAH, Inc.”²⁶⁴. The court has freed more than 280 *agunot*²⁶⁵, but Rackman’s initiative has not received the support of the majority of the Orthodox community.

The Rackman/Morgenstern *bet din* is freeing women by annulment. Instead of terminating the marriage by a *get*, given by the husband to the wife, the marriage is terminated by a *ptur*, a document of annulment given by the *bet din* to the wife. The basis for the *Beit Din Zedek LiBaiot Agunot* to annul a marriage is *kiddushei ta’ut*. It means that a marriage is voidable because important information about a spouse or about the terms of marriage was not revealed at the time of the wedding. Therefore, informed consent to enter into the marriage agreement was lacking. The *Beit Din Zedek LiBaiot Agunot* has expanded the grounds an annulment can be based on. They divide the grounds into three categories, *Kiddushei ta’ut I-III*.²⁶⁶

1. A “salient defect” in the husband (e.g. impotence) existed at the time of the wedding, but was not disclosed to the bride, who would have rejected him as a spouse had she known. It does not matter if the husband willfully concealed the information, or if he himself also was

²⁶⁰ Feinstein, *Iggrot Moshe on Even ha Ezer* 4:113.

²⁶¹ Feinstein, *Iggrot Moshe on Even ha Ezer* 4:83.

²⁶² Rackman[without year] p.244.

²⁶³ Rackman: 1995:71.

²⁶⁴ Aranoff 2000:201.

²⁶⁵ Lichtman 2000: *In Jerusalem Magazine*, January 7.

²⁶⁶ Aranoff *et al* 1998:26-27.

unaware. The list of “salient defects” also includes physical and psychological abuse, adultery, sexual molestation, abandonment, criminal activity, substance abuse and sadism. The *Beit Din Zedek LiBaiot Agunot* views the withholding of a *get* as an indication of sadism. It is enough if the defects are manifest after the marriage. They are still considered to have existed as potential defects at the time of the wedding.

2. The woman enters into the marriage under the false impression that the rabbis will provide a way out of the marriage, by using physical coercion, if problems occur after she was married. She does not realize that the rabbis today lack powers to impose a divorce on a recalcitrant husband. Had she realized that she could be virtually imprisoned by her husband, she would never have consented to marriage.
3. Modern women would not agree to marriage if they realized that the nature of the Jewish wedding is the man acquiring the woman.

Rackman’s initiative has not received the support of the majority of the Orthodox community, and not of the Rabbinat of Israel²⁶⁷. It has been criticized for making far-reaching reforms without sufficient halakhic bases. Even if annulments are accepted in normative orthodox *halakhab* today²⁶⁸, they are accepted in a more limited way. A marriage can be considered void *ab initio* because of a major mistake (*kiddushei ta’ut*) e.g. in the marriage ceremony. It can also be void because the husband had a concealed defect, which would have led the wife to reject him, had she known about it. However, the number of mistakes and defects that prevent a marriage from ever having been valid is very limited in normative orthodox *halakhab*. The *Beit Din Zedek LiBaiot Agunot* has expanded the list of what can be considered *kiddushei ta’ut*.

The view accepted by the majority of the orthodox community is that in the case of a defect in the husband, this defect must have existed manifestly at the time of the wedding. Rackman’s interpretation that e.g. criminal activity, substance abuse and adultery manifest subsequent to the wedding can be said to have existed already at the time of the wedding, is contested.²⁶⁹

Regarding what the *Beit Din Zedek LiBaiot Agunot* calls *kiddushei ta’ut* II and III, they are not accepted as grounds for annulling marriages in normative orthodoxy. It is questioned if they are halakhically valid at all.²⁷⁰ However, the claim that the woman never would enter a marriage if she would know that there is not any way for her to get out of it (*kiddushei ta’ut* II) resembles R. Feinstein’s ruling of annulment in the case where the woman was aware of the man’s actual mental defect but unaware of its consequence, i.e. the inability to issue a *get*.²⁷¹

There is a disagreement between the *Beit Din Zedek LiBaiot Agunot* and other orthodox rabbis as to if the marriage can be annulled if the conjugal

²⁶⁷ Frazer 1999:128, n. 118.

²⁶⁸ See e.g.. R. Moshe Feinstein: *Igrot Moshe Even ha-Ezer* 1:79, 80.

²⁶⁹ Bleich 1998:91-92. See also Rackman, M. 1999:103-106, for a reply.

²⁷⁰ Bleich 1998: 108-116.

²⁷¹ Feinstein, Moshe: *Iggrot Moshe on Even ha Ezer*, no. 80.

relationship continued after the defect was discovered. Emanuel Rackman²⁷², Michael Rackman²⁷³ and Susan Aranoff²⁷⁴ hold that it is possible. J. David Bleich on the other hand, thinks that the wife needs to act immediately after the discovery of the defect to annul the marriage. Otherwise a marriage requiring a *get* has been established by means of intercourse.²⁷⁵

There is also a disagreement regarding the Talmudic principle of *tam lemetav tan du milemetav armelu*, “better to dwell two together, than to dwell alone”.²⁷⁶ This principle is traditionally applied on women; it presumes that a woman would rather marry a “defective” man than stay unmarried. The *Beit Din Zedek LiBaiot Agunot* considers the presumption “rebuttable in every case, if not completely obsolete” due to the change in women’s economic and social status.²⁷⁷ J. David Bleich²⁷⁸ opposes the idea that the principle would be obsolete. It is not a statement for which psychological or sociological changes matters. Bleich considers it a presumption, but a presumption that is hard to rebut. Only in “very limited instances” can the presumption be set aside. Susan Aranoff, replied at length in an article in *Nashim*, a journal for Jewish women and gender issues. She clarified that not only does she consider *tam lemetav tan du milemetav armelu* outdated today, it is not a comprehensive unyielding presumption in the Talmud either.²⁷⁹ She shows that in the five Talmudic contexts the principle appears in, it is cited as an aphorism more than a determining legal presumption. At least, if used as a presumption, a presumption that easily could be rebutted in the individual case. Aranoff writes: “[M]y argument that the Talmud is not making a broad generalization about women’s attitudes toward all loathsome marriages, but rather a judgment about a woman in this specific set of circumstances.”²⁸⁰ As far as today’s *agunot* are concerned, a *bet din* should take into account women’s changed social and economical status in this set of circumstances. Finally, Aranoff shows that in none of the cases in the Talmud, the principle was used when the husband was abusive, or suffering from a grave personality disorder. Rather, the Talmudic cases dealt with the risk of a levirate marriage with a repulsive brother-in-law, an unimpressive husband in physical, social or economical regard, failure to give the bride an item of a certain value at the wedding among others. These cases were less serious for the woman than the situation of physical abuse many *agunot* are in today. Not even in those for the woman less serious cases, the presumption was more than a presumption, which could be rebutted.

The *Beit Din Zedek LiBaiot Agunot* has been heavily criticized not only from the rabbinical establishment, but also from *agunot* activists. Rivka Haut, an orthodox feminist and activist for *agunot*, even expressed that the Morgenstern/Rackman *bet din* made the situation worse. She means that other rabbis, who would have used the more traditional way of annulling marriages,

²⁷² Rackman, E 1998:4.

²⁷³ Rackman, M. 1999:104-105.

²⁷⁴ Aranoff 1999: 4.

²⁷⁵ Bleich 1998:85. Intercourse can constitute the marital act, see chapter 2.1.1.

²⁷⁶ *Talmud Bavli, Bava Kamma 110 b.*

²⁷⁷ Aranoff *et al* 1998:26-27.

²⁷⁸ Bleich 1998:102-108.

²⁷⁹ Aranoff 2000:208-219.

²⁸⁰ Aranoff 2000:210.

now refrain from it because they do not want to be confused with the Rackman/Morgenstern *bet din*.²⁸¹

Another problem is of course that this *bet din* divides the Jewish community even more. Not even within orthodoxy will it be taken for granted that a divorced woman really is divorced, and able to remarry. Only one of the *agunot* freed by Rackman and Morgenstern is actually able to remarry in Israel, since the Israeli Rabbinat has accepted the annulment of her marriage by the *Beit Din Zedek LiBaiot Agunot*.²⁸²

6.2 Conditional divorce

In the *Gemarah*²⁸³, it is described how the participants in the wars of King David leave their wives a *get*, conditioned on the failure of the husbands to return home from battle.²⁸⁴ In modern time, the conditional *get* has also been used to prevent soldier's wives to become *agunot*. It was used in Palestine during both world wars, and in England during World War I.²⁸⁵ However, the conditional *get* is not so well suited for the case of the recalcitrant husband. Both Maimonides and the *Shulkhan Arukh* state that if the husband and wife are secluded together before a bill of divorce is delivered to the wife, the *get* is not valid any longer.²⁸⁶ This would annul any conditional *get* written at the time of the marriage.

6.3 Conditional marriage, *kiddushei al tenai*

The bride and the groom can agree on certain conditions regarding their marriage. If those conditions are not met, the marriage is considered null and void. The conditions could include circumstances such as the husband's presence, or the existence of a civilly valid marriage.

Once the marriage has been consummated it is presumed in normative *halakhab* that the conditions are renounced.²⁸⁷ However, if a condition is made at the time of the marriage, and kept in effect during the sexual relationship, the condition remains valid. A breach of the condition then end the relationship without a divorce, "as if there never was a marriage".²⁸⁸ If the condition is explicitly repeated there is strong halakhic support that it can be used. R. Moshe Isserles ruled that the condition is valid in his normative Ashkenazic comments to the *Shulkhan Arukh*. Isserles suggested that

²⁸¹ Sofer 2000.

²⁸² Lichtman: *In Jerusalem Magazine*, January 7, 2000.

²⁸³ Talmud Bavli *Ketubot* 9b.

²⁸⁴ However, Rabbenu Tam interpreted the divorce as unconditional, with the prerogative of the couple to remarry when the husband returned. Bleich 1977:151.

²⁸⁵ Bleich 1977:153.

²⁸⁶ Bleich 1977:153.

²⁸⁷ *Even ha Ezer* 38-39.

²⁸⁸ Broyde 2001:96.

conditional marriage could be used on the case of the *yevamah* if the brother was unwilling or unable to perform *halitzah*.²⁸⁹

Some contemporary authors doubt the presumption that a sexual relationship “heals” the condition, and say that it was true only when the betrothal and marriage were years apart. Now, in the Jewish wedding ceremony, they take place after each other, under the *chuppah*, the wedding canopy. Can anyone really believe that “the man who made a stipulation just a few minutes before has changed his mind” because he had intercourse with the bride?²⁹⁰

The conditional marriage was never widely used.²⁹¹ Maybe it was considered too difficult to renew the conditions periodically once the sexual relation started, preferably repeat them in front of a *bet din*.²⁹² However, there are historical examples that conditional marriages have been used. It was used by R. Isaac of Brunn in the 15th century, in the case of the *yevamah*, in order to release the widow from the obligation of marrying an apostate brother-in-law. In the 20th century, attempts were made to revive the idea of conditional marriages. In 1907, a council of French rabbis suggested a marriage with the condition that if it were terminated by a civil divorce, the Jewish marriage would be considered null and void as well. The French suggestion was met with intense opposition.²⁹³ There were three main points of criticism:

1. The connection to the civil divorce would turn Jewish law into a puppet.
2. R. Isaac’s of Brunn conditional marriage was only applicable on that very case of the *yevamah*,
3. Once the marriage has been consummated we presume that the man renounced the condition.

In 1924, the rabbinate of Turkey instituted conditional divorce. It was however rejected by the rabbinate in Palestine.²⁹⁴ In 1967, R. *Eliezer Berkovits* developed the suggestion further. His suggestion was that the man would state before the wedding that in the case he would in the future refuse to give a *get*, the *bet din* would have the power to annul the marriage. Also this proposal was met with opposition from the orthodox authorities, but was adopted by the Conservative movement.²⁹⁵

6.4 Abandoning *kiddushin*, the Jewish marriage

To abandon *kiddushin*, the Jewish marriage altogether is the most radical suggestion to how to solve the *agunah* problem. The idea is that if there is no Jewish marriage, there is consequently no need for a Jewish divorce through a *get*. Meir Simcha Feldblum, professor in Talmud at the Bar Ilan University

²⁸⁹ Isserles on *Even ha Ezer* 157:4

²⁹⁰ Chieger 1981:223-24.

²⁹¹ Washofsky 1981:147.

²⁹² Broyde 2001:96.

²⁹³ Meiselman 1999:62.

²⁹⁴ Novak 1974:44.

²⁹⁵ See above, 2.5.

developed this suggestion, which he named *be derekh kiddushin*, “in the way of marriage”, or “like a marriage”. His idea, based on examples from the Talmud, is that there are many levels of marriage. The preferred one is *kiddushin*, the model that is now normative in Jewish law, whereby the man “acquire” the woman by presenting her an object of a certain value, standardized to be a ring. Other “connections” between man and woman in which the woman is not considered as “property” that can be “bought” also exist. These models, or connections, as Feldblum calls them, do not require a *get*.²⁹⁶ One example is *pilegshut*, usually translated as concubinage. Feldblum’s suggestion has its base in *pilegshut*, although he is very careful to point out the differences.²⁹⁷ *Derekh kiddushin* keeps the wedding ceremony used today almost intact. It only changes the words “*mekaddeshet li*” (“sanctified to me”) with “*meukbedet li*” (“kept special for me”).²⁹⁸ The couple will see themselves as married and so will everybody else. Feldblum means that his suggestion will not promote immorality. It will preserve the family unity, and if one of the spouses wants divorce he suggests marriage counseling first. This whole focus on family unity he means makes *derekh kiddushin* different from *pilegshut*, with its connotations of extramarital affairs.²⁹⁹

Feldblum himself realizes that not all Jews will accept the model of *derekh kiddushin*. Therefore, he suggests that the model of *kiddushin* also remains for couples that are *shomrei mitzvot*, religiously observant.³⁰⁰ In fact he advocates *derekh kiddushin* only for women who are not observant, and who do not want to be dependent on the *get*, while still keeping within Jewish tradition. He writes that his solution will not resolve the *agunah* problem but will merely reduce it.³⁰¹ There will always be people who want to be stricter, although Feldblum regards the fear of *mamzerut* as “mild”.³⁰²

In addition to be a medicine worse than the illness it tries to cure, this suggestion has also been criticized from a moral point of view, that it is not acceptable to totally abandon the institution of marriage.³⁰³ There might also be a legal problem. The lack of a complete marriage ceremony and *kinyan* does not necessarily mean that there is not any need for *get*.³⁰⁴ As we have seen, *ex post facto*, a valid marriage can be said to have been created simply by intercourse if there is intent to constitute a marriage.

6.5 Get through an agent

In 1912, R. Ben-Zion Alkalai of Algiers suggested that the husband would appoint the *dayanim* of the rabbinical court as agents for writing the *get*. R. Louis Epstein put forward a suggestion in the 1930’s that the groom would appoint

²⁹⁶ Feldblum 1997:215.

²⁹⁷ Feldblum 1997:214.

²⁹⁸ Feldblum 1997:211.

²⁹⁹ Feldblum 1997:214.

³⁰⁰ Feldblum 1997:211.

³⁰¹ Feldblum 1997:215.

³⁰² Feldblum 1997:211.

³⁰³ Broyde 2001:63.

³⁰⁴ Klein 1975:1-12.

his bride the agent for the purpose of writing her own *get*. The agency would come into effect, should he leave her, refrain from supporting her for at least three years or if the couple would receive a civil divorce.

A halakhic objection against Epstein's suggestion was that an appointment of an agent to deliver the *get* could not be seen as a serious promise with specific terms. Such a contract is called *asmakhta* in Jewish law, and it is not enforceable.³⁰⁵ With both the suggestions of *get* through an agent it would be very easy for the husband to dismiss the agent anytime he likes. In addition, according to both Maimonides and the *Shulchan Arukh* cohabitation annuls the agency for divorce, just like it annuls a condition.³⁰⁶

6.6 *Get zikui*

Get zikui can be translated as “constructive agency”. It is not really an implied contract, because there is not any intent, not even implied, from the principal. The principal is more like a third party beneficiary.³⁰⁷ It is based on a halakhic principle that if a certain thing is thought to be to the benefit of somebody, the benefit may be imposed on this individual, even without his informed consent.³⁰⁸ However it needs to be an absolute unmitigated benefit for the beneficiary. There cannot be any negative consequences of the action.³⁰⁹ In the area of divorce, the discussed application of the principle is for the *bet din* to issue or accept a *get* in the place of the husband or wife, because this can be said to be an unmitigated benefit for the husband/wife.

First we look at the case where the *bet din* accepts the *get* on behalf of the wife. It has been questioned if accepting the *get* at all can benefit the woman in an absolute way. Divorce serves to terminate the obligation for the husband to support the wife. Even if she really hates her husband, it is therefore unavoidable that she will also lose financially on the divorce. Her benefit of the divorce is not unmitigated.³¹⁰ The *Shulchan Arukh*³¹¹ notes that in case the woman committed adultery, there might be an unmitigated benefit, so that *get zikui* could be used. (A woman who committed adultery cannot, according to Jewish law, have a sexual relation to her husband, and she is not any longer entitled to support.) However, R. Isserles holds that unless she plans to get married to somebody else there is not any such unmitigated benefit. Also the principle of *tam lemetav tan du milemetav armelu*, (it is better to dwell together than alone) makes it dubious if a *get* ever can be said to be an unmitigated benefit for the woman.³¹² If the presumption is that “it is better for a woman to have any husband at all than to be a widow” it can even be said to be against her best interests to be divorced. Jewish law does not allow acting on a person's

³⁰⁵ Meiselman 1999:64.

³⁰⁶ Bleich 1977:166.

³⁰⁷ Bleich 2001:45.

³⁰⁸ Washofsky 1981:160.

³⁰⁹ Bleich 2001:49-50.

³¹⁰ Bleich 2001:50.

³¹¹ *Even ha Ezer* 140:5

³¹² Aranoff 2000:210-11.

behalf without his/her consent if it is to that person's detriment.³¹³ It has been argued that fulfilling a religious duty is an absolute benefit. In that case it can be argued that the *bet din* can be authorized to receive a *get zikui* on behalf of a woman who refuses to get divorced although her husband is an apostate. Jewish law requires a woman to leave her husband if he is an apostate.³¹⁴ Receiving the *get* on her behalf in that case rests on an analogy with Maimonides' famous statement that a man can be stricken until he realizes his own good, which is his religious duty to give his wife a *get*.³¹⁵

The opposite, accepting a *get* on behalf of the husband has not been accepted either, in fact it is more contested. The problem is that the procedure of *get zikui* does not uphold the requirement that the husband need to issue the *get* of his free will.³¹⁶ There is also not any benefit absolute enough to mandate the court to accept a *get* on behalf of a recalcitrant husband. He does not have the problem of committing adultery, even if he remains married to his first wife when he marries again.³¹⁷

However *get zikui* could be used to free certain *agunot*, when the husband is not recalcitrant.³¹⁸ A rabbi Klatzkin ruled after the first world war, that some women whose husbands had disappeared in the war could remarry. In those cases, there were indications of the will of the husbands. In one case, the husband actually had left a *get* with an agent, who unfortunately got killed in the war as well.³¹⁹ In 1957 the then Chief Rabbi of Israel, Herzog, sought to free four women from Yemen who came to Israel as *agunot* when their husbands converted to Islam. R. Herzog sought the opinion of R. Yechezkel Ya'akov Weinberg, who looked for a solution involving a *get zikui* to allow the women to remarry. However, he did not find one. In the case of an apostate, even if a divorce does not harm him in any way, it does not benefit him either. The requirement of an absolute unmitigated benefit is thus not fulfilled.³²⁰

The reason that *get zikui* cannot be used on the recalcitrant husband is because of the definition of "benefit". In the definition that is normative today, the wife can be said to benefit from a divorce in certain cases, by application of "objective criteria imposed from the outside"³²¹. If this was extended to the husband, which R. Weinberg seriously considered in his opinion regarding the Yemenite women, *get zikui* could be applied also in the case of the recalcitrant husband. If the woman can show grounds for divorce, it might be possible to say that it is, in the line of Maimonides' opinion, to his absolute benefit to obey the court order, but his evil inclination is keeping him from it.³²² This would be a parallel to how *get zikui* is considered an absolute benefit for the woman whose husband is an apostate. However, this is not normative *halakha* today,

³¹³ Washofsky 1981:163.

³¹⁴ Washofsky 1981:163-164, Bleich 2001:64-65.

³¹⁵ See above, chapter 2.3.

³¹⁶ Washofsky 1981:161.

³¹⁷ Novak 1974: 33.

³¹⁸ Washofsky 1981:160-65.

³¹⁹ Bleich 2001:55-56.

³²⁰ Washofsky 1981:159-165, Bleich 2001:68-69.

³²¹ Washofsky 1981:164.

³²² Washofsky 1981:164.

and it requires redefinitions and reinterpretations of the halakhic authorities to be made possible.

6.7 Revival of the enactment of the *Gaonim*

Rabbi Shlomo Riskin, the rabbi of Efrat, has in his book *Women and Jewish Divorce*, demonstrated that Rabbenu Tam's interpretation of the Talmudic texts, a reading that became universally accepted and dominant, was a minority opinion and against most of the scholars both preceding it and contemporary with it.³²³ It went against the *Gaonim* and the early authorities of North Africa, Spain and France. Riskin's view is therefore that there is not any reason for the halakhic authorities of today not to restore the woman's unilateral and unlimited right to get out of a marriage she finds intolerable. There are sufficient halakhic grounds to do it, and not any real need to adhere strictly to Rabbenu Tam's views, according to R. Riskin. What is needed is a re-adaptation of the views of the *Gaonim* or of the Maimonides even if Riskin does not really states this for practical implementation.³²⁴

Irwin H. Haut, an orthodox rabbi and practicing attorney in the U.S., holds that the only viable and complete solution is legislation, like the one the *Gaonim* enacted.³²⁵ He calls for the Israeli Rabbinate to enact such legislation. He envisions a decree under which "the refusal of one spouse or the other to participate in *get* proceedings, after the civil termination of their marriage, would result in the retroactive annulment of that marriage."³²⁶ The solution itself is close to what is used by the Conservative movement today. The big difference is that Haut wants it enacted by the Chief Rabbinate of Israel as a *takanah*, thus possessing a larger authority.

Irving A. Breitowitz³²⁷, a rabbi and associate professor of Law at the University of Maryland, thinks that the re-acceptance of the view of Maimonides would be "unwise and impractical". He means that the compulsion is ineffective outside Israel, where the rabbinical courts do not have the power to sanction. He does however point out that submitting to the *bet din's* jurisdiction in a prenuptial agreement, enforceable in the civil courts, could solve this. If the legislation of the *Gaonim* would be enacted instead, even annulment could be used against the husband who does not divorce his wife although she claimed that he is disgusting to her. Breitowitz is also worried that Maimonides'

³²³ See above chapter 2.2.1.

³²⁴ The only concrete proposal Riskin puts forward for a solution to the *agunah* problem, both in Israel and the Diaspora, is that of a prenuptial agreement, similar to the *ketubah* stipulations found in the Jerusalem Talmud. The bride and the groom could agree in a special prenuptial agreement that if a *bet din* decides that the woman should be granted a divorce, but the husband refuses, he should be liable of paying a specified sum of money for each day he keeps her an *agunah*.

³²⁵ Haut (unlike Riskin) does not consider the woman's right to seek dissolution of a marriage with a man she finds intolerable as originating from the interpretation of the *Gaonim* of the Talmud, but rather an enactment by them. In practice however, the result is the same.

³²⁶ Haut 1983:96-97, Haut 1977: 29-49.

³²⁷ Breitowitz 1993:57.

method blurs the distinction between *kofin* and *yotzee* cases, and may thus produce a forced *get*. However, Maimonides was not himself worried about this and ruled that a *get* could be compelled, not merely ordered even if the basis was “just” that the wife wanted to get out of the marriage.³²⁸ Breitowitz draws the conclusion that the reenactment of Maimonides suggestion actually would solve the *agunah* problem, as would the *takanot* of the *Gaonim*. However, “the present state of *halakhab*” makes it impossible. There is not any central court to promulgate these enactments.

6.8 Halakhic reinterpretation by the Rabbinat of Israel

“The problem is not with the Jewish law, which is reasonably flexible. It is the rabbis in the religious establishments who are not creative. They are reluctant to use the power of Jewish law.” Words like these are common among activists for *agunot*.³²⁹ Rabbis and halakhic authorities on the other hand, say that there is not any Jewish legal institution of today that has the power to enact a *takanah*, an authoritative legislative religious decree. No *bet din* has the authority to be universally accepted.³³⁰ Some even say that after the Talmudic period, the normative halakhic legislation came to an end.³³¹ This was the opinion of Rabbenu Tam. That was the reason that he stated that the enactments of the *Gaonim* were not longer in effect. However, other halakhic authorities held that the power to make enactments still existed, although some stated that with the dispersion of the Jewish people, the enactment was limited to the community in which it was enacted.

Menachem Elon, former justice of the Supreme Court in Israel, and author of the monumental work “Jewish Law”, thinks that the rabbinical establishment could (and should) rise to the occasion and adopt legislation on the area of marriage and divorce. He thinks that annulment is the best way to solve the *agunah* problem. However, he thinks that the rabbis need to exercise their legislative authority before this can be done. The Israeli rabbinat is an authority that has the universal recognition to do so.³³²

Just as the reasons for this abstention were the fragmentation and dispersal of the Jewish people, the local character of communal legislation and the absence of a central authority, so the new circumstances – the ingathering, the unification and the creation of a central authority for the Jewish people – are reasons for renewed exercise of legislative authority. The halakhic center in the State of Israel should be, and actually is, the main Jewish center, with halakhic hegemony over the entire Jewish diaspora. Consequently it must do whatever is necessary to adopt legislation, which, upon its enactment, will be, or in the course of time will become, the legacy of the Jewish people everywhere. (Elon 1994: 879.)

³²⁸ Breitowitz 1993:57, n.158.

³²⁹ Sharon Shenhav, cited in Frankel 1999: 29.

³³⁰ See for instance Gartner 1985:142.

³³¹ Meiselman 1978: 103.

³³² Elon 1994:879.

The Chief Rabbinate of the Land of Israel was itself created by a *takanah* in 1921. So was the Rabbinical Court of Appeals the same year, and procedural rules in 1943. Within the area of Family Law, it is noteworthy that in 1950, *takanot* prohibiting bigamy, child marriages and levirate marriages were enacted.³³³ Those enactments were accepted as binding and as an integral part of Jewish law.³³⁴ After 1950, the legislative activity of the Israeli Rabbinate in general ceased.³³⁵ Also the courts have taken more stringent positions and have not been responsive to problems that Jewish law has the capacity of solving. An example of this is the reluctance of the rabbinical courts to compel a recalcitrant husband to divorce his wife.³³⁶

Elon himself points out that it has not been easy even to get the rabbinical courts in Israel to accept new enactments. Their authority has been undercut by disregard of their provisions, judicial limitations on their application and even explicit rejection from the rabbinical courts. There are even examples of district rabbinical courts that have refused to accept the authority of the Rabbinical Court of Appeal.³³⁷ Significant parts of the religious Jewish population do not recognize the Chief Rabbinate of Israel as the supreme halakhic institution. There is also a tendency for the different communities, like the Sephardic and Ashkenazic to follow their own traditions, instead of the new *takanot* creating a unified Jewish law for Israel. So has Ovadia Yosef, the former Sephardic Chief Rabbi recommended the Sephardic community to follow their own tradition in the question of not accepting the ban of Rabbenu Gershom, in spite of a *takanah* from the Israeli Rabbinate in the 1950's that made the ban applicable to the entire population.³³⁸

This is not a sign that the rabbinical courts possess the authority and recognition that it would take to make a reinterpretation of the laws of divorce that would help the *agunah*. And then the result would be the same, as with the Rackman/Morgenstern court – divorces not universally accepted. This also creates a divided Jewish society where intermarriage between different groups is impossible due to fear of *mamzerut*.

However, the rabbinate of Israel is probably the one authority that possibly could make a reinterpretation. Irwin H. Haut agrees with Elon that an enactment by the Israeli rabbinate could be the solution the *agunah* problem.³³⁹ Haut writes that just as the breakdown of the central rabbinic authority caused Rabbenu Tam to reject the enactments of the *Gaonim*, “today in the State of Israel, with what can become a centralized Rabbinate for all *Kelal Yisrael* [the Jewish people] i.e. the Chief Rabbinate, any objection regarding the local nature of the *takanah* falls away.”³⁴⁰

³³³ Elon 824 – 835.

³³⁴ Elon 1994:1808.

³³⁵ Elon 1994:834.

³³⁶ Elon 1994:1807.

³³⁷ Elon 1994:1810-1817. Interestingly enough, in those cases the civil Supreme Court has upheld the authority of the Rabbinical Courts of Appeal.

³³⁸ Elon 1994:1808.

³³⁹ Even if Haut thinks that the legislation of the *Gaonim* should be re-enacted, while Elon only advocates a right for the rabbinical courts to annul marriages.

³⁴⁰ Haut 1977:39-39. Explanation between brackets by the author of the present paper.

6.9 Summary and conclusion

Unlike the prenuptial agreement, the suggestions presented in this chapter try to solve the problem once and for all, by circumventing the requirement for the husband to give the *get* of his free will. All the solutions described above are based on legitimate halakhic rules. Jewish law permits the husband to deliver the *get* via an agent. It acknowledges the power of the rabbis to annul marriages and to issue a divorce to the wife if that would benefit her. Still there is a twofold problem with those solutions. They have not been applied in normative *halakhab* on the case with the recalcitrant husband. They have also not been embraced by a majority of the authoritative halakhic leadership of today.

Emanuel Rackman, wrote in 1995, about different solutions to the *agunah* problem: “All have merit if only the rabbinate will conclude once and for all that a solution must be found and that one does not have to wait for the Messiah’s coming to give the final answer.”³⁴¹ Unfortunately, in spite of all the merits his, and other creative and brave rabbis’ suggestions have, they still lack the support of the rabbinate of Israel and the normative halakhic authorities. Therefore, the annulments from the *Beit Din Zedek LiBaiot Agunot* lack validity outside the circles that support that court. A woman whose marriage was dissolved there can probably not remarry in Israel. Her children risk the stigma of *mamzerut*. That is not a solution to the *agunah* problem.

There are good arguments for all those solutions presented in this chapter. Take the conditional marriage as an example. It certainly would help the *agunah* if the marriage were conditioned on the husband’s presence. Such a solution would circumvent both the need for a *get* and the *bet din*’s discretionary power. It would make any discussion about faults or grounds superfluous. The conditional marriage had the support of R. Moshe Isserles, who wrote the normative Ashkenazic glosses to the *Shulkehan Arukh*. However, even if halakhic support for a conditional marriage – provided that the condition is renewed in an ongoing sexual relationship – can be found in history, it has never been a custom and a practice. Without broad acceptance, it would be hard to start using the conditional marriage in a big scale, allowing for women to remarry without a *get*.

In *halakhab*, minority opinions rejected in one generation can be used in another. The enactments of the *Gaonim*, which R. Riskin focuses on, were once normative *halakhab*. In fact, Maimonides interpretation of them still is for the few Jews remaining in Yemen. There are good arguments for applying that model again today. It is a model of unilateral right to divorce, without fault, which has a lot in common with modern society. However, the contemporary normative rabbis fail to use precedents that do exist and they fail to acknowledge past improvements in divorce law – even if there are outstanding exceptions like Rabbi Feinstein’s usage of *kiddushei ta’ut*. Until the contemporary authorities consider themselves competent enough and are

³⁴¹ Rackman, E. 1995:68.

united enough to redefine and reinterpret the usage of the methods described, the methods cannot be used for solving the *agumab* problem.

Rabbi J David Bleich, who has written extensively on the subject of *agunot*, holds that “responsible solutions to the *agumab* dilemma are within the realm of possibility. But to be viable and non-schismatic, any proposed solution must be advanced within the approbation of respected rabbinic decisors and accepted by all sectors of our community.”³⁴² If the Chief Rabbinate of Israel does not embrace a solution, it will be of little avail. It will not be accepted as the law of the land in Israel, and it will not have the authority to be universally accepted. Even if it is not guaranteed that an enactment from the Israeli rabbinate would have that authority, it is the only option that exists. Otherwise there will be many *batei din*, orthodox and conservative, that follows their own *halakhab* and whose members will not be able to marry each other.

³⁴² Bleich 1998:118.

7 The *agunah* and the American legal system

7.1 The American courts and the *agunah*

For a long time, wives have sued their recalcitrant husbands in American courts, based on contractual theories. Irwin H. Haut, a rabbi and lawyer, divides the cases into three groups³⁴³:

1. Agreements for the delivery of a *get* after a civil divorce. In the first case, *Price v. Price*³⁴⁴ the court was unwilling to grant the wife relief, or even examine if there was a basis for the contractual claim. The reason was a fear to get too close to the prohibition in the first amendment to the American constitution, against state interference in religion. In later cases the courts have enforced agreements to give *gittin*³⁴⁵. There is still a remaining fear, however, that enforcing a *get* will be considered a violation of the first amendment. Furthermore, a *get* given under the compulsion of a secular court, without a preceding decision from a *bet din*, may be void under Jewish law as a *get me'useb*.
2. The *ketubah* as an agreement to give or accept a *get*. When no other agreement existed, the *ketubah* has been seen as an implied undertaking by the husband to deliver a *get* in the case of a civil divorce. Examples of such cases are *Stern v. Stern* and *Minkin v. Minkin*.³⁴⁶ Also here there is a risk for the *get* to be considered coerced and void, since the secular courts enforced it without a prior decision by the *bet din*.
3. Agreements to submit to the *bet din*. Here, the *agunah* first sues the recalcitrant husband for a specific performance in the *bet din*. If the *bet din* rules that she has grounds, she again sues the husband in the civil court, to actually issue the *get*, or otherwise be liable to sanctions. From a halakhic point of view, this is to prefer. If the rabbinical court rules that she has grounds, it is legitimate under Jewish law to let a civil court enforce the decision. In *Avitzur v. Avitzur*³⁴⁷, the grounds for the suit were the addition to the conservative *ketubah*. Mrs. Avitzur appealed the case to the highest court in New York, the Court of Appeals. The Court of Appeals saw the addition to the *ketubah* as an arbitration agreement, enforceable before a civil court, like any secular agreement, without any constitutional problems.

³⁴³ Haut 1983: 67-84.

³⁴⁴ Cited in Cobin 1986:410 and Haut 1983:68.

³⁴⁵ *Gittin* is the plural of *get*.

³⁴⁶ Cited in Cobin 1986:412-13 and Haut 1983:81-82.

³⁴⁷ Haut 1983:133-137.

7.2 The first New York State Get Law

What is commonly referred to as the first New York State *Get* Law is an amendment made in 1983 to section 253 in the Domestic Relations' Law. In principle, this amendment withholds a civil divorce until all barriers to the spouse's remarriage are removed. It was in this amendment the concept of "removal of barrier to remarriage" first appeared. The same term would later be used also in the second New York State *Get* Law. Section 253 contains a statutory definition of the term. It means that

1. One party imposed on the other a barrier by a voluntary act of withholding.
2. The party applying for the civil divorce is capable of removing this barrier for his spouse.

This definition is important, especially in the application of the second *get* law, from 1992. It excludes from "a barrier to remarriage" the case in which the husband actually cannot give a *get* to his wife because the *bet din* refuses to officiate at the *get* proceeding. This can be the case, for instance if the *bet din* considers the *get* void because the husband was forced to deliver it.³⁴⁸ In such a situation, the husband is not capable of removing this barrier for his spouse, and should not be hit by the sanctions under the 1992 law.³⁴⁹

The first New York State *Get* Law was criticized mostly from an American constitutional perspective. It was questioned if maybe the law violated the first amendment to the constitution of the United States. It was also criticized for not being sufficiently effective. The law will work to help *agunot* only if it is the husband who applies for a civil divorce while denying his wife a *get*. If it is the wife who applies for a civil divorce, or if the civil divorce was granted even before the religious, the first New York *Get* Law is of little use.

Halakhic authorities, including R. Moshe Feinstein approved of it.³⁵⁰ The reason for this is that there is not any halakhic problem in denying a person something (in this case the civil divorce) that is not his and that he has no right to demand.³⁵¹

7.3 The second New York Get Law

What is commonly referred to as the second New York State *Get* Law is the amendment from 1992 to the Equitable Distribution Law. This amendment permits judges to take into account a husband's refusal to remove barriers to his wife's remarriage when distributing marital assets. The concept of "barrier to remarriage" is defined as in the first *get* law. There are thirteen factors for the judge to take into account when dividing the marital property. The effect of refusing to remove a barrier to remarriage is balanced against all those thirteen.

³⁴⁸ Jacob 1999:162.

³⁴⁹ Jacob 1999:165.

³⁵⁰ Jacob 1999:162.

³⁵¹ Malinowitz 1994:6.

The judge can withhold portions of the assets from the husband until he removes the barriers to his wife's remarriage. The judge similarly balances the effect of the *get* refusal against eleven factors when determining alimony.³⁵²

Also this *get* law has been criticized for infringing the civil rights according to the first amendment. If the secular courts can decide when and how a *get* should be given, it can be seen as an intrusion in the religious law.³⁵³

In the United States, as in most places outside Israel, an *agunah* always has the possibility of getting a civil divorce, if she does not particularly care about the religious law. Therefore, the whole purpose of enacting laws like the New York State Law is to help religious women to get out of non-working marriages. For this reason it is important to pay attention to the opinions of leading rabbis in evaluating the law. If the halakhic establishment disapproves of the law, and finds it halakhically unacceptable or causing *gittin* to be invalid, the law cannot be said to constitute a successful solution to the *agunah* problem. The basic fear from the rabbinical establishment with the second New York State *Get* Law, is that a situation is created in which the husband can suffer financial loss explicitly for his refusal to give a *get*, although there is not any order from the *bet din* of sanctions. This might cause the *get* to be void, a *get me'useh*.³⁵⁴

The situation would have been better halakhically, had the *get* law been limited to cases in which a *bet din* found that a *get* was appropriate and sanctions to be enforced. However, this is not the case. The law speaks of removal of barriers, regardless of if the woman has grounds according to Jewish law or not. In fact, the law does not require the *bet din* to participate at all. This means that even in cases where grounds for divorce exist, there was not necessarily an order from the *bet din* compelling the husband³⁵⁵, which might invalidate the *get* due to illegal pressure.

If sanctions under the second *get* law can be seen as indirect pressure (the sanction is not applied for refusal to give the *get*, even if delivering the *get* would remove the sanction) the *get* would be valid even if the *bet din* did not compel a divorce. However in that case, the reason for the sanction has to be legitimate under Jewish law. Equal distribution is not such a halakhically valid reason, according to some authors.³⁵⁶ On the other hand, if the goal of the law could be interpreted as support and maintenance for the woman, the *get* would be valid, since support is a halakhically justifiable goal. A husband has a duty to support his wife until he gives her a *get*.³⁵⁷ R. Moshe Feinstein even stated that higher support payments than required by the *halakhab* are permitted without creating a *get me'useh*.³⁵⁸ However, R. Malinowitz, member of a *bet din* in Monsey, United States, denies that the 1992 law can be seen as a support

³⁵² Malinowitz 1994:7.

³⁵³ Malinowitz 1994:12.

³⁵⁴ Malinowitz 1994:16. See also chapter 2.3 above about forced *gittin*, sanctions and the free will of the husband.

³⁵⁵ Broyde 1995:6.

³⁵⁶ Malinowitz 1994: 20.

³⁵⁷ Broyde 1994:9.

³⁵⁸ *Iggrot Moshe, Even ha Ezer*, 4:106.

obligation. The 1992 law according to him, includes more than just support. For example, it includes post-marital support, which, according to him, “constitutes out and out theft” according to the *halakhab*.³⁵⁹ Also R. Broyde admits that the 1992 law has more the function of a penalty provision.³⁶⁰ He would like it to be considered having a supportive function, but while waiting for an interpretation by the New York Court of Appeals, the secular purpose of the 1992 *get* law remains unclear³⁶¹, and therefore it also remains unclear if the reason for the sanction could be halakhically acceptable and thus a ground for indirect pressure.

Some authors claim that the pressure of the second New York *Get* Law is sufficiently coercive to invalidate a subsequent *get* if there is not any order from a *bet din* to compel the sanctions. Even the threat of the pressure is enough to consider *all*, or at least many, *gittin* given in New York as void.³⁶² R. Michael J. Broyde, assistant professor in Jewish Law at Emory University, means that the second New York State *Get* Law is not desirable. It should not have been enacted in the first place, *le-kehat-bila*. Secular authorities should not decide about controversial measures like this. However, he is of the opinion, that *be-di-avad*, given the fact that the law already exists, a majority of the divorces in New York are still valid. Even if he does not think that the law ideally should be there, it does not influence divorces so badly that they are to be considered invalid in general. The second New York *Get* Law may even have contributed to some good.³⁶³ Broyde can see several different reasons that a *get* delivered under the 1992 law still can be valid.³⁶⁴

1. In cases where it is clear that the husband actually wants to end the marriage, but is obstructing the delivery of the *get* because of economical disagreements, there is not any problem of a *get me'useh*. This is based on a statement by R. Moshe Feinstein³⁶⁵. Broyde gives an example³⁶⁶: If a couple disagrees over the financial conditions of the divorce, and the husband tries to use his power to withhold the *get* as a bargaining chip, the woman can reply that she will seek relief under the 1992 law. Although there is an element of coercion of the husband before issuing the *get*, the *get* is valid, *ex post facto*, once it has been delivered. The element of pressure is not enough to invalidate the *get*, since the husband's resistance was due to economical concerns. This means that the woman actually would have a remedy against extortion with the help of the 1992 law.
2. Provided that the equitable distribution of marital property is a valid according to *halakhab*, there is not any illicit coercion. Nothing is taken from the husband; rather a bonus is withheld from him (since the assets do not belong to either party in the marriage). Broyde holds that equitable distribution may be valid according to the *halakhab*, according to the

³⁵⁹ Malinowitz in Malinowitz and Broyde 1997:26.

³⁶⁰ Broyde in Malinowitz and Broyde 1997:26.

³⁶¹ Broyde, response to Gartner 1998:95.

³⁶² Malinowitz 1994:21-22.

³⁶³ Broyde 1995:10, 2001:117.

³⁶⁴ Broyde 1995:7-9, 2001:105-115.

³⁶⁵ Feinstein: *Iggrot Moshe, Even ha Ezer* 3:44.

³⁶⁶ Broyde 2001:116.

principle of *dina de-malkhuta dina*, the law of the land is the law [instead of the *halakhab*]. This principle can be applied in economical matters.³⁶⁷

3. An economical sanction does not produce a forced *get*, if the sanction is reasonable enough, so that the husband can choose to pay it if he prefers that to giving the *get*. Some authorities even claim that economical duress can never constitute coercion. However, other authors point out that the latter views are not normative.³⁶⁸
4. Maimonides' ruling that the husband's repulsiveness to the wife is a ground for divorce is valid, *ex post facto*. Broyde means that even if no *bet din* would grant a wife a divorce on the grounds that her husband is repulsive to her, once there is a divorce, however doubted as forced, it is still valid after the fact. Even if Maimonides ruling is not authoritative enough to be used as a grounds for divorce, it is still normative enough to legitimize a doubted divorce after it already took place. Also here, other authors point out that Broyde's views are not normative.³⁶⁹
5. However, especially when the wife has reasonable grounds, *amatla*, more authorities accept the view, it is actually the normative view of the *Shulchan Arukh*. It is even better if a *bet din* rules that grounds are at hand prior to the writing of the *get*.
6. Marriages entered into after 1992 can be said to have accepted the 1992 *get* law as an implicit condition, an agreed-upon penalty. The choice of staying in New York, in spite of the law, can also be interpreted that way.
7. If the coercion is separated in time from the actual writing of the *get*, the *get* might not be void.

R. Broyde's conclusion is that the *gittin* of New York may well be valid after all. However, most of his reasons for this are only reasons that hold *ex post facto*, and nothing he recommends legislation to be based on ideally. The reasons are not authoritative enough to be used as grounds for divorce for a woman before a *bet din*, although still normative enough to legitimize a doubted divorce after it already took place.

7.4 Summary and conclusions

Cases from American courts show that in the more recent decisions there is a tendency that the courts do not any longer see enforcement of *gittin* as an infringement of the first amendment.³⁷⁰ However, from the halakhic perspective, a *get* produced after civil pressure may be considered void. In that sense, the agreements in which the parties submit to the *bet din* are better.

When it comes to legislation, the first *get* law was accepted by the halakhic authorities. This may be explained by the fact that in this first *get* law; the religious law sets the pace. If there is not any *get*, also the civil divorce will be withheld. There are not any other sanctions than the loss of a civil divorce that the *halakhab* does not value anyway. The 1992 law on the other hand, puts

³⁶⁷ Broyde in Malinowitz and Broyde 1997:31-32.

³⁶⁸ Malinowitz in Malinowitz and Broyde 1997:25.

³⁶⁹ *Ibid.*

³⁷⁰ Cobin 1986:412.

pressure on the husband in a way that is dubious halakhically. Here the Jewish law is encouraged to follow the secular law. If it does not, then there will be sanctions.

To be halakhically valid ideally, the *get* that is produced under the pressure of the second New York *Get* Law has to be compelled by a *bet din* before the sanctions are applied. The *agunah* should be able to prove that she has a halakhically valid basis for her claim. The consequence of this is that the New York State *Get* Law would give enforcement power to the decrees of the *batei din* in New York, similar to what the rabbinical courts have in Israel.

However, in case the civil court imposes sanctions and the husband delivers a *get*, without being compelled by a *bet din* before, the *get* may still be valid *ex post facto*, according to the grounds suggested by Broyde. Being valid *ex post facto* means that even if those grounds are not authoritative enough to be used as grounds for divorce by a woman before a *bet din*, they are still normative enough to legitimize a doubted divorce after it already took place. This means that more *agunot* will be freed with the 1992 *get* law than without, since the “gray zone” of halakhic grounds that cannot and would not be used ideally by a *bet din*, are applied here.

In cases where it is clear that the husband actually wants to end the marriage, but is obstructing the delivery of the *get* because of economical disagreements, there is not any problem of a *get me'useh*, according to R. Moshe Feinstein. This means that the woman actually would have a remedy against extortion in the 1992 law. It also means that in all “normal” cases where the husband actually has a will to divorce his wife, the *get* does not need to be considered “tainted” by the sanctions. The fear that all New York divorces would be considered void is not founded.

If Israel decides to have a civil marriage and divorce law, this is a legislation that should be adopted. The problem with separation of religion and state will not be such an issue in the Israeli context. As far as the *halakhab* is concerned, even if the rabbinical authorities do not want this law ideally, they have still accepted the divorces that have followed after its enactment. Although the rabbinical courts in Israel have more effective tools of enforcement (for instance imprisonment), additional pressure in the area of division of marital property would be useful. Today this is an area in which the husband is able to use his power to withhold the *get* as a bargaining chip. The result is that the woman has to give in to extortion. This might be prevented in legislation like the 1992 *get* law.

8 Future solutions

8.1 Civil Family Law

Today there is not any civil marriage in Israel. Every person has to get married according to the laws of his or her religious community. However, the Supreme Court, in the case of *Skornik v. Skornik*³⁷¹ recognized marriages performed outside Israel. Recognition of marriages performed outside the country has not been limited to cases in which the personal law of the couple was foreign and where the couple came to Israel after their marriage. Cases of marriages performed abroad, with the aim to circumvent Israeli law, e.g. in the case of a mixed marriage between people of different religions, have also been recognized in court practice. The recognition of foreign marriages has turned Cyprus into a place where Israelis, who for some reason are not able³⁷² or willing to subject themselves to the monopoly of the rabbinate, go and marry.

The Supreme Court has also recognized a “private marriage”, performed outside the auspices of the rabbinate between a divorcee and a *cohen*³⁷³, as valid *ex post facto*.³⁷⁴ However, when two Jews without any obstacles to marriage under the rabbinate wanted to make a private ceremony, the Supreme Court did not recognize it, although, halakhically they have a stronger claim to validity *ex post facto* than the marriage between a *cohen* and a divorcee. The court reasoned that for this couple, a legally sanctioned ceremony was already available.³⁷⁵

The Association for Civil Rights in Israel (ACRI) has written a draft civil marriage law.³⁷⁶ If turned into a law, ACRI hopes and believes that a civil law will make life easier for a lot of groups, *agunot* included. ACRI recommends a civil marriage to be obligatory, above and beyond an optional religious wedding. The association rejects an optional civil marriage, because they think there will be too many that would choose not to have a civil wedding “just for the sake of the tradition”, only to later discover that they cannot get a divorce. Therefore ACRI recommends a compulsory civil marriage. The procedure would be as follows: To get married, a license from the secular authorities would be needed beforehand. The wedding must be done by an official,

³⁷¹ C.A. 191/51, *Skornik v. Skornik*, 8 P.D. 141; 2 SJ 327.

³⁷² This is not too uncommon a situation, since there is a discrepancy between the Law of Return (which allows for immigration to Israel if you are Jewish, had a Jewish parent or grandparent) and the *halakhah*. The *halakhah* only recognizes a person as Jewish if she or he has a Jewish mother, which means that e.g. immigrants with a Jewish father but a non-Jewish mother are unable to marry a Jew, this in spite of seeing him or herself as belonging to the Jewish sector of Israeli society.

³⁷³ A *cohen* is a Jew of priestly descent. Special laws of marriage apply to him. For instance it is prohibited for him to marry a divorcee.

³⁷⁴ C.A. 238/43, *Cohen-Busslik v. A.G.*, 8 P.D. 4; 2 SJ 239.

³⁷⁵ *Shagav v. District Rabbinical Court of Safed* 21 (ii) P.D. 505 (1967), summarized in *Elon* 1994:1782.

³⁷⁶ Association for Civil Rights in Israel: *Kedat u kedim*. Jerusalem 2001. [Hebrew].

licensed from the state, and has to be registered with the civil authorities afterwards. It would not be an obstacle to marriage if the parties were of different religions.

When it then comes to divorce, it would take place according to a civil method. Anybody could be granted a divorce, even if a *get* is not issued or received. There is not any strict separation between religion and state in this draft law. It is suggested that the state should be able to interfere in the case of the recalcitrant husband, and apply sanctions, much like the New York State *Get* Laws³⁷⁷.

The ACRI recognizes that even with their proposal, a problem with *igun* may still arise for any couple that had a religious wedding and do not see a civil divorce as a termination of the marriage. However, the association states that with their proposal, the question of *igun* is reduced to a problem only for a woman who sees herself as a subject to religious law. For all secular women in Israel who have become trapped in an *agunah* situation, this proposal would be a relief. With the possibility of state intervention and a pressure from the civil court, like the New York State *Get* Law, the suggestion might also offer some relief to religious women who are waiting for a *get*.

The problem with the introduction of secular legislation is that the religious parties represented in the Knesset meet it with a great deal of resistance and opposition. Although these parties constitute a minority of the electorate, they have learned to “manipulate the legislature”. The parliamentary system of Israel requires a party, which wants to form a government without controlling an absolute majority by itself, to join in a coalition with other parties. In practice the support of the small, religious parties have been necessary in forming a coalition. The religious parties on their part have been successful in asking for a price in exchange for their willingness to form a coalition with a minority party. Chaim H. Cohn, the former law professor and Supreme Court Justice describes that price as “laws of religious coercion were allowed to multiply.”³⁷⁸

The resistance on the part of the rabbis is of course because they are afraid that with a civil marriage, the rates of intermarriage and *mamzerut* will increase. This, they fear, will lead to a division of the state with fewer halakhically Jewish citizens.³⁷⁹ As we have seen above, marriage on a Torah level can be constituted by intercourse.³⁸⁰ Therefore, some also mean that even if a marriage is entered in a civil way, it still requires a *get*. They mean that even if there is a civil marriage, halakhically there is not any civil divorce.³⁸¹

It is interesting that Rabbi Shear Yeshuv Cohen, the Chief Rabbi of Haifa, does not seem to entirely rule out the possibility of a civil marriage. At the

³⁷⁷ See chapter 7.

³⁷⁸ Cohn 1998: 90-91.

³⁷⁹ See for instance Englard 1971:187.

³⁸⁰ See above, chapter 2.1.1.

³⁸¹ Klein 1975:1-12.

eleventh international congress of the Association of Jewish Lawyers and Jurists he said:

I do not believe that the majority of Jews would seek not to be married by a Rabbi even if civil marriage was to be established in this country. It may be wise for us, as Rabbis, to allow for freedom of choice regarding marriages and divorces and prove that a majority will anyhow choose the religious system – just as in the case of circumcision, where despite the absence of a statute, the vast majority of parents arrange for a circumcision because they feel it is a basic Jewish duty. (Cohen, Shear-Yashuv: *The separation of church and state...is impossible*. Justice 20, 1999, p.19.)

8.2 Other legal reforms

When it comes to the equitable division of property, civil law states that in cases where the couple was married after 1974, the wife can sue for the balance of resources only upon the termination of the marriage- i.e. when the husband gives the *get*.³⁸² Also in the case of annulment of a marriage, balancing of the resources may not be realized, since it is not considered termination of a marriage.³⁸³ Until the *get* is delivered, an absolute separation of property exists. She has not any right to “common” property, registered in his name.

This legislation gives even less incentive for the husband to deliver the *get*, since he in addition to stop her from remarrying also can prevent her from getting her share in their property. The woman is in a limbo both financially and with regard to her personal status. The weaker party, usually the woman, is left without financial support unless there is a temporary decision concerning alimony and child support. The woman might be forced, by economic necessity, to give in to her husband’s demands. Rather than enter into a difficult battle in both the rabbinical and civil courts, during which she might have very scarce financial resources, many women will waive or compromise their rights to marital property (like pension benefits) in exchange for the *get*. A wife whose husband makes the *get* conditional on her giving up her right to resource-balancing has not much of a choice, but to give in to his extortion.

The situation was different according to the rules of co-ownership, evolved in case law before the 1973 Spouses Property Relations Law. Then a spouse could realize his right to half of the property acquired by mutual efforts during the marriage *at any time during the course of the marriage*.³⁸⁴ This created a *de facto* divorce, which at least attached the financial divorce to the actual separation.³⁸⁵ Amending the law to allow for the division of property already before the delivery of the *get* would strengthen the situation of the *agunah*.

Another disadvantage that comes with the *mesurevet get* not being considered as a divorcee is that she is not entitled to single parent benefits. The National

³⁸² Spouses Property Relations Law, 1973, section 5(a).

³⁸³ Shava 1976:127.

³⁸⁴ Shava 1976:127.

³⁸⁵ Shava 1976:129.

Insurance Law³⁸⁶ does include *mesurevet get* after two years waiting for a *get*. However, the definition of a *mesurevet get* is limited to a woman whose husband refuses to give her the *get*, against the orders of the rabbinical court. This excludes women without halakhically acceptable grounds to why they want to leave their husbands.

8.3 Summary and conclusion

Suggestions outside the framework of Jewish law will never solve the problem of the *agunah*. A woman married according to Jewish law will remain married until she receives her *get* or until the rabbinate recognizes a different way of terminating a Jewish marriage. However, civil solutions can relieve the hardships of the *agunah*.

It seems as if a civil divorce would have considerable advantages. Even for a religiously observant woman, with a civil divorce, at least the issues of custody and dividing the assets would be taken care of, even if the woman would still be considered married according to Jewish law. Then it would be up to her if she still wanted to wait for the *get*. At least she would be in a financially more favorable situation. With the possibility of state intervention and a pressure from the civil court, like the New York State *Get* Law, the suggestion might also offer some relief to religious women who are waiting for a *get*.

The civil marriage would reduce the question of *igum* to be a problem only for a woman who she sees herself as a subject to religious law. For all secular women in Israel who have become trapped in an *agunah* situation, a civil divorce would be a relief. Civil marriage and divorce legislation would put Israel on equal foot with other Western countries. The question of keeping the religious family laws would be up to the individual, not the state.

There is also other civil legislation advocated by organizations dealing with the *agunah* problem³⁸⁷, which could improve the situation, without totally abolishing the power of the rabbinical courts the way a civil marriage is feared to do. These reforms would relieve some of the economic pressure for both religious and secular women. The regulations around division of property increase the power of the husband. It increases the helplessness of the wife, as her financial situation, in addition to her personal status, is connected to the delivery of the *get*. Changing this legislation and make it possible to divide property before the delivery of the *get* would solve one of those dilemmas and make the wife less vulnerable. Meanwhile it should be noted that the possibility to do away with this provision in a prenuptial agreement exists.³⁸⁸ Also widening the definition of the *mesurevet get* in the National Insurance Law would strengthen the *agunah* economically.

³⁸⁶ *Hok bituah leumi* [National Insurance Law].

³⁸⁷ See for instance, *Mavoi Satum*'s Platform for Legal and Halakhic Reform.

³⁸⁸ See above, chapter 4.7.

9 Conclusion

In this study I have described the system of family law and the divorce procedure in Israel. It contains certain difficulties for a woman, especially in the case her husband refuses to give her a divorce.

The complexity of the problem stems from the fact that Israel's family law is not secular, man-made law. It is the religious law that has been incorporated as the law of the land by the secular legislator. The source of authority in religious law is not the people, instead its origin is considered divine, and only possible to change under certain conditions, by certain people and in certain ways. Modern parameters for what constitutes good legislation do not necessarily apply on the religious law. On the other hand, the source of legitimacy for the rabbinical court today in Israel is in fact the secular legislator. It was the *Knesset* that gave them the power over certain matters in family law and personal status. The complexity also stems from the fact that the people the law is applied on are not necessarily religious. Their values are those of a modern democracy, where the individual and her rights are in focus.

To find a solution to the *agunah* problem I have turned in three directions:

1. Things will continue the way they are today. Matters of marriage and divorce will remain under the jurisdiction of the rabbinical courts. The *halakhab* they apply will remain the normative *halakhab* of today. I call this the status quo solution.
2. The secular way, Israel implements a civil law for marriage and divorce.
3. A new normative solution will be found within the halakhic framework and tradition.

The first and the second options are on a state level. To keep the religious court system or to implement a civil divorce are decisions to be taken by the *Knesset*. The third option is not in the hands of the people, but in the hands of the halakhic authorities. It is not an alternative to option one and two, but rather complements them. A civil family legislation does not necessarily strip the rabbinical courts of their ability of enforcement.

9.1 The status quo solution

Because of the parliamentary system in Israel it is likely the religious parties will retain their influence and guarantee that the present system of rabbinical control of matters of marriage and divorce will continue. A secular person has, in spite of the orthodox monopoly on family law in Israel, certain ways of getting around the complications surrounding issues of marriage and divorce. Israelis will continue to get married on Cyprus and they will continue to live together as reputed spouses instead of getting married.

Hopefully, even within the existing system, the use of *kefiyyat get*, sanctions against a recalcitrant husband will increase. The rabbinate of Israel has an advantage compared to the Jewish courts in the diaspora in the sense that they

can actually put power behind their decisions. During the last decade, the enforcement possibilities have even increased.

If the rabbinical courts do not make use of their power to sanction a recalcitrant husband, it is possible that the civil courts will develop a way of putting pressure on him. This is a development that has already started, with the recognition of “infringement of a woman's personal autonomy” as an actionable ground under the Israeli tort law. Maybe an aggressive use of the civil courts will force the rabbinical establishment to change. The problem for the rabbinical establishment is, seen from a sociological perspective, that unless they are prepared to compromise, they will bring about a separation between religion and state, because their laws will have become too far removed from the people. Once the separation has taken place, they are relieved of the pressure to compromise with the public opinion. But by then Israel may be emptied of its Jewish, halakhic meaning, which is exactly what the rabbis fear.

9.2 The secular way

Suggestions outside the framework of Jewish law will never totally solve the problem of the *agunah*. A woman married according to Jewish law will remain married until she receives her *get* or until the rabbinate recognizes a different way of terminating a Jewish marriage. However, civil solutions can relieve the hardships of the *agunah*, and it can limit the problem in practice to religious women.

It seems as if a civil divorce would have considerable advantages. Even for a religiously observant woman, with a civil divorce, at least the issues of custody and dividing the assets would be taken care of, even if the woman would still be considered married according to Jewish law. Then it would be up to her if she still wanted to wait for the *get*. At least she would be in a financially more favorable situation.

Especially if combined with state intervention like the New York State *Get* Law, and pressure from the civil courts, the suggestion might also offer some relief to religious women who are waiting for a *get*. However, a civil family law may further weaken the rabbinical court system, and thereby circumscribe their ability to accomplish a comprehensive halakhic solution. A civil family legislation should therefore not strip the rabbinical courts of their ability of enforcing sanctions against a recalcitrant husband.

The civil marriage would reduce the question of *igum* to be a problem only for a woman who she sees herself as a subject to religious law. For all secular women in Israel who have become trapped in an *agunah* situation, a civil divorce would be a relief. Civil marriage and divorce legislation would put Israel on equal foot with other Western countries. The question of keeping the religious family laws would be up to the individual, not the state.

9.3 A new normative solution

For observant Jews, the *agunah* question needs a halakhic solution. For them the question is: can the *halakhab* change in a direction where chained women easier can get released?

A method to counter the *agunah* problem that has proved useful already is the prenuptial agreement. It is largely accepted by the rabbinical establishment and also by the women's organizations. However, as we have seen, it has its weaknesses. It is an inducement; its purpose is to put pressure on the recalcitrant husband to give a *get*. If he in spite of the pressure does not deliver one, the woman is still left an *agunah*.

The solutions on the other hand, seek to solve the problem by finding other ways of terminating a marriage than by the *get*, by expanding or reinterpret the halakhic framework. The solutions seek to remove the power of the husband to leave his wife an *agunah*. If this were to be accomplished, it would be a more radical and efficient way of dealing with the problem. It also means that radical changes would have to be made in what is now normative Jewish law.

The *halakhab* is pluralistic. Many different opinions are recorded in the sources, as long as they have any rabbinic support, including minority opinions. This makes the *halakhab* full of alternative solutions to a problem like the *agunah* problem. Enacting minority opinions, or opinions contrary to the big codifications, is difficult. Nevertheless, minority opinions rejected in one generation can be used in another. The enactments of the *Gaonim*, which R. Riskin focuses on, were once normative *halakhab*. In fact, Maimonides' interpretation of them still is, for the few Jews remaining in Yemen. There are good arguments for applying that model again today. It is a model of unilateral right to divorce, without fault, which has a lot in common with modern society.

All the solutions described in chapter six are based on legitimate halakhic rules. There are good arguments for many of those solutions. Still there is a twofold problem with them. They have not been applied in normative *halakhab* on the case with the recalcitrant husband. They have also not been embraced by a majority of the authoritative halakhic leadership of today. I think the former question is the least problematic one. The *halakhab* changed before, and it changed in modern time. The enactment of the Chief Rabbinate of Israel regarding e.g. bigamy is a good example of that.

The other problem is that the suggested solutions are not embraced by the halakhic authorities of today. It raises the question of who is able to interpret the *halakhab* today, in a way that becomes normative for world Jewry. Rabbi Emanuel Rackman tried in his *Beit Din Zedek LiBaiot Agunot*. It did not succeed. The danger with a development of courts like his is that a multiplicity of halakhic systems will develop, with people's personal status not recognized from one community from another. A solution that might free a woman in one court could become an obstacle for her children in the future because of the

concept of *mamzerut*, if it does not have the support of the halakhic authorities in general.

Menachem Elon thinks that the rabbinical establishment could (and should) rise to the occasion and adopt legislation on the area of marriage and divorce. He thinks that annulment is the best way to solve the *agunah* problem. The Chief Rabbinate of Israel has this authority today. What they develop and decide would be acceptable to most of world Jewry. In the past, there was no such thing as a rabbinic authority recognized by most of the world's Jewry, and the risk was then that another *beit din* would reject that what one *bet din* might decide and the result would be chaos.

However, Elon himself points out that it has not been easy even to get the rabbinical courts in Israel to accept new enactments. The authority of the enactments has been undercut by disregard of their provisions, judicial limitations on their application and even explicit rejection from the rabbinical courts. There are even examples of district rabbinical courts that have refused to accept the authority of the Rabbinical Court of Appeal. This is not a sign that the rabbinical courts possess the authority and recognition that it would take to make a reinterpretation of the laws of divorce that would help the *agunah*. And then the result would be the same as with the Rackman/Morgenstern court – divorces not universally accepted. This also creates a divided Jewish society where intermarriage between different groups is impossible due to fear of *mamzerut*.

Until the contemporary halakhic authorities are considered and consider themselves competent enough and are united enough to redefine and reinterpret, they cannot be a halakhic solution to the *agunah* problem. If the Chief Rabbinate of Israel does not embrace a halakhic solution, it will be of little avail. It will not be accepted as the law of the land in Israel, and it will not have the authority to be universally accepted. Even if it is not guaranteed that an enactment from the Israeli rabbinate would have that authority, it is the only option that exists.

Glossary

A glossary of Hebrew terms and other terms, frequent in my work.

<i>Agunah</i> (pl. <i>Agunot</i>)	Lit. “Anchored” woman. A woman who cannot get out of a marriage that no longer functions.
<i>Amatla</i>	“Reasonable basis”. Grounds for a coerced divorce, recognized in the <i>Shulkhan Arukh</i> .
<i>Amoraim</i>	The scholars discussing material from the <i>Mishna</i> in the academies of Babylonia and Palestine in the Talmudic Period, 220-500 C.E. Their discussion and interpretation is known as the <i>Gemarah</i> .
<i>Asmakhta</i>	A non-serious promise with unspecified terms. A pledge for a situation one does not really expect to come about. A contract that is considered <i>asmakhta</i> is halakhically invalid because it is indeterminate and vague.
Ashkenazic Jewry	Jewry with traditions developed in Ashkenaz, i.e. Europe.
<i>Be-di-avad</i>	<i>Ex post facto</i> . Jewish law sometimes prohibits something before it happened, only to look upon it more leniently afterwards when it already happened, <i>be-di-avad</i> .
<i>Bet din</i> (pl. <i>batei din</i>) also “ <i>beth din</i> ” or “ <i>beit din</i> ”	Rabbinical court.
<i>Cohen</i>	A Jew of priestly descent. Special laws of marriage apply to him. For instance it is prohibited for him to marry a divorcee.
Conservative Judaism	A modern and progressive stream of Judaism, which holds on to the <i>halakhab</i> , although it is a different and more reinterpreted <i>halakhab</i> than within Jewish orthodoxy.
<i>Dayan</i> (pl. <i>dayanim</i>)	A rabbinical court judge, member of a <i>bet din</i> .
<i>Derekh kiddushin</i>	“In the way of marriage” or “like a marriage”. An alternative way of marriage, suggested as a solution to the <i>agunah</i> problem.
<i>Diaspora</i>	(Greek) The Jewry outside the state of Israel.
<i>Gaonim</i>	The <i>Gaonim</i> were the heads of the Babylonian Academies and the authoritative interpreters of the Talmudic law, 600-1000 C.E.
<i>Gemarah</i>	The discussion of the <i>Mishna</i> and the topics stated in the <i>Mishna</i> from the Talmudic Period, 220-500 C.E.
<i>Genizah</i>	A <i>genizah</i> is a deposit of discarded religious documents that cannot be disposed of because of what it contains, usually the name of the Deity.
<i>Get</i> (pl. <i>gittin</i>)	Letter of divorce.
<i>Get me’useh</i>	A forced <i>get</i> .
<i>Get ziknei</i>	“Constructive agency”, based on a halakhic principle that if a certain thing is to the unmitigated benefit of somebody, the benefit may be imposed on this individual, even without his informed consent. In the area of

	divorce, the discussed application of the principle is for the <i>bet din</i> to issue or accept a <i>get</i> in the place of the husband or wife, because this can be said to be an unmitigated benefit for the husband/wife.
<i>Halakhab</i>	<i>Halakhab</i> is usually translated into “Jewish Law”. It includes areas like civil and criminal law, as well as areas relating to ritual food preparation, holiday observance etcetera, which are not thought of as “law” in a Western discourse.
<i>Halakbot</i>	Laws.
<i>Halizab</i>	Ceremony of release of a <i>yevamah</i> .
<i>Hatsa’a</i>	Recommendation, the lowest level of order from a <i>bet din</i> to a recalcitrant spouse to deliver/accept a <i>get</i> .
<i>Hasidism</i>	A movement within Judaism and one branch of what often is referred to as “ultra-orthodoxy”.
<i>Havka’at kiddushin</i>	Annulment.
<i>Huva/hayyav</i>	Obligation, the second to strongest level of an order from the <i>bet din</i> to a recalcitrant spouse to deliver/accept a <i>get</i> .
<i>Herem</i>	A rabbinic ban, transgression of which is punished with excommunication, but which does not render the punishable action void.
<i>Heter me’ab rabbanim</i>	Permission of a hundred rabbis for a man to remarry although his wife did not accept the <i>get</i> .
<i>Igun</i>	State of being an <i>agunah</i> .
<i>Kashrut</i>	The Jewish dietary laws.
<i>Ketubah</i>	The <i>ketubah</i> is essentially a prenuptial agreement, in which the husband accepts certain financial obligations to his wife, during the marriage, but also in the case of a divorce. Without the <i>ketubah</i> , the couple is not allowed to continue living together.
<i>Kefiyat get</i>	Compelling of, or imposing on, the husband to deliver a <i>get</i> .
<i>Kiddushin</i>	Consecration. One of the halakhic terms for a Jewish marriage.
<i>Kiddushei al tenai</i>	Conditional marriage
<i>Kiddushei ta’ut</i>	Marriage grounded in error.
<i>Kinyan</i>	Acquisition of title. This is present also in the marriage ceremony. The man “acquires” the woman by presenting her an object of a certain value, standardized to be a ring.
<i>Knesset</i>	The Israeli Parliament
<i>Kofin</i>	“We force”. Cases in which the recalcitrant husbands can be forced by physical threats and sanctions.
<i>Kosher</i>	lit. “Fit”, according to the Jewish dietary laws.
<i>Le-kebat-hila</i>	In the first place, ideally. Jewish law sometimes prohibits something before it happened, <i>le-kebat-hila</i> , only to look upon it more leniently afterwards, <i>ex post facto</i> .
<i>Levir</i>	The brother-in-law of a widow whose husband died childless. According to the <i>halakhab</i> , the <i>levir</i> has to either marry the widow or set her free by a ceremony of release.
Levirate marriage	The tradition that the brother-in-law has to either marry

	the widow of a childless man, or set her free by a ceremony of release.
<i>Mamzer</i> (pl. <i>Mamzerim</i>)	<i>Mamzer</i> is usually translated as “bastard”. However, it is a narrower concept, and it refers only to a child born out of a relation between a married Jewish woman and a Jewish man other than her husband. The status, or rather the stigma, of being a <i>mamzer</i> has serious consequences. A <i>mamzer</i> is not allowed to marry any other Jew than another <i>mamzer</i> , and is thus a kind of outcast within the Jewish nation.
<i>Mamzerut</i>	The state of being a <i>mamzer</i> .
<i>Mesurevet get</i> (pl. <i>mesuravot get</i>)	A Jewish woman whose husband refuses to give a <i>get</i> , a bill of divorce.
<i>Mezunos</i>	Maintenance.
<i>Mishna</i>	The oral tradition from the <i>Tannaitic</i> period codified in 200 C.E.
<i>Mishpat Ivri</i>	The term <i>Mishpat Ivri</i> literally means Jewish Law, and is sometimes used to denote the part of <i>halakhab</i> that governs relationships in human society, i.e. what is included in the <i>corpus juris</i> of other contemporary legal systems.
<i>Mitzvah</i>	Religious duty.
<i>Moredet</i>	“Rebellious wife”, a woman who refuses a sexual relationship with her husband.
<i>Posek</i> (pl. <i>poskim</i>)	Halakhic legislator or decisor.
<i>Pilegshut</i>	Concubinage.
Reconstructionist Judaism	A stream of modern Judaism which focuses on cultural aspects of Judaism and on Judaism as a civilization.
Reform Judaism	A stream of modern Judaism, originating in the 19 th century Germany. Reform Judaism focuses more on the spiritual aspects of Judaism, while it has paid less attention to the halakhic issues and in the beginning also to the ethnic/nationalist aspects of Judaism.
<i>Responsum</i> , pl. <i>responsa</i>	(Latin, in Hebrew <i>tshuvah</i> , pl. <i>tshuvot</i> .) A written answer given by a halakhic decisor, a <i>posek</i> , on a specific question, in a specific case.
<i>Rishonim</i>	The <i>Rishonim</i> were the early commentators on the Talmud, following the <i>Gaonim</i> , from approximately 1000 C.E.
Sephardic Jewry	The Sephardic Jews stem from Spain, from which they were expelled in 1492. Thereafter they spread to mainly the countries of the Middle East.
<i>Shalom bayit</i>	lit. “Peace of the house”. Reconciliation.
<i>Shari’a</i>	(Arabic) The Muslim religious law.
<i>Shulchan Arukh</i>	The <i>Shulchan Arukh</i> (“The set table”) by R. Yosef Karo 1488-1575, is a codification of the normative <i>halakhab</i> . Although Karo was Sephardic authority it is normative also for Ashkenazic Jews, because R. Moshe Isserles added Ashkenazic comments.
<i>Takanah</i> (pl. <i>takanot</i>)	Enactment.

<i>Talmud</i>	The <i>Talmud</i> is a compilation of <i>Mishna</i> , the oral tradition from the <i>Tannaitic</i> period codified in 200 C.E. and the <i>Gemarah</i> , the rabbinical commentary of the <i>Mishna</i> from the <i>Amoraic</i> period, 220-500 C.E.
<i>Tam lemetav tan du milemetav armelu</i>	The Talmudic principle “Better to dwell two together, than to dwell alone”.
<i>Tannaitic</i>	From the period when the oral traditions codified in the <i>Mishnah</i> in 200 C.E. developed.
<i>Toenet</i> (pl. <i>toanot</i>)	Female pleader in the rabbinical courts in Israel.
Torah	The five books of Moses. In a wider sense, Torah also means the entire religious/legal tradition, where the Talmud is considered as oral Torah and the five books of Moses as the written Torah.
<i>Tshuvah</i> (pl. <i>tshuvot</i> .)	A written answer given by a halakhic decisor, a <i>posek</i> , on a specific question in a specific case.
<i>Yevamah</i>	A <i>yevamah</i> is “a levirate widow”; the widow of a man who died childless and was survived by a brother. The widow is then bound to the brother-in-law, the <i>levir</i> , who has to either marry her or release her through a ceremony called <i>halizah</i> .
<i>Yotzee</i>	“He shall or must”. Cases of recalcitrance in which the woman has a certain ground for divorce, but in which no other measures of sanction than a public proclamation of disobedience, or a trade boycott against the husband could be used as a sanction against him.

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Karo, Yosef: *Shulkhan Arukh*

Feinstein, Moshe: *Iggrot Moshe on Even ha Ezer*.

Israeli Laws

The Israeli laws that exist in English translation are published by the Government Printer in a series called Laws of the State of Israel (LSI).

Chief Rabbinate of Israel Law (1980) 34 LSI 97

Law of Return 4 LSI 114 (1950) amended in 1954 and 1970

Marriage Age Law (1950) 4 LSI 158

Matters of Dissolution of Marriage (Jurisdiction in Special Cases) Law (1969) 23 LSI 274

Penal law (1977) LSI special volume

Rabbinical Courts Jurisdiction (Marriage and Divorce) Law (1953) 7 LSI 139

Spouses (Property Relations) Law (1973) 27 LSI 313

Succession Law (1965) 19 LSI 58

Women's Equal Rights Law (1951) 5 LSI 171

Laws in Hebrew

Hok batei din rabbaniyim kiyum piskei din shel gerushin [The Rabbinical Courts Enforcement of Divorce Decrees Law] 1951 with later amendments

Hok bituah leumi [National Insurance Law]

Judgments from the Supreme Court of Israel

Judgments translated to English are published in the two series listed below. I have also referred to the Supreme Court cases, cited in secondary literature.

Selected Judgments of the Supreme Court of Israel (SJ)

Asher Felix Landau (ed.): The Jerusalem Post Law Reports 103, 1993