



Enforcement of Divorce Judgments in Jewish Courts in Israel: The Interaction Between Religious and Constitutional Law*

Yehiel S. Kaplan

Associate Prof., Faculty of Law, University of Haifa

Abstract

In the State of Israel, Rabbinical courts are granted sole jurisdiction in the adjudication of marriage and divorce of Jews. In these courts, the husband presents the divorce writ of Jews, the *get*, to his wife on the occasion of their divorce at the end of the adjudication process. When Jews sue for divorce in Rabbinical courts, the courts occasionally determine that the man should grant his wife a *get* or that the wife should accept the *get* granted by her husband. Sometimes one spouse disobeys the ruling. Although the Rabbinical courts occasionally impose sanctions in an attempt to enforce divorce judgments, they are generally reluctant to do so. The implementation of inappropriate measures can lead to the conclusion that a given divorce is in fact a legally ineffectual coerced divorce. Consequently, the Jewish courts occasionally delay the imposition of these sanctions out of concern that inappropriate coercive measures invalidate the *get*, rendering the couple still legally married. The Supreme Court of Israel has ruled, though, that the Rabbinical courts in Israel should act in light of the constitutional principles in *Basic Law: Human Dignity and Freedom*. However, the Supreme Court of Israel has not clearly or specifically addressed the balance between the rights and obligations of the husband and wife in the process of enforcing divorce judgments, neither before nor after the enactment of the of the two important constitutional Basic Laws enacted in 1992. A detailed policy analysis of the sanctions against recalcitrant spouses in Rabbinical courts in Israel—in light of the principles of Jewish and constitutional law in the country—has not yet been undertaken. The aim of this essay is therefore to present the appropriate formula pertaining to the imposition of sanctions against recalcitrant spouses given the principles of Jewish and constitutional law. The formula is presented in light of constitutional law in Israel. However, it is also applicable in other countries with similar constitutional legislation, such as Canada, where legislation sometimes allows for the civil enforcement of Jewish divorce.

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Keywords

Israel; constitutional law; Rabbinic Courts; Jewish law; divorce; gender; equality

1. Introduction

The two Basic Laws enacted in 1992—*Basic Law: Freedom of Occupation*¹ and *Basic Law: Human Dignity and Liberty*²—are significant in the constitutional law of Israel. The resolution accepted by the first *Knesset* (= the parliament of Israel), the so-called “Harai resolution”, was to enact the constitution of Israel gradually, chapter by chapter, in the form of “Basic Laws.”³ In the first stage the Basic Laws that were enacted were mainly structural laws.⁴ At this stage the Basic Laws did not include a definition of individual rights and the form of their protection.⁵ In 1992 the *Knesset* passed two new Basic Laws: *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Liberty*. This was a beginning of a new constitutional period in Israel:⁶ an era of constitutional entrenchment of rights in Israel.⁷ *Basic Law: Freedom of Occupation* guaranteed the right to freedom of occupation, usually understood in legal scholarship in Israel as protecting the autonomy of an individual to choose his or her profession. *Basic Law: Human Dignity and Liberty* granted constitutional status to the right to human dignity and liberty, the right to life and physical integrity, the right to property, the right to privacy and the right to freedom of

¹ *Basic Law: Freedom of Occupation*, Sefer Hachukim (= S.H.) 114 (1992).

² *Basic Law: Human Dignity and Liberty*, S.H. 150 (1992).

³ See: Daphne Barak-Erez, “From an Unwritten to Written Constitution: The Israeli Challenge in an American Perspective” 26 *Colm. Hum. Rts. L. Rev.* 309 (1994-1995).

⁴ See : *Basic Law: The Knesset*, 12 L.S.I. 85 (1958); *Basic Law: Israel Lands*, 14 L.S. I. 48(1960); *Basic Law: The President of the State*, 18 L.S.I. 11 (1964); *Basic Law: The Government*, 22 L.S.I. 257 (1969), replaced by: *Basic Law: The Government*, S.H. 214(1992); *Basic Law: The State Economy*, 29 L.S.I. 273 (1975); *Basic Law: The Army*, 30 L.S. I. 150(1976); *Basic Law: Jerusalem, Capital of Israel*, 34 L.S.I. 209 (1980); *Basic Law: The Judicature*, 38 L.S.I. 101(1984); *Basic Law: The State Comptroller*, S.H. 30 (1988).

⁵ See: Daphne Barak-Erez, *supra* note 3,315.

⁶ See: Daphne Barak-Erez, *supra* note 3,323; Ran Hirschl, “Israel ‘Constitutional Revolution’: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order”, 46 *Am. J. Comp. L.* 427(1998).

⁷ See: Ran Hirschl, “The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions”, 25 *Law & Social Inquiry* 91-149 (2000).

movement.⁸ As a result of the enactment of these two new Basic Laws Israel granted a stronger status to some basic human rights. It also introduced a potential disqualification of “unconstitutional laws” by the Supreme court. In addition, it manifested clearly in these Basic Laws the dual character of Israel as a Jewish and democratic state.⁹ The results of the enactment of these Basic Laws have impact on law and society in Israel.¹⁰

In the State of Israel, Rabbinical courts are granted sole jurisdiction in the adjudication of litigation in the sphere of matters of marriage and divorce of Jews. In these courts, the husband presents the Divorce writ of Jews, the *get*, to his wife on the occasion of their divorce at the end of the divorce adjudication process. Although there are ideological disputes between advocates of the current system in Israel and those who wish to institute civil marriage and divorce instead of, or in addition to, the current legal system, the two Basic Laws enacted in 1992—*Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Liberty*—preserved the current system.

When Jews sue for divorce in Rabbinical courts, the courts occasionally determine that the man should grant his wife a *get* or that the wife should accept the *get* granted by her husband. Sometimes one spouse disobeys the ruling. The primary law used in Israel to assist the husband or wife of the recalcitrant spouse is the *Rabbinical Courts Law (Enforcement of Divorce Judgments)* 5755—1995 (henceforth: *Rabbinical Courts Law*), which enables Rabbinical courts to impose various sanctions on the recalcitrant spouse.

Although the Rabbinical courts occasionally impose sanctions in an attempt to enforce divorce judgments, they are generally reluctant to do so. Jewish courts grant significant legal weight to the position of Jewish legal authorities

⁸ See: Daphne Barak-Erez & Aeyal M. Gross, “Social Citizenship: The Neglected Aspect of Israeli Constitutional Law”, *Exploring Social Rights*, 243, at 244 (Oxford, Hart publishing, 2007).

⁹ See: Ran Hirschl, “The ‘Constitutional Revolution’ and the Emergence of the New Economic Order in Israel”, *Israel Studies*, 2, no. 1, 136-155(1997).

¹⁰ See: an essay concerning the effect of these Basic Laws in various spheres in Israel. This essay mentions articles in footnotes: Aharon Barak, “The Constitutional Revolution: Bat Mitzvah”, *1 Mishpat Ve-Asakim* 3, at 35-36, n. 151-157 (2004) [in Hebrew]. In this essay, The former president of the Supreme Court of Israel, Aharon Barak, examined the nature and essence of the “constitutional revolution” in Israel. He stressed that as a result of the “constitutional revolution” human rights in Israel were granted a supra-legal constitutional status. The omnipotent power of the *Knesset* has been limited. The main part of his essay was devoted to the results of the “constitutional revolution” and to the exploration of how these results have impact on law and society in Israel.

that take a stringent view concerning the rules of Jewish law restricting the use of strong coercive measures, which conflict with the current requirement that the husband and wife consent to grant or receive a writ of divorce. The implementation of inappropriate measures can lead to the conclusion that a given divorce is in fact a legally ineffectual coerced divorce. Consequently, the Jewish courts occasionally delay the imposition of these sanctions out of concern that inappropriate coercive measures invalidate the *get*, rendering the couple still legally married. However, this policy can be counterproductive since the adoption of a less conservative policy, also represented in Jewish legal texts, would more readily induce the recalcitrant spouse to give or receive the desired *get*. This would alleviate the suffering of the non-recalcitrant spouse, and allow him or her to begin a new legitimate relationship that could lead to the establishment of a new family.

The dilemma concerning the appropriate policy in the sphere of enforcement of divorce judgments is not only an internal problem of the Rabbinical courts in Israel and Jewish law scholars. The Supreme Court of Israel is an external organ that supervises the activity of the Rabbinical courts. It has ruled that the Rabbinical courts in Israel should act in light of the constitutional principles in *Basic Law: Human Dignity and Liberty*.¹¹ However, the Supreme Court of Israel has not clearly or specifically addressed the balance between the rights and obligations of the husband and wife in the process of the enforcement of divorce judgments.¹²

In certain cases pertaining to the implementation of coercive measures against recalcitrant spouses,¹³ the Supreme Court had to make a decision regarding the appropriate implementation of a harsh sanction—namely, imprisonment. In these cases, the recalcitrant spouses had caused unnecessary agony to their wives over the course of many years, and imprisonment was the last resort for the refused spouse. The use of the harsh and extreme measures

¹¹ See H.C. 3914/92, *Lev v. Tel-Aviv Regional Rabbinical Court*, (1994) P.D. 48 (2) 502-505 (*henceforth: Lev*); and H.C. 6751/04, *Sabag v. The High Rabbinical Court of Appeal*, (2004) P.D. 59 (2) 834 (*henceforth: Sabag*).

¹² This failure to address the balance between spouses' respective rights and obligations refers to both periods: before and after the enactment of the two Basic Laws in 1992. With respect to the former timeframe, see Cr. A. 220/67, 164/67, *Attorney General v. Yichyeh and Orach Avraham*, (1968) P.D. 22 (1) 29, 49-50 [*Yichyeh and Orach Avraham*]. Regarding the latter timeframe, see H.C. 631/96, 1803/96, *Baruch Even Tzur v. Supreme Rabbinical Court*, (1996) Takdin-Elyon 96 (2), 61 [*Baruch Even Tzur*]."

¹³ Including the abovementioned *Yichyeh and Orach Avraham* and *Baruch Even Tzur* cases, *supra* note 12.

was justified given the particular behaviour of the recalcitrant spouses in the specific contexts of these disputes; however, the Supreme Court avoided the broader issue of appropriate constitutional policy. Moreover, the Court explained in these cases that the prison keys were in the hands of the recalcitrant spouses, who could at any time release themselves from incarceration by granting a *get* to the wife.¹⁴ However, recourse to imprisonment and the Court's subsequent explanation are only appropriate in extreme cases, and in many other situations wherein sanctions are imposed against the recalcitrant spouse, the rights and obligations of the husband and wife should be balanced in an appropriate manner. This is an essential policy, particularly in light of the Basic Laws' enactment in 1992.

The application of the principles of these Basic Laws to sanctions imposed against a recalcitrant spouse is evident in the *Sabag* case. In the *Sabag* case, the Rabbinical court had exercised its authority to prevent a recalcitrant husband from leaving the country, as a means of pressuring him to grant his wife a *get*. The majority of the Supreme Court, however, held that although refusal to grant a *get* is a grave problem and painful for the spouse, the problem must not be solved by imposing the jurisdiction of the Rabbinical court on an individual lacking sufficient connection to the state, especially since preventing the husband's egress to his permanent place of residence severely violates his constitutional right to freedom of movement: "the appropriate solution cannot be in conflict with the fundamental principles governing the propriety of legal proceedings, and these are not commensurate with the resolution of disputes by means of coercion and pressure that lack any legal basis, notwithstanding the gravity of the disputes."¹⁵

Additionally, in the *Abaksis* case,¹⁶ Justice Arbel of the Supreme Court of Israel decided the issue of imposing the jurisdiction of a Rabbinical court on an individual who claimed he lacked the connection to Israel that would place him under the jurisdiction of the Rabbinical courts. Again, the husband in this case claimed that the prevention of his exit to his permanent place of residence in another country severely violated his constitutional right to freedom

¹⁴ See *Yichyeh and Orav Avraham*, *supra* note 12; and *Baruch Even Tzur*, *supra* note 12; H.C. 10736/07 *Ploni*, *infra* note 21.

¹⁵ *Sabag*, *supra* note 11. See also a subsequent decision of the high Rabbinical Court, in circumstances that are similar to the circumstances of the *Sabag* case, *supra* note 11.; Case 5156-64-1. Decision by Rabbis Daichovsky, Bar Shalom and Buaron. (16 elul 5768-16 september 2008). (Not published. Available at: www.rbc.gov.il/judgements/docs/244.doc).

¹⁶ H.C. 2123/08, *Abaksis v. Abaksis*, (2008) (not published).

of movement. He also claimed that the linkage between the deposit of a *get* at a Rabbinical court in Israel and the removal of the court order preventing his exit from Israel was unconstitutional, since it was not in spirit of the *Basic Law: Human Dignity and Liberty*. On the other hand, the wife claimed that the policy of the Rabbinical court in this case was in the spirit of the constitutional principles, including the principle of proportionality. Justice Arbel herein stated that the husband's territorial connection to Israel was strong, and he was subject to the regular jurisdiction of the Rabbinical courts. She took into consideration the suffering and agony of the wife. In Arbel's view, the policy of the Rabbinical court reflected the appropriate constitutional balance given the circumstances of the case. The right of this woman to release herself from the chains of an undesirable marriage—stemming from her constitutional right to human dignity and liberty, as well as her right to autonomy and a normal family life¹⁷—was more important than the husband's constitutional right to freedom of movement. She also stated that the keys to his release from the undesirable situation were in his hands.¹⁸

However, it is not clear if the policy in the *Sabag* case coincides with the policy in the *Abaksis* case, and the constitutional balance between conflicting human rights is not mentioned explicitly in both cases. In these cases the Supreme Court of Israel did not specify the desirable balancing formula that should be implemented when sanctions are imposed upon a recalcitrant spouse. In the *Abaksis* case the Court stated that when sanctions are imposed upon a recalcitrant spouse, the High Court of Justice should intervene and invalidate the decision of the Rabbinical court when it does not act in light of the principles of natural justice or the directives in the legislation of the State of Israel. However, in this case the policy of the Rabbinical court is just and equitable.¹⁹ As a matter of fact, it also held that the Rabbinical court in this case had taken into consideration the principle of proportionality and did try to balance in an appropriate manner between the rights and obligations of

¹⁷ In paragraph 17 of the *Abaksis* case, *id.*, Justice Arbel stressed that the freedom dignity emotions and the right to family life of the wife of the recalcitrant spouse are very important. She also stated that as a result of the behavior of the recalcitrant husband other rights of the wife—such as her right to autonomy, self fulfillment as a free individual and her right to shape her own fate in her life and choose if and when she desires to end her marriage—cannot be real and full scale rights in day to day life.

¹⁸ See paragraphs 3 and 20, *id.* See also: paragraph 11 of the decision of Justice Meltzer, *ibid.*

¹⁹ See paragraph 17, *id.* See also: paragraph 11 of the decision of Justice Meltzer, *ibid.*

the husband and the wife. The Court was careful and adopted a policy of gradual imposition of sanctions against the husband.²⁰

In another case—the *Ploni* case²¹—the Supreme court stated explicitly that the appropriate policy is the balanced implementation of restrictive orders in an attempt to convince a recalcitrant spouse to give or receive a *get*. Therefore the implementation of these orders should be gradual. First the Rabbinical court should use less severe measures, and eventually, when these measures are not effective, it should use more severe measures. This approach was presented as the implementation of the policy developed in *Plonit* case, wherein the Supreme Court justified the balanced and gradual imposition of sanctions upon a recalcitrant spouse in a Rabbinical courts.²²

These above-noted are short statements of policy which are general guidelines. A detailed policy analysis of the sanctions against recalcitrant spouses in Rabbinical courts in Israel—in light of the principles of Jewish law and constitutional law in the country—has not yet been undertaken. The aim of this essay is therefore to present the appropriate formula pertaining to the imposition of sanctions against recalcitrant spouses given the principles of Jewish and constitutional law.

The formula is presented in light of constitutional law in Israel. However, it is also applicable in other countries with similar constitutional legislation, such as Canada, where legislation sometimes allows for the civil enforcement of Jewish divorce.²³ Canadian family law legislation, since 1986, has introduced new solutions that can ameliorate the plight of the spouse of the Jewish recalcitrant spouse, who refuses to grant or receive a *get*. Legislative solutions have now been enacted by both the province of Ontario and by the federal government. In Ontario, sections 56(5) to (7) of Ontario's Family Law Act State:

(5) The court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of

²⁰ See *ibid*, the policy of the Rabbinical court in paragraph 5 of the decision of Justice Arbel and paragraphs 17 and 20 of her decision.

²¹ See H.C. 10736/07 *Ploni v. The High Rabbinical Court of Appeal*, (2008) (not published).

²² See H.C. 10229/06, *Plonit v. The High Rabbinical Court of Appeal*, (2007) (not published), paragraph 6.

²³ See concerning the legislation pertaining to the province of Ontario: J.T. Syrtash, *Religion and Culture in Canadian Family Law*, 128 (Butterworths, Toronto, Vancouver, 1992). See also concerning subsequent federal legislation pertaining to all provinces of Canada: Syrtash, *ibid*, 147-148; Divorce Act, R.S., 1985, c.3, #21.1, 161, 178. Concerning the principles of Canadian law that provide assistance to the recalcitrant spouse see Syrtash, *ibid*, 132-134, 150.

barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in making of the agreement or settlement.

(6) Subsection (5) also applies to consent orders, releases, notices of discontinuance and abandonment and other written or oral arrangements.

(7) Subsections ... (5) and (6) apply despite any agreement to the contrary.

When a spouse makes application for any relief under the Family Law Act the Ontario legislature enacted a procedure in sections 2(4) to (7) of this act that obliges the recalcitrant spouse to remove all barriers in his or her control that prevent the remarriage in light of the faith of the other spouse. The law states:

(4) A party to an application under section 7 (net family property), 10 (question of title between spouses), 33 (support), 34 (powers of court) or 37 (variation) may serve on the other party and file with the court a statement, verified by oath or statutory declaration, indicating that,

(a) The author of the statement has removed all barriers that are within his or her control and that would prevent the other spouse's remarriage within that spouse's faith; and

(b) The other party has not done so, despite a request.

(5) Within ten days after service of the statement, or within such longer period as the court allows, the party served with a statement under subsection (4) shall serve on the other party and file with the court a statement, verified by oath or statutory declaration, indicating that the author of the statement has removed all barriers that are within his or her control and that would prevent the other spouse's remarriage within the spouse's faith.

(6) When a party fails to comply with subsection (5), (a) if the party is an applicant, the proceeding may be dismissed; (b) if the party is a respondent, the defence may be struck out.

(7) Subsections (5) and (6) do not apply to a party who does not claim costs or other relief in the proceeding.

In a decision of the Ontario Court (General Division) the Supreme Court of Ontario - *t. v. t.*²⁴ -an agreement to grant a *get* was enforced. In this case the husband improperly obtained a certificate claiming that the parties were divorced according to the principles of Jewish law.²⁵

²⁴ Unreported decision, supreme Court of Ontario, madam Justice Boland, October 17, 1989, court File No. FL 1379/89.

²⁵ See Syrtash, *supra* note 23, 126.

The affidavit route is also adopted in Canada's Amendment to its Divorce Act-section 21.1. This section states that in the event of the spouses refusal to remove all the barriers to the marriage of the other spouse, the removal which is within the spouse's control, then the court has the authority, after fifteen days from the filling out of the relevant affidavit, to dismiss any application or defense filed by the recalcitrant spouse and strike out any of his pleadings and affidavits filed under the Divorce Act.²⁶

Questions concerning the validity of the Jewish *get* granted or received after the imposition of the abovementioned measures in Canadian law and in the Canadian constitutional sphere could be raised also concerning this legislation. Indeed, these questions were presented concerning the constitutional validity of this affidavit route. This legislation can be regarded as assistance of the legal system in Canada to the performance of a desirable act in light of the principles of Jewish religious law: The granting or receiving of a *get*. Some critics claimed that the state should not compel an unwilling spouse to perform a religious act. In addition, this legislation can be regarded as problematic in light of the principles of the constitution of Canada as a result of the enactment of the rule in section 27 of the Canadian Charter.²⁷

This essay focuses upon the desirable policy pertaining to enforcement of divorce judgments in Israel. However, a similar examination, in light of principles of Jewish law and constitutional law, is relevant also concerning the assistance of other legal systems, which use direct or indirect means of coercion, to Jewish courts who desire to convince recalcitrant spouses to consent to give or receive a Jewish writ of divorce. This assistance is granted to Jewish courts not only in Canada, but also in other countries, such as the United States of America.²⁸ These countries implement civil remedies in an attempt to

²⁶ See Ibid, 150.

²⁷ See J. T. Syrtash, *Religion and Culture in Canadian Family Law*, 135, 144 (Butterworths, Toronto-Vancouver, 1992).

²⁸ Two main legal remedies in the legislation in the United States of America—the so-called “first” and “second” “*get* law”—were an attempt to assist the husband or wife of the Jewish recalcitrant spouse. See concerning the so-called “first *get* law” of the state of New York in 1983: I. Haut, *Divorce in Jewish Law and Life* (New York, 1983), 101; L.S. Kahan, “Jewish Divorce and Secular Courts: The Promise of Avitzur”, *Geo. L.J.* 73 (1984), 193, 202-210; L.M. Warmflash, “The New York approach to enforcing religious marriage contracts: from Avitzur to the Get Statute”, 50 *Brook. L. Rev.*(1984), 229, 231; B.J. Redman, “Jewish Divorce: what Can be Done in Secular Courts to Aid the Jewish Woman?” 19 *Ga. L. Rev.* 73 (1984), 389, 409-416; L.C. Marshall, “The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations” *Nw U. L. Rev.*80 (1985) 204; T. Rostain, “permissible

assist the wife or husband of the Jewish recalcitrant spouse.²⁹ It is accordingly desirable that the legislator and courts in these countries will also take into consideration the appropriate balance between conflicting doctrines and considerations relating to enforcement of divorce judgments in Jewish law³⁰ and to the human rights of husband and wife within the context of constitutional law.³¹

Accommodations of Religion: Reconsidering the New York Get Law”, 96 Yale L. J.(1987), 1147; 1166-1167; M. Feldman, “Jewish Woman and Secular Courts: Helping a Jewish Woman Obtain a Get”, *Berkley Women’s L. J.* (1990)139, 159-169; I. Breitowitz, “The Plight of The Agunah: A study in Halachah, Contract and the first Amendment “,51 *Mad. L. Rev.*(1992), 312,376 (henceforth: Breitowitz, “The Plight”); L. Zornberg, “Beyond the Constitution: Is the New York Get Legislation Good Law”, 15 *Pace L. Rev.* (1995), 703, 768. See also concerning the so-called “second *get* law” of the state of New York-the amendment of the Equitable Distribution Law of the State of New York in 1992: I. Breitowitz, *ibid*; I. Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in Modern Society* (Westport,1993), 209-237 (henceforth: Breitowitz, *Between Civil*); E.S. Nadel, *infra* note 30, 74-78; Zornberg, *ibid*, 707, 733-735.

²⁹⁾ In addition to the abovementioned legislation in Canada- sections 56(5) to (7) of Ontario’s Family Law Act, quoted in the text, and federal legislation, *supra* note 23 – see also legislation in the United States of America: Section 253 of the New York Domestic Relations Law(McKinney 1986 & Supp. 1995) – “Removal of barriers to remarriage”; N.Y. Domestic Relations Law, #236(B)(6). When the Domestic Relations Law was amended at this stage another section, section (d), was added. Section (a) of the law included eleven factors that could be taken into consideration when the court decides concerning maintenance. These considerations are similar to those mentioned in section 236(B)(5) of this law, concerning equitable division of property of the spouses, including a wide discretion to take into consideration any factor which is just and equitable. Section (d), which was added to this law, states that one of the appropriate considerations in this context is “the effect of a barrier to remarriage.” Prof. Breitowitz-I. Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in Modern Society* (Westport, 1993), 210, n.614-claimed this was the adoption of the policy in the British *Brett* case. See *Brett v. Brett* [1969] 1 All E. R. 886.

³⁰⁾ See evaluation of the law in the United States of America in light of the principles of Jewish law: P. Hellman, “Playing Hard to Get: Orthodox Jews and the Woman who Have Trouble Divorcing Them”, *New York Magazine*, Jan 25, 1992, 40, 45; Breitowitz, *Between Civil*, 209, n.611, 230-232; C. Maliniwitz, “The New York State Get Bill and It’s Halachik Ramifications”, *J. of Halachah & Contemporary Society* (1994), 7, 13; G. Schwartz, “Comments on the New York State Get Law”, *J. of Halachah & Contemporary Society* (1994), 26.

³¹⁾ See constitutional evaluation of law pertaining to Jewish divorce in the United States of America: I. Breitowitz, *supra* note 28, at 375-421; E. S. Nadel, “New York’s Get Laws: A Constitutional Analysis”, 27 *Colm. J. L. & So. Probs.*, 55-100 (1993-1994);L. Zornberg, *supra* note 28.

The main conclusion of this article is that the policy of imposing sanctions against recalcitrant spouses should be clearly defined in light of guiding principles drawn from Jewish and Israeli constitutional law—including those stated in the abovementioned new Basic Laws. These Basic Laws state that certain fundamental human rights, such as freedom of movement, freedom of occupation, human dignity and liberty, are important constitutional rights. The sanctions that Rabbinical courts impose in an attempt to induce the recalcitrant spouse to give or receive a *get* are sometimes significant (e.g., imprisonment, solitary confinement and severe limitation of the freedom of occupation, etc.). Therefore, the careful evaluation of the implications of these sanctions is very important in light of the restrictions in Jewish law concerning coerced divorce and those in the specific Israeli law pertaining to the enforcement of divorce judgments and the general constitutional principle of proportionality. In light of the principles of Jewish and Israeli law the courts should grant due weight to the rights and obligations of the husband and wife when these sanctions are imposed, and implement an appropriate balancing formula regarding these rights and obligations. The choice of a specific sanction imposed upon the recalcitrant spouse should also be the result of careful examination of the circumstances of each divorce case. Finally, the sanctions should be imposed in a gradual process. Only after less significant sanctions are ineffective should more significant sanctions should be implemented. This policy is in spirit of the “values of the Jewish and democratic state”³² mentioned in the new Basic Laws.³³

³²⁾ Section 2 of Basic Law Freedom of Occupation, the section of purpose, states: “The purpose of this Basic Law is to protect freedom of occupation, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” Section 4 of Basic Law Freedom of Occupation, the section of violation of freedom of occupation, states: “There shall be no violation of freedom of occupation except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorisation in such law.”

Section 1 of Basic Law Human Dignity and Liberty, the section of purpose, states: “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” Section 8 of this law, the section of violation of rights, states: “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”

³³⁾ This policy is mentioned in short statements of the Supreme Court of Israel. The constitutional analysis is absent in these cases. See *supra* notes 21–22.

2. Enforced Get (Get Meuseh) in Jewish Law

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

Early sources of Jewish law indicate that a woman could originally be divorced against her will. However, during the same historical time period, when a wife wished to divorce her husband, a court decision in favor of divorce was insufficient on its own; rather, the husband's cooperation was also required.³⁴ After the husband agreed of his own free will to divorce his wife and gave her a *get*, the woman was divorced. Later, a change occurred with respect to the wife's consent to receive a *get*. The cooperation of both the husband and the wife was required, and without it the *get* was considered invalid.³⁵

According to ancient Jewish sources, the gap between the capacities of the husband and the wife to sever their marital bond is narrowed by the principle

³⁴ Some maintain that originally, during the biblical period, the husband could divorce his wife against her will and had absolute power with regard to divorce. See E.G. Elinson, "Talmudic restrictions in divorce—their nature and validity," *Dine Israel* 5 (1974): 37, n.1 [in Hebrew]. (Henceforth: Elinson, "Talmudic restrictions in divorce,") The principle that the husband can give his wife a *get* of his own free will whenever he so desires, while the wife must accept the *get* "of her own free will or against her will," is mentioned in the early Jewish legal literature (in the *Mishnah*, *Tosefta*, and *Talmud*): *Mishnah*, Yebamot 14:1; *Tosefta*, Ketubot 12:3; *Babylonian Talmud*, Yebamot 113b; and *Babylonian Talmud*, Gitin 88b. See also M.A. Friedman, *Jewish Marriage in Palestine*, vol. 1 (Tel Aviv: 1980), 312-313. A similar principle is mentioned in *Sifre Deuteronomy* (Finkelstein ed.), (NY: 1969), #269, page 290. See also *Babylonian Talmud*, Gitin 77a; and *Babylonian Talmud*, Baba Metzia 10b, 56b. During this period, the gap between the husband and the wife in the area of divorce was narrowed in part by limits set by the Sages regarding the circumstances that justify divorce. Beit Shammai maintained that divorce is only justified if the husband discovers something improper with regard to the marital relationship (*ervat davar*), that is, if the wife has committed adultery, or according to a different interpretation, if she is guilty of immodest behavior. Beit Hillel maintained that divorce is permitted even if the woman merely burned her husband's food; see *Mishnah*, Gitin 9:10. See also Elinson, "Talmudic restrictions in divorce," 38-40. The *Babylonian Talmud* mentions a limitation set by the Jewish scholars in the subsequent period of the *Amoraim*: they had reservations about one's divorcing his first wife. See *Babylonian Talmud*, Gitin 90b; and *Babylonian Talmud*, Sanhedrin 22a. See also Elinson, "Talmudic restrictions in divorce", 40-45.

³⁵ Elinson, "Talmudic restrictions in divorce," 37 n.2. Rabbi Bleich explains: "In Judaism both the establishment of the matrimonial bond and its dissolution through divorce have always been seen as flowing from the acts of the parties and not from rabbinic judicial authority." - J.D. Bleich, "Jewish Divorce: Judicial Misconceptions and Possible Means of Enforcement," *Connecticut Law Review* 16 (1984), 219.

in Jewish law that *de facto* entitles a woman to receive a *get* against her husband's will. In prescribed circumstances, the husband may be "compelled" (i.e., the divorce judgment is at the level of *kofin*) to give his wife a *get*.³⁶ As a result, coercive measures may be exercised against the husband to persuade him to give a *get*. In such situations, the husband is in practice compelled to divorce his wife against his will.³⁷ The court could rule that the husband is "compelled" to divorce his wife, and it could exercise harsh coercive measures, such as flogging, in an attempt to persuade the recalcitrant husband to give a *get*.³⁸ The practical result of these harsh coercive measures is that the husband does not divorce his wife purely of his own free will.

³⁶ See *Mishnah*, Ketubot 7:9-10. Under certain circumstances, the husband may be forced to divorce her against his will. See also mGitin 9:8. Ancient sources mention alternative grounds for compelling the husband to divorce his wife against his will. In addition to defects, illnesses, and problematic professions, certain types of improper conduct justify divorce against the husband's will. See *Mishnah*, Ketubot 7:1 and *Babylonian Talmud*, Ketubot 70a. See also *Mishnah*, Kidushin 2:5.

³⁷ In addition to the sources referred to in the previous note, the Mishnah also states: "Three women are divorced [against their husband's will] and receive their *ketubah*:" - *Mishnah*, Nedarim 11:12. However, it is stated at the end of that Mishnah that the Sages later greatly reduced a woman's ability to initiate divorce proceedings against her husband with such claims. Elsewhere, the Mishnah mentions other circumstances in which the husband is compelled to divorce his wife against his will, including when she is prohibited to him (*Mishnah*, Yebamot 3:5, and 10:1; and *Mishnah*, Eduyot 4:9), and when the couple have not had a child after ten years of marriage (*Mishnah*, Yebamot 6:6). The Babylonian Talmud mentions other cases in which the husband is forced to divorce his wife against his will, including when he is not ready to maintain his wife, according to the Amora Rav (*Babylonian Talmud*, Ketubot 63a, 77a), and, according to the Amora Rabbi Ami, when he takes a second wife (*Babylonian Talmud*, Yebamot 65a). Sometimes the wife's conduct justifies forcing the husband to divorce her against his will, for example when rumors that she is promiscuous abound. See *Mishnah*, Yebamot 2:8; and *Babylonian Talmud*, Yebamot 24b.

³⁸ A distinct category of cases in which divorce is compelled first appears in a clearly-defined form in the commentaries of the medieval authorities. See *Commentary of Rashbam*, Baba Batra 48a s.v. *vekhen ata omer begitei nashim*; *Tosafot*, Ketubot 70a s.v. *yotzi*; *Responsa Or Zarua*, #760; *Piskei Rosh*, Yebamot 6:11; *Responsa Rosh*, 43, #4; *Chidushei Haritba*, Baba Batra 48a s.v. *vekhen*. The existence of this distinct category is implied by the wording used in Maimonides, *Mishneh Torah*, Laws Concerning Divorce 2:20: "Someone who by law is *compelled* to divorce his wife" (emphasis added). This special category is mentioned several times in the writings of Rabbi Menachem ben Solomon Hameiri. See *Beit Habehirah*, Kidushin 50a s.v. *mi*; Baba Batra, 40b s.v. *get*; Baba Batra, 47b s.v. *hasikarikon*; Baba Batra, 48a s.v. *get*. See also *Responsa Rashba*, 1, #1192; 5, #205; 7, #414; *Responsa Rosh*, 43, #4; *Responsa Maharam Chalawah*, #53; *Responsa Chakhmei Provence*, #48, #76-78; *Responsa Maharik Hachadashot*, #29; *Tashbetz*, 2, #68, #256; *Responsa Yakhin Uboaz*, 1, #130; 2, #21.

In this context, great importance is ascribed to the discretion of the court with regards to the imposition of coercive measures. Even when grounds exist for compelling divorce. Flogging and other harsh coercive measures are only permitted after a Rabbinical court rules that the husband is “compelled” to give a *get*. A *get* that was given after the exercise of a coercive measure, without an explicit judicial ruling of a Jewish court that grounds exist for “compelling” divorce, is considered an unlawfully (*shelo kadin*) enforced *get* (*get meuse*).³⁹

Many medieval Jewish law scholars regarded the list of cases of “compelled” divorce in the ancient Jewish literature as basically closed.⁴⁰ This list consists primarily of certain cases of “compelled” *get*.⁴¹ Yet, the legitimacy of drawing inferences by way of analogy, and applying the rule of the “compelled” *get* to cases more severe than those explicitly mentioned in the ancient literature, was also accepted.⁴² The list of cases of “compelled” divorce was expanded to

³⁹ If Gentiles use coercive measures to force a husband to give his wife a *get*, in circumstances where there are lawful grounds for compelling the husband to divorce his wife, but a Rabbinical court never actually issued a ruling to that effect, the *get* is deemed improper (but not altogether invalid, for it disqualifies the woman who received it from marrying a priest). But if the Gentiles were acting as agents of a Rabbinical court that had ruled that there were lawful grounds to compel a divorce, the *get* is enforced (*meuseh*), but the enforcement is lawful, and the *get* is valid. See *Mishnah*, Gitin 9:8. C.f. *Mekhilta de Rabbi Yishmael* (Horowitz-Rabin ed.), Mishpatim, sec. 1, pp. 21, 246; *Babylonian Talmud*, Baba Batra 48a; *Babylonian Talmud*, Yebamot 106a; *Babylonian Talmud*, Gitin 88b; *Jerusalem Talmud*, Gitin 9:10. For commentary on these sources, see: *Mishneh Torah*, Laws Concerning Divorce 2:20; *Responsa Yakhin Uboaz*, 2, #21; *Responsa Rashbash*, #339; A. Cohen, “The question of Rabbi Zalman Katz (*Maharzakb*) and Rabbi Jacob Weil regarding an enforced get,” *Moriah* 6 (1975): 11-12 [in Hebrew]; Cohen, “The responsa of Rabbi Nathan Igra,” *Moriah* 6 (1975): 12-13 [in Hebrew]; and Cohen, “The responsa of Rabbi Abraham Hakohen (*Maharakh*),” *Moriah* 6 (1975): 13-14 [in Hebrew].

⁴⁰ See *Responsa Rashba*, 1, #1192; #573; 5, #95; *Responsa Baalei Hatosafot*, #75; *Responsa Rosh*, 17, #6, and the parallel source, *Responsa Rosh*, 43, #3; 43, #9 (the first one); *Tur*, Even Haezer, 154; *Responsa Hakhmei Provence*, #48; #72-75; #78; *New Responsa Maharik*, #24, #29; Cohen, “The question of Rabbi Zalman Katz,” supra note 39, 11-12; Cohen, “The responsa of Rabbi Nathan Igra,” supra note 39, 12-13; *Tashbetz*, 2, #22.

⁴¹ See *Responsa Yakhin Uboaz*, 1, #130; 2, #21.

⁴² See *Piskei Rosh*, Ketubot 5:34; *Responsa Rosh*, 43, #6; *Piskei Rosh*, Ketubot 4:3; *Tur*, Even Haezer, 9; *Beit Yosef*, ad loco s.v. *uma shekatav beshem*; *Responsa Ribash*, #241; *New Responsa Maharik*, #2, p. 12, #29; *Tashbetz*, 2, #8; *Responsa Maharam Alashkar*, #73. See also Z. Warhaftig, “Coercion to grant a divorce in theory and in practice,” *Shenaton Hamishpat Haivri* 3-4 (5736-5737/1976-1977): 153, 178-183 [in Hebrew] (henceforth: Warhaftig, “Coercion.”); E. Shochetman, “Women’s status in marriage and divorce law,” in *Women’s Status in Israeli Law and Society*, ed. F. Raday, C. Shalev and M. Liban-Kooby (Tel Aviv: 1995), 380, 417-420 [in Hebrew] (henceforth: Shochetman, “Women’s status.”); and Shochetman, “Aids as grounds for divorce in Jewish law,” *Mishpatim* 25 (1995): 25-28. [in Hebrew] (henceforth: Shochetman, “Aids”).

include other cases that shared a similar or identical rationale to the grounds for divorce mentioned in the early literature.⁴³ In many cases, however, the Jewish authorities refrained from ruling in favor of “compelling” divorce because they hesitated to rule against those who maintained that the list of cases where a *get* may be coerced should not be expanded.⁴⁴ Even in cases where opinions differed, many refrained from relying on those who ruled in favor of compulsion.⁴⁵

⁴³ *Tashbetz*, 2, #8; *New Responsa Maharik*, #2, p. 12; *Responsa Rosh*, 43, #13; *Tur*, Even Haezer, 154; *Responsa Rashbash*, #383 (first one). See also Shochetman, “Women’s status,” supra note 42, 380, 417–420. Warhaftig, “Coercion,” supra note 42, 179–194, lists the grounds for compelled divorce that were derived from grounds explicitly mentioned in ancient sources from the period of the Mishnah and the Talmud. These include, among others, the following: a husband who is seriously ill, and endangers the health of his wife and children (*Responsa Rosh*, 42, #1); a wife-beater, who ought to be treated more severely than someone who beats another person, in part because of the analogy to the law regarding someone who forbs his wife by a vow from deriving benefit from him (*Responsa Maharam ben Barukh* [Prague], #907); a prisoner, who is unable to fulfill his conjugal obligations, and is regarded as one who forbids his wife by a vow from cohabiting with him and deriving other benefits (*Tashbetz*, 2, #68); a couple who disagree on where to live, and there are grounds for compelling divorce due to certain relevant factors, including the priority given to Jerusalem and the land of Israel over other places, the couple’s prior agreement on where to live, and the circumstances that existed before they married (*Mishnah*, Ketubot 13:11, and elsewhere); the *mais alai* plea, according to Maimonides (*Mishneh Torah*, Laws Concerning Marriage 14:8); and the absence of domestic harmony (*Responsa Hachayim Vehashalom*, 2, #35; *Responsa Yabia Omer*, 3, Even Haezer, #18). It should be noted that in recent generations, when this last argument has been the sole ground for divorce, it has been rejected as a decisive factor justifying a compelled *get*. See *Responsa Divrei Shmuel*, 3, #145.

This list is not closed. For example, divorce is compelled when there is a factual or legal doubt regarding the validity of the betrothal, such as when the couple married in secret, as a joke, under duress, or in certain other problematic circumstances. See P. Shifman, *Doubtful Marriage in Israel* (Jerusalem: 1975), 59–98 [in Hebrew]. Similarly, a husband who committed adultery may be compelled to divorce his wife, based on, among other things, a *kal vahomer* argument (i.e., the application of a rule in cases more severe than those explicitly mentioned) with respect to “compelled” divorce in the *Talmud*. See R. Halperin, “Husband’s adultery as a ground for divorce,” *7 Bar-Ilan Law Studies* (1989): 297, at 304–305 [in Hebrew]; and Shochetman, “Aids,” supra note 42, 42 (in light of legal rules in *Sefer Haagudah*, Yebamot 77; *Hagahot Harema*, Even Haezer 154:1). Moreover, where a husband has run away, and there is real concern that his wife might become an *agunah*, the authorities are inclined to rule in favor of compelled divorce (or at least to apply certain restraining measures against him). See *Responsa Maharsham* 8, #282. Regarding the derivation of new grounds for “compelling” divorce by way of analogy, see Shochetman, “Aids,” supra note 42, 19; and Shochetman, “Women’s status,” supra note 42, 380.

⁴⁴ See *Responsa Ribash*, #241.

⁴⁵ See *Responsa Rosh*, 42, #1; *Tur*, Even Haezer, 154, 5; *New Responsa Maharik*, #24; *Responsa Maharit*, 1, #113; *Responsa Chatam Sofer*, Even Haezer, 1, #116; *Responsa Chatan Sofer*, #59.

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

2.2.1 Matching the Level of Enforcement with the Appropriate Sanction

The medieval Jewish authorities distinguished between two levels of enforcement with respect to divorce judgments: (1) *Kofin legaresh*—“compelling” divorce; and (2) *Chiyuv legaresh*—“obligation” to divorce.⁴⁶ The lower levels of divorce—“*mitzvah* (religious obligation) to divorce” and “recommended” divorce—in the sense that Israeli Rabbinical courts use them today, did not exist in the writings of the medieval Jewish authorities. They only distinguished between two levels of enforcement: “compelling” divorce and “obligating” divorce.

According to Rabbenu Chananel and subsequent authorities, when it is stated, “he should divorce her,” this means that the level of sanctions is lower (i.e., this level of enforcement is “obligation” to divorce). When the level is *Chiyuv legaresh*, no use may be made of the severer sanctions that are available when the husband is “compelled” to divorce his wife. In these circumstances, the sanction is in the relatively weak form of verbal persuasion. The recalcitrant husband is asked to give his wife a *get*, and told that he is obligated to divorce her, and if he refuses, the Sages will be displeased with him, and the

The rule is: “The matter is in doubt, and in cases of doubt, they do not compel”- Responsa *Ribash*, #242. See also *Shulchan Arukh*, Even Haezer, 11:8, and *Beit Shmuel* ad loc., #18. Regarding the principle that there is no compulsion in cases of doubt, see also *Chidushei Harashba*, Ketubot 72b s.v. *veasikna*.

⁴⁶ The sanctions imposed on a husband who refuses to give a writ of divorce where the level of enforcement of divorce judgments is “obligation” to divorce are more moderate than those imposed when the ground for the divorce is one with regard to which “compulsion” is mentioned. See *Babylonian Talmud*, Ketubot 77a; *Jerusalem Talmud*, Ketubot 11:7. When the level of divorce is that of “obligation”, the Rabbinical court cannot resort to flogging, or any other severe coercive measure (such as pronouncement of a ban or excommunication), the use of which is only permitted when the court rules that the husband may be “compelled” to divorce. Rabbi Jacob ben Meir (= Rabbenu Tam) emphasized that when the husband is not “compelled” to give a divorce, it is forbidden to coerce him by way of flogging or any other harsh coercive measure, such as excommunication or banning. See *Sefer Hayashar*, Responsa, #24; *Mordekhai*, Ketubot, #204. The distinction is between verbal pressure, on the one hand, and coercion by means that have a more direct effect, on the other. See also *Responsa Baalei Hatosafot*, #75; *Tosafot*, Ketubot 70a s.v. *yotzi*; *Responsa Rashba*, 5, #95; 7, #414; *Piskei Harosh*, Yebamot, 6:11, 15; *Responsa Rosh*, 43, #4; #12-1; *Responsa Mahari Bruna*, #211; *Responsa Maharach Or Zarua*, #157; *Tashbetz*, 2, #8, #68, #256; *Responsa Yakhin Uboaz*, 1, #130; 2, #21; *Responsa Rashbash*, #383 (first one); *Responsa Maharalbach*, #33; *Gvurat Anashim*, #72.

Jewish community will consequently be permitted to refer to him as a “sinner.”⁴⁷

2.2.2 *Rabbenu Tam’s isolating measures*

A possible remedy that is used when a the level of divorce judgment issued is both “obligation” and “coercing” divorce, is the exercise of Rabbenu Tam’s isolating measures. Due to the significance of these measures in Israeli law, as will be explained below,⁴⁸ we shall devote a separate discussion to them.

Rabbenu Tam (= Rabbi Jacob ben Meir) first mentioned his isolating measures in his twelfth century responsum, in his *Sefer Hayashar*.⁴⁹ He writes: “If all of our rabbis agree, you may issue a decree with a severe curse [for violators of the decree]. This decree will state that every man and woman of the house of Israel... is forbidden to speak with him [the husband], to do business with him, to host him, to give him food or drink, to escort him, or to visit him when he is ill.”

Rabbenu Tam lists specific measures of social isolation that may be inflicted on the husband, but adds that the list of measures mentioned in his responsum is not closed and other indirect measures similar to those mentioned may also be inflicted: “And they may add stringent measures as they please, [to be imposed] on anyone, if that man does not divorce and release this girl [his wife], for there is no compulsion in this, for if he wishes, he will comply, and he will not suffer in his body on account of this ban [the isolating measures], but rather, we will separate ourselves from him.”⁵⁰ The rationale in this responsum is the rationale of withholding benefit: “For there is no compulsion in this, for if he wishes, he will comply, and he will not suffer in his body on account of this ban [the isolating measures], but rather, we will separate ourselves from him.” A similar distinction between direct and indirect measures is found in another responsum by Rabbenu Tam.⁵¹

⁴⁷ See *Responsa Chakhmei Provence*, #73-74, #84; *Responsa Baalei Hatosafot*, #75; *Sefer Mitzvot Gadol*, positive commandments, 48 (end); *Mordekhai*, Ketubot, #194, #204-05; *Responsa Maharik*, #29; *Sefer Haagudah*, Ketubot, #98; *Tasbbetz*, 2, #8, #256; *Responsa Yakhin Uboaz*, 2, #21; *Hagahot Harema*, Even Haezer, 154:2.

⁴⁸ See infra note note 95.

⁴⁹ *Sefer Hayashar*, Responsa, #24.

⁵⁰ *Sefer Hayashar*, Responsa, #24. With regards to the scope of the application of Rabbenu Tam’s isolating measures, see Warhaftig, “Coercion,” supra note 42, 162; and A. Beeri, “Legal Means for Enforcing a Jewish Divorce (Isolating Measures of Rabeinu Tam),” *Shenaton Hamishpat Haivri* 18-19 (1992-1994): 65, 73-74 [in Hebrew]. (henceforth: Beeri, “Legal Means”).

⁵¹ See *Hagahot Mordekhai*, Gitin, #468. See also Beeri, “Legal Means,” supra note 50, 73-74.

In contrast to banning, these isolating measures have no direct effect on the “body” of the recalcitrant husband.⁵² They do not share the nature of flogging, excommunication and banning, whose effects are unmediated and physical. Rather, the measure employed is indirect, for the status of an excommunicated or banned individual is never affixed to the recalcitrant husband. It is the public at large, who live with him in the same community, who are forbidden to come into contact with him. They may not speak to him, do business with him, host him, give him food or drink, escort him, or visit him when he is ill. Excommunication and banning, on the other hand, have a direct effect. A categorical status is assigned to the party who refuses to give or receive a *get*; a status the excommunicated or banned party cannot evade.⁵³

Rabbenu Tam’s isolating measures are not a universal sanction because they only apply in a specified geographical location. The party upon whom the measures have been imposed may free himself from their burden by uprooting himself from his community and moving to another, whose members are not bound to observe the measures. By remaining in his community, the isolated party attests to his tacit agreement to accept the onus of the isolating measures. Some explain that when the party remains in the locale where the measures have been imposed, they are regarded as a sanction that the individual has brought upon himself. Therefore, when those measures are put into effect, the divorce that follows is not tainted by compulsion or duress.⁵⁴

⁵² An ancient text—the Babylonian Talmud—explicitly states that excommunication and banning act on the person’s body. See *Babylonian Talmud*, Moed Katan, 17a. Subsequent sources also emphasized that excommunication and banning impact on the person’s body. See *Seder Eliahu Rabbah*, #13.

⁵³ The fourteenth century scholar from Spain, Rabbi Nissim Gerondi, explains that when an excommunication is inflicted on a person’s body he carries it with him wherever he goes. See *Responsa Ran*, #48: “Because this excommunication is not affected by locality, for it rests on the person’s head.” See also 17 *Encyclopedia Talmudit* (Rabbi S. Y. Zevin (editor), Yad Harav Hertzog, Jerusalem, 5743-1983), “*Cherem (Charmeit tziibur)*”, 343-378 [in Hebrew].

⁵⁴ In the late Middle Ages, Rabbi Joseph Kolon, citing a slightly different version of Rabbenu Tam’s responsum regarding isolating measures, attributes great significance to the fact that the isolated husband can leave the locale in which the measures have been imposed: “For here no coercion is exerted upon him, for if he so desires, he can find himself a different place [to live], and he will not be stricken in his body on account of this banning [the isolating measures], but rather we separate ourselves from him.” – *Responsa Maharik*, #102. See also *Ibid*, #135. This distinction between externally inflicted coercion and coercion that the husband inflicts “upon himself” was noted by Rabbi Moses Feinstein in his *Responsa Igrot Mosheh*, Even Haezer 1, #137. Yet Rabbi Feinstein clarified in his responsum that changing one’s place of residence is no small matter. It may be assumed that once a person is settled in a particular place, it is difficult for him to leave. See also *Responsa Shevet Halevi*, 5, #27.

However, we should also consider the weakness of the distinction between a direct action, inflicted upon a person's body,⁵⁵ and an indirect action. One main argument against the validity of this distinction in contemporary society is that it does not adequately take into account the effect of the sanction on the recalcitrant non-religious spouse, especially the husband, with regard to his or her free will. An action that in a formal sense is direct might have less effect on the husband's will than an indirect action that is of greater significance from the husband's perspective and has greater effect on his free will. This may be the case if the social effects of excommunication or banning are less severe than those of Rabbenu Tam's isolating measures. When the isolating measures are implemented, the isolated party may agree to divorce his or her spouse in order to free himself or herself from the oppressive feeling of social isolation, which in contemporary society might sometimes be significantly greater than the social isolation experienced by someone who has been excommunicated or placed under a ban. The heavy social pressure brought to bear on recalcitrant spouses when Rabbenu Tam's isolating measures are imposed can impact significantly upon their will to give or receive a *get*.⁵⁶

⁵⁵ Use was sometimes made of the wording found in Rabbenu Tam's responsum, according to which the isolating measures (in contrast to excommunication and banning) are not inflicted on the individual's "body", nor does he "carry" them "on his body" wherever he goes. This follows what Rabbenu Tam writes in his responsum: "And he is not stricken in his body." In Jewish society of the twelfth century, the majority of Jews held a profound belief that excommunication or banning penetrated every organ of one's body, and that the banned husband carried the sanction in his body wherever he went. In such a society, a sanction that is "in his body" is very severe, and to a large extent deprives the individual of his free will with regard to giving a *get*. Therefore, imposition of such a sanction generates the apprehension that the *get* will not be given of the husband's free will, but will be an unlawfully coerced *get*. Rabbenu Tam's isolating measures, on the other hand, only affect someone in his own community, and he does not carry them with him to other locales. Rabbi Eliyahu, the Vilna Gaon, comments: "For he can save himself from this by moving to another city. As long as no action is taken against his body, it is not called 'compulsion.'"—*Biur Hagra*, Even Haezer, 154, #64. This is in contrast to the effects of banning. Explaining the ubiquity of banning's effects, Rabbi Moses Feinstein remarked: "When the court puts him under banning ... he should be concerned that his body will be stricken wherever he is."—*Responsa Igrot Moshe*, Even Haezer, 1, #137 (emphasis added). Hence, the isolating measures are not considered sanctions that deprive the recalcitrant husband of his free will. See *Responsa Binyamin Zeev*, #79. See also Beeri, "Legal Means," supra note 50, 84.

⁵⁶ On the serious consequences for the husband's free will when Rabbenu Tam's isolating measures are imposed, see Beeri, "Legal Means," supra note 50, 85.

2.2.3 Level of Enforcement

According to the understanding of medieval Jewish legal authorities; when a divorce judgment is enforced at the highest level (i.e., when divorce is “compelled”), even sanctions that impact on the individual’s body, such as flogging, are permitted. The *get* is indeed “enforced” (*meuseh*), but enforced in a lawful manner. On the other hand, when the enforcement level of the divorce judgment is lower (i.e., in the case of “obligation” to divorce), sanctions that affect the individual’s body are forbidden. Should they nevertheless be implemented, the validity of the *get* is liable to be adversely effected, because the divorce will have been enforced in an unlawful manner. Less severe sanctions that do not affect the individual’s body are permitted in such circumstances, and if they are indeed employed, the *get* is not regarded as having been unlawfully enforced.

In the responsum that first mentions the isolating measures, Rabbenu Tam refers to a situation in which divorce may not be “compelled.” He states explicitly that when a woman rebels against her husband with the claim that she finds him repulsive, the husband is not “compelled” to give her a *get*. In these circumstances, the use of harsh coercive measures, such as flogging or a ban, is forbidden.⁵⁷ Yet though recourse to such coercive measures – which are only permitted in the case of a “compelled” divorce – is forbidden, Rabbenu Tam, responding to the plight of a woman who finds her husband repulsive, allows the use of isolating measures.

The fourteenth century authority, Rabbi Mordekhai ben Hillel, held that a new sanction was proposed during the days of Rabbenu Tam, a sanction that may be employed when the court issues a judgment of obligation to divorce.⁵⁸ Similarly, the formulation of the rule in Rabbi Moses Isserles’ glosses on the *Shulchan Arukh* implies that Rabbenu Tam’s isolating measures may be employed when the enforcement level is that of obligation to divorce.⁵⁹

⁵⁷ See *Sefer Hayashar*, Responsa, #24. See also *Responsa Maharik*, #102, #135.

⁵⁸ See *Mordekhai*, Ketubot, #204.

⁵⁹ In his sixteenth-century codification of Jewish law, the *Shulchan Arukh*, Rabbi Joseph Caro writes: “Wherever they [the early sources] said *yotzi* (“he must divorce her”), the husband is compelled, even with whips, to divorce his wife. But some say that anyone about whom the Talmud did not state explicitly *kofin lehotzi* (“he is compelled to divorce his wife”), but only *yotzi veyiten ketubah* (“he must divorce her and pay her ketubah”), may not be compelled with whips to divorce his wife, but rather, we say to him: ‘The Sages have obligated you to divorce your wife, and if you do not do so, it will be permissible to call you a sinner.’” – *Shulchan Arukh*, Even Haezer 154:21. In his glosses on Rabbi Joseph Caro’s remark, Rabbi Moses Isserles writes: “Since there is a dispute among the Sages [about whether or not divorce is “compelled” when the

There were authorities that were inclined to restrict the possibility of imposing this sanction, which they considered harsh, on the recalcitrant husband. They argued that whenever divorce cannot be compelled, the isolating measures could not be imposed.⁶⁰ In adopting this view, their primary consideration was the opinion that in actual practice the isolating measures could constitute a harsher sanction than banning, or at least one of equal harshness. Indeed, according to the initial view of Rabbi Joseph ben Lev, the only justified policy was one that limited the use of Rabbenu Tam's isolating measures to situations wherein divorce may be compelled.⁶¹ However, at the concluding stage of his deliberation, Rabbi Joseph ben Lev inclined—in circumstances where, in his opinion, implementation of the isolating measures was justified—toward leniency in the imposition of the isolating measures, and was ready to consider the possibility of applying them even where divorce could not be lawfully “compelled,” provided that he was joined by several other sages of his generation. Rabbi Joseph ben Lev wrote: “Regarding the imposition of Rabbenu Tam's isolating measures, even though we have given reasons to be stringent, I am nonetheless inclined to be lenient. If some of the generation's authorities and sages agree to impose Rabbenu Tam's isolating measures in a case like ours, I will concur along with them.” Thus, in certain circumstances,⁶²

sources say “*yotzi*”), it is proper to rule stringently, and not to compel with whips, so that the *get* will not be enforced in an unlawful manner. [See *Tur*, Even Haezer, 154, quoting the view of Rabbi Asher ben Yechiel]. But if his wife is forbidden to him, all enforcement level is not that of “compelled” divorce, which justifies the use of such harsh means against the husband], we also may not put him under a ban (banning). Nevertheless, they may decree on all persons who are members of the nation of Israel not to grant him any benefit, nor to do business with him, [See responsum attributed to Rabbenu Tam, *Sefer Hayashar*, Responsa, #24. See also *Responsa Maharik*, #102, #135.] nor to circumcise his son, nor to bury him, until he gives [her] a writ of divorce. See *Responsa Binyamin Zeev*, #88. The court may impose any stringency like this [any indirect sanction of withholding benefit] that it desires, “provided it does not put him under a ban.”—*Hagahot Harema*, Even Haezer, 154:21.

⁶⁰ Rabbi Joseph ben Lev initially held that the sanction of *harchakah* is harsh, and should not be used in situations where the husband is not “compelled to divorce his wife: “*Harchakah* is more difficult for them than banning. If banning is regarded as unlawful coercion, all the more so *harchakah*.” - *Responsa Mahari ben Lev*, 2, #79 (at the end).

⁶¹ One authority in Jewish law, Rabbi Menachem Mendel Schneerson, has argued that the need to move to another community must be considered a severe blow to the recalcitrant husband, which significantly infringes upon his free will to divorce in much the same manner as does banning. Thus, according to his view, the isolating measures may only be imposed in those circumstances where banning is permitted that is, in cases of compelled divorce. See *New Responsa Tzemah Tzedek*, Even Haezer, #264.

⁶² See *Responsa Mahari ben Lev*, 2, #18; see also *Gvurat Anashim*, #72.

he was ready to rule that it was possible to impose Rabbenu Tam's isolating measures when divorce cannot be "compelled."⁶³

In the responsa literature of recent generations, rabbis sometimes mention the view of Rabbi Joseph ben Lev when they are uncertain as to the permissibility of implementing the isolating measures.⁶⁴ The isolated party's decision to remain in his place of residence does not necessarily mean that he tacitly agrees to be placed in a difficult situation, similar to that of a banned or excommunicated party.⁶⁵ Nevertheless, there are those who maintain that the strong pressure applied to the husband by way of Rabbenu Tam's isolating measures does not diminish his free will. Rabbi Hertzog argues that if the husband agrees to divorce his wife after these measures are applied to him, this means that he is not sufficiently attached to his wife, and that in the end the *get* is given of his own free will: "It is not so harsh that he would divorce his wife if he was deeply attached to her, and if he divorces her, he is not regarded as having acted under duress."⁶⁶ According to Rabbi Hertzog, the imposition of Rabbenu Tam's isolating measures is permitted when the authorities have considered the circumstances and concluded that "in order to fulfill his duty to God, it is a *mitzva* for [the husband] to divorce [his wife]," so that she not remain an *agunah*, that is, bound to her husband in an undesirable marriage. Rabbi Hertzog explained as follows: "According to Rabbenu Tam ... they may in any event force him with words, and also with the isolating measures, which are much more [severe] than words. This applies when it is clear to the court that the law is that he should divorce her, and not chain her to him and cause her to suffer for no purpose."⁶⁷

The categories of religious obligation to divorce (*mitzvah*) and recommendation to divorce—as they are used in the literature of recent generations—are not found in the literature of the Middle Ages. Consequently, medieval literature gives no consideration to the imposition of Rabbenu Tam's isolating measures at levels of enforcement lower than that of obligation to divorce. Given the fear in contemporary rulings of Israeli Rabbinical courts that the *get* will

⁶³ See *Responsa Mahari ben Lev*, 2, #79 (at the end).

⁶⁴ See the point of view of Rabbi Ovadiah Yosef, *Responsa Yabia Omer*, 7, Even Haezer #23; 8, Even Haezer #25. See also Beeri, "Legal Means," supra note 50, 89.

⁶⁵ On the status of the excommunicated and the banned (*muchram* and *menudeh*) by the community, see also, "*Cherem (Charme' tzibur)*," supra note 53, 343-378 [in Hebrew]; and G. Libson, "The ban and those under it: Tannaitic and Amoraic perspectives," 6-7 *Shenaton Hamishpat Haiuri* (1979-80): 177, 184-196 [in Hebrew].

⁶⁶ *Responsa Heikhal Yitzchak*, Even Haezer 1, #1.

⁶⁷ See *Responsa Heikhal Yitzchak*, Even Haezer 1, #3.

not be free of the taint of unlawful enforcement at levels of enforcement lower than that of obligation to divorce, many times judges in these courts do not use these measures to uphold a divorce judgment when the enforcement level does not exceed that of *mitzvah* or recommendation to divorce. In practice, the Rabbinical courts have imposed Rabbenu Tam's isolating measures not only in circumstances where divorce could not be "compelled," but also when a ruling was issued that the husband is obligated to divorce his wife. However, they did not use this measure when the level of enforcement was lower than that of obligation to divorce.⁶⁸

3. Enforced *Get* in Israeli Law

3.1 Rabbinical Courts Jurisdiction Law (Marriage and Divorce), 5713—1953, section 6

The legal arrangement that applied until 1995 regarding the enforcement of divorce judgments in Israel is set down in section 6 of the *Rabbinical Courts Jurisdiction Law (Marriage and Divorce)*, 5713—1953 (henceforth *Rabbinical Courts Jurisdiction Law*).⁶⁹ This section stated at the first stage:

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

Jewish law authorities in Israel have discussed the basis for the arrangement set down in this law. Rabbi Meshulam Rata identified legislation that would enable Rabbinical courts to enforce divorce judgments by imprisonment as problematic.⁷⁰ However, many scholars in generations have maintained that

⁶⁸ See the ruling cited in Beeri, "Legal Means," supra note 50, 93-95; *Responsa Yabia Omer*, 7, Even Haezer #23; 8, Even Haezer #25; *Responsa Tzitz Eliezer*, 17, #51. See also the ruling issued by the Rabbinical court associated with Kehilat Machzikei Hadat in Antwerp (and later confirmed by Rabbi Nissim Karelitz, head of a Rabbinical court in Bnei Brak), cited in Beeri, "Legal Means," ibid, 99.

⁶⁹ See *Law Book of the State of Israel*, 5713—1953, 165.

⁷⁰ *Responsa Kol Mevasser*, 1, #83. See also Warhaftig, "Coercion," supra note 42, 175.

when imprisonment is appropriately imposed, there need be no apprehension that the *get* will be regarded as having been unlawfully enforced. Rabbi Hertzog maintained that when a Rabbinical court rules that a husband should be “compelled” to divorce his wife, imprisonment may be used as a means of coercion. However, he also held that to avoid apprehension regarding the imprisonment of those who cannot be “compelled” to divorce their spouses, it is important that it be possible to appeal the ruling of the lower Rabbinical court to the high Rabbinical court.⁷¹ Here, the determining factor is the degree of pressure that the coercive measure exerts upon the recalcitrant spouse. If the prison conditions do not exert excessive pressure on a recalcitrant spouse, there is room for imposition of imprisonment.⁷²

In the past, Jewish courts did not usually imprison Jews (including recalcitrant spouses) in Jewish prisons. However, circumstances have changed in recent generations. The number of women denied a *get* has risen, and the conditions of life in a permissive society have made it more possible, and acceptable, in certain segments of society for such women to choose to live with new partners before being released from their marital bond. More effective solutions to the problem of a husband’s refusal to give a *get* have become necessary. Consequently, the utilization of imprisonment as a sanction against the recalcitrant spouse is now permitted. In one of the rulings of a Rabbinical court in Israel, the Jewish judges (*Dayanim*) took into account the fact that prison conditions are not as harsh today as they used to be in the past. Rabbi Ovadiah Yosef writes: “And all the more so regarding the coercion that is used today, which is not coercion with whips, but rather, sitting in prison. There is no comparison between [the conditions in] the prisons of our day and those

⁷¹ The high Rabbinical court can, among other things, overturn the ruling that the husband is “compelled” to give a *get*. Rabbi Hertzog also maintained that it is important that in its ruling, the court will explicitly write that “the husband should be compelled by way of imprisonment.” In his opinion, where it written in a general way that the husband “should be compelled”, there would be a possibility that the court meant that the husband should be compelled to divorce by ordering him to pay a substantial amount of maintenance to his wife. See his letter dated the week when the Matot-Masey portion of the five books of Moses was read in the synagogues on Sabbath, in the Jewish year 5713 (1953), cited in Warhaftig, “Coercion,” supra note 42, 174-175.

⁷² See *Responsa Heikhal Yitzchak*, Even Haezer 1, #1. See also *ibid*, #2: “Not every imposition of a sum [of money] constitutes absolute duress. ... Since the monetary payment does not seriously diminish his livelihood, it shows that he is not as closely attached to his wife as he claims he is, and the *get* is valid. It is not an unlawfully enforced *get* unless they impose upon him something that is not in his power to bear, such as physical torture, or a huge sum that will destroy him.”

of early times.”⁷³ As a direct consequence of this new reality,⁷⁴ the Rabbinical court, given its authority to do so under Israeli law, ordered that the appropriate coercive measure in this case should be imprisonment.

3.1.1 *Deficiencies of the Rabbinical Courts Jurisdiction Law, section 6*

3.1.1.1 The Remedial Process is Slow

Significant time elapses from the point at which divorce proceedings begin until the court, “by final judgment, has ordered that a husband be compelled to grant his wife a letter of divorce or that a wife be compelled to accept a letter of divorce from her husband.”⁷⁵ Only after the final date of appeal has passed, or after the appeal has been rejected by the Supreme Rabbinical Court of Appeals, is it possible to compel a recalcitrant spouse to give or accept a *get* by way of imprisonment.⁷⁶

Even after the “final judgment”, when a recalcitrant spouse remains steadfast in his or her refusal to give or accept the *get*, the spouse who is refused the *get* must wait an additional period of time. This delay stems from the fact that in section 6 of the *Rabbinical Courts Jurisdiction Law* the matter of compelling

⁷³ *Responsa Yabia Omer*, 3, Even Haezer #20. See also *ibid*, #18-19, where discussion of the subject begins.

⁷⁴ Following the precedent in Jewish literature, Rabbi Shear Yashuv Cohen, former head of the Haifa District Rabbinical Court, asserted: “The coercive measure that stands at our disposal in the State of Israel is imprisonment. Even those who oppose coercing with whips would agree to coerce with imprisonment. *Rashi* (= Rabbi Solomon Yitzchaki) explained that Jewish prisons are used ‘to compel [a husband] to divorce a woman who is disqualified [from marrying him].’—*Commentary of Rabbi Solomon Yitzchaki (Rashi)*, Pesachim 91a s.v. *beit haasurin shel yisrael*. Rabbi Ovadiah Yosef has noted: “There is no comparison between the prisons of our day and those of early times.” In his letter to the rabbis and *Dayanim* of Israel from the fifth of Av, 5713 (1953), Rabbi I.H. Hertzog, of blessed memory, accepted the proposal of legislation stating that the recalcitrant parties be compelled by way of imprisonment. S. Cohen, “Compelling a *get* at present,” *Techumin* 11 (1990): 195, 201 [in Hebrew]. On the validity of a *get* given by a recalcitrant husband after having been put in prison, see also M. Silberg, *Personal Status in Israel* (Jerusalem: 1965), 125-126 [in Hebrew] (henceforth: Silberg, *Personal Status*); and E.G. Elinson, “Refusal to give a *get*,” *Sinai* 69 (1971): 135-136 [in Hebrew]. Similarly, Rabbi Saul Yisraeli wrote that imprisonment in an Israeli jail in contemporary society is less harsh than the imprisonment of a recalcitrant spouse mentioned in the early literature. See *Mishpetei Shaul* (Jerusalem: 1997), 236.

⁷⁵ See *Rabbinical Courts Jurisdiction Law*, sec. 8.

⁷⁶ See S. Daikhovsky, “A Critique of Rabbinical Court Decisions,” *Dine Israel* 13-14 (1986-1988): 7, 12 [in Hebrew].

a *get* does not rest solely in the hands of the Rabbinical courts.⁷⁷ Rather, Rabbinical court are herein authorized to determine that Jewish law allows the imposition of measures of compulsion, but are not granted authority to impose imprisonment at that stage. The law requires that a Rabbinical court's judgment be evaluated by two external supervisory authorities, which have to approve the ruling before imprisonment can be imposed on the recalcitrant spouse. The Attorney General must agree to apply to the district court for an order of imprisonment, and the district court must decide to accept this request. Only after the Rabbinical court's ruling has been evaluated twice by these authorities, who implement the additional tests of Israeli secular law, can the Jewish court carry out its decision to imprison the spouse.

In addition to these two control mechanisms, which invoke the supervision and discretion of external organs, there is also a delaying mechanism that is intended to prevent hasty action. The Rabbinical court's ruling may only be applied after a time specified in legislation has elapsed following the date of the court's decision to imprison the recalcitrant spouse.⁷⁸ All these mechanisms prevented the hasty imprisonment of recalcitrant spouses, when this imprisonment was according to the rules of the *Rabbinical Courts Jurisdiction Law*, prior to additional legislation in the future.

3.1.1.2 The Remedy is Limited to Cases of “Compelled” Divorce

For other reasons as well, this legal arrangement leaves certain needs unsatisfied. Any Rabbinical court ruling in which it is stated that the court “compels,” “obligates,” “deems a *mitzva*” or “recommends” divorce, is regarded as a divorce judgment.⁷⁹ Yet, section 6 of the *Rabbinical Courts Jurisdiction Law* states that a Rabbinical court is authorized “to compel compliance with the

⁷⁷ See H.C. 85/54, *Zada v. Attorney General*, (1954) P.D. 8, 738 (henceforth: *Zada*); H.C. 54/55 *Rosenzweig v. Head of Implementation, Jerusalem*, (1955) P.D. 9, 1540; Silberg, *Personal Status*, supra note 74, 388-389; and *Yichyeh and Orav Avraham*, supra note 12. See also Shifman, *Family Law in Israel*, vol. 1 (Jerusalem: 1995), 37, n.11; 201[in Hebrew](henceforth: Shifman, *Family Law*).

⁷⁸ Before the *Rabbinical Courts Law (Enforcement of Divorce Judgments)*, 5755—1995 was enacted, this time period was six months from the day that the order of compulsion by imprisonment was given as the final judgment of the Rabbinical court. This period may also extend beyond the six months “from the day the order was issued” mentioned in section 6 of the *Rabbinical Courts Jurisdiction Law*. See Silberg, *Personal Status*, 390-1. Following the enactment of this law, in 5755-1995, this time period has been reduced to 60 days.

⁷⁹ See H.C. 661/77, *Haber v. Supreme Rabbinical Court*, (1978) P.D. 32 (3) 329; and H.C. 644/79, *Guttman v. Tel Aviv-Jaffa District Rabbinical Court*, (1980) P.D. 34 (1) 443, 446-448.

order by imprisonment.” The Supreme Court held that the imposition of imprisonment is only possible after the court has ordered that the husband or wife be compelled to give or accept a *get*, but not after it rules that they are obligated to divorce or be divorced, or hands down a ruling at any level of enforcement lower than compulsion.⁸⁰ The Israeli legislator set down this limitation in order to prevent the possibility of an unlawfully enforced *get*. Concern over unlawfully enforced divorce made it difficult to find an effective way to ameliorate the plight of women refused a *get*. Prior to 1995—when the rule in abovementioned section 6 was the basic source in Israeli legislation pertaining to enforcement of divorce judgments—the Rabbinical courts were fearful of compelling someone to give or receive a *get* by way of imprisonment when they were unsure that there was a cause for divorce that warranted compulsion according to Jewish law. In such a case, the *get* could be regarded as having been unlawfully enforced, that is, given under pressure, and not of the recalcitrant spouse’s free will.

The Rabbinical courts in Israel attached great importance to the stringent views of certain Jewish scholars.⁸¹ This stringent tendency stands in opposition

⁸⁰ See H.C. 822/88, *Rosenzweig (Borokhof) v. The Attorney General*, (1988) P.D. 42(4) 760. In this case, imprisonment was impossible since the court decided that the husband is obligated to give his wife a *get*, but did not rule that he can be compelled to divorce her. The problematic nature of the situation wherein a sanction can only be imposed when divorce can be compelled is clearly evident in this case. A woman was locked into a difficult situation for nine years due to her husband’s refusal to give her a *get*. The Rabbinical court evaluated the principles of Jewish law that were relevant in this case, and as a result reached the conclusion that it was powerless and could not impose the sanction of imprisonment. Justice Elon, in his decision in the Supreme Court, suggested: “We can only advise the petitioner to continue to present her claims and her troubles before the honorable Rabbinical Court in Haifa, viz., that she has not yet been released from her state of being an abandoned wife. ... We are confident that the honorable Rabbinical Court will reconsider her case, as was stated in the earlier verdicts of the District Rabbinical Court and the Supreme Rabbinical Court, and find a way to compel the husband to give his wife a *get*, in order to save the woman from the chains of her marriage” - page 761.

⁸¹ These Jewish scholars held that the list of grounds for divorce mentioned in the ancient sources as warranting compulsion to divorce is closed, and in most cases nothing may be added to it. Usually, divorce may be compelled only in those cases regarding which the Sages of the Talmud explicitly mentioned compulsion. See *Piskei Harosh*, Yebamot 6:11; *Responsa Rosh*, 17, #6; *Tur*, Even Haezer, 154, in the name of his father, Rabbi asher ben Yechiel (*Rosh*). Consideration of the position of this scholar (*Rosh*) is evident in a responsum of Rabbi David ben Solomon ibn Abi Zimra (*Radbaz*). See *Responsa of Radbaz*, 4, #108 (#1180). Only in rare cases has the use of analogy enabled Jewish lawscholars to add new grounds for compulsion of divorce. As the causes for compelling a *get* in the early sources are well-defined, this opinion limits the possibility of a present-day ruling that a *get* may be compelled. In his glosses on the

to the viewpoint of the Chief Rabbi of Israel in the past, Rabbi Hertzog, who wrote: “Even though the husband knows that there are Jewish scholars who rule against compulsion, if the Rabbinical court rules in favor of compulsion, he might give his consent [to divorce], for there is a religious obligation to obey the words of the Sages.”⁸² Yet, Rabbi Hertzog’s viewpoint has not been the prevailing opinion in the decisions of the Rabbinical courts in Israel. The significant weight accorded by these courts to the aforementioned stringent opinions militates against a judgment of “compelled” divorce when the cause for divorce is controversial.

However, the Rabbinical courts should balance between competing considerations in the sphere of Jewish divorce. Just as the aforementioned considerations are taken into account, weight should also be given to an opposing consideration—namely, ameliorating the plight of the spouse who is refused a *get*. This, too, is an important value in Jewish law. Before the *Rabbinical Courts Law* was enacted, not enough was done from the perspective of the spouse who was refused a *get*, as only on rare occasions did the *Dayanim* issue a ruling that the level of divorce was the highest level of enforcement: “compelled” divorce.⁸³ Instead, they assumed that it was preferable that the *get* be given without having to resort to the drastic measure of imprisonment used when divorce is compelled.⁸⁴

Shulchan Arukh, Rabbi Moses Iserlis held, in accordance with the opinion of Rabbi Asher ben Yechiel, that the court may not compel divorce if there are any disagreements among the authorities as to whether or not a *get* may be compelled in the circumstances in question. He therefore prohibited the use of direct coercive measures, such as flogging, excommunication, and banning when there is no agreement that the divorce may be compelled. See *Hagahot Harema*, Even Haezer, 154:21. Rabbi Moses Sofer maintained that when the Jewish scholars are not in unanimous agreement that a certain ground for divorce warrants compulsion, direct coercive measures cannot be used to force the recalcitrant spouse to give or to receive a *get*. See *Responsa Chatam Sofer*, Even Haezer, 1, #116. In these circumstances, the recalcitrant spouse can claim that he or she is not in violation of the obligation to obey the Sages, as according to some authorities, he or she cannot be compelled to give or receive a *get*.

⁸² *Responsa Heikhal Yitzchak*, Even Haezer, 1, #1.

⁸³ See Shifman, *Family Law*, supra note 77, 297; and Warhaftig, “Coercion,” supra note 42, 205.

⁸⁴ Until 1995 (5755), when imprisonment was the only measure of enforcement of divorce judgment explicitly mentioned in legislation, consideration of the possibility of ruling in favor of compelled divorce was generally based on the assumption that it was preferable that the *get* be given without having to resort to the drastic measure of imprisonment. The Minister of Religious Affairs during that period wrote: “The hesitations of the Rabbinical courts are many, and the reluctance to use coercive measures is still very great. Sometimes the judgment does not fit the

3.1.1.3 The Remedy of Imprisonment is Ineffective in Certain Cases

The effectiveness of imprisonment was cast in doubt following its failure in certain cases, including that of Yichyeh Avraham. Yichyeh Avraham was a husband who, despite prolonged incarceration, refused to release his wife from the chains of an unwanted marriage.⁸⁵ Imprisonment has also been ineffective in cases where wives refused to accept a *get*. According to Talmudic law, in cases of compelled divorce, the sanction applied is flogging.⁸⁶ In the wake of the position expressed in the writings of Rabbi Abraham ben David (*Raabad*),⁸⁷ however, most Jewish scholars maintain that a woman should not be flogged and the Rabbinical courts have (to the extent possible) avoided imposing the alternative harsh sanction of imprisonment on women that refuse to accept a *get*. Even where a situation has justified a ruling that the enforcement level is that of “compelled” divorce, the courts have refrained from ruling that a woman be “compelled” to accept a *get*, and so too refrained from imposing the sanction of imprisonment.⁸⁸ Instead, they have preferred to grant the husband a dispensation to contract a second marriage,⁸⁹ which exempts him from his

legal arguments, as if at the last minute the court refrained from using the authority granted to it. . . . Even in cases where there is justification for considering compelling divorce, the Rabbinical courts prefer to exert moral or monetary pressure, for example, ordering a large award of maintenance to the woman. Only in the most extreme cases do they resort to orders of imprisonment.” Warhaftig, “Coercion,” supra note 42, 210. See also E. Magen, “Personal liberty and debtors in the Execution Office,” *Hapraklit* 40 (1992), 390-393 [in Hebrew]; and Shifman, *Family Law*, supra note 77, 297-298. In light of the legal practice with respect to the enforcement of divorce judgments prior to 1995, one scholar has concluded: “Divorce is almost never compelled today in the State of Israel, despite the legal authority that rests in the hands of the Rabbinical Courts.” Shochetman, “Women’s status,” supra note 42, 421, n.211.

⁸⁵ *Yichyeh and Orah Avraham*, supra note 12, at 29.

⁸⁶ See *Babylonian Talmud*, Ketubot 78a. According to the medieval Jewish law scholars, in cases where divorce may be compelled, another direct coercive measure—banning—may also be used. See *Sefer Hayashar*, Responsa, #24; *Hagabot Harema*, Even Haezer, 154:21.

⁸⁷ See *Hasagot Haraabad*, on *Halakhot Rabati of Rabbi Isaac Alfasi*, Ketubot, ch. 5, regarding a rebellious wife: “How does he compel? Should you say, with whips—it is not the way of the world to [whip] a woman.” See also *Hasagot Haraabad*, Laws Concerning Marriage 21:10: “I have never heard of punishing a woman with whips.

⁸⁸ See Appeal 5720/89, P.D.R. 3, 369, which states that the woman is obligated to accept a *get*, but not that she may be compelled to do so, for she would be liable to be imprisoned, “and for a woman, that is no less coercive than whips.” See also Appeal 5716/8, 5716/9, P.D.R. 2, 141-142; Warhaftig, “Coercion,” supra note 42, 199-201; and B. Schereschewsky, *Family Law* (Jerusalem: 1993), 294, n.7.

⁸⁹ The consideration in favor of a granting a dispensation to the husband to contract a second marriage is that if the alternative of coercion of the recalcitrant wife is chosen, in an attempt to

obligations toward his recalcitrant wife, including the obligation to pay her maintenance.⁹⁰

The Attorney General's involvement has also prevented the imprisonment of women. In a very rare case, in which a Rabbinical court ordered for a woman to be imprisoned for having refused to accept a *get*, in the end she was not sent to prison. The Attorney General did not want the district court to approve the Rabbinical court's order to compel the woman to accept a *get* by way of imprisonment.⁹¹ Since one of the conditions for enforcing a divorce judgment by way of imprisonment is the Attorney General's endorsement, his policy regarding the imprisonment of women herein prevented application of this remedy.

encourage her to consent to accept the *get*, there is apprehension that this *get* might be compelled in questionable circumstances and will be regarded as having been unlawfully enforced, and should the wife remarry, she will be guilty of adultery and her children will incur the problematic undesirable status of *mamzer*, who is disqualified to marry most Jews. The alternative of the abovementioned dispensation is preferable since questionable circumstances in this sphere are less problematic. If a man remarries without having been issued a dispensation to contract a second marriage, he only violates the enactment of Rabbenu Gershom, and not the biblical prohibition of adultery, and his offspring from the second marriage do not incur the problematic status of *mamzer*. In H.C. 235/68, *R.B. v. The Chief Rabbis of Israel*, (1969) P.D. 23 (1) 475, the Supreme Court accepted the position of the Rabbinical courts that when a woman refuses to accept a *get*, the most suitable way to force her to accept it is by granting her husband permission to contract a second marriage, and not by imprisonment. This verdict was affirmed in Additional Appeal 10/69, *Boronovski v. The Chief Rabbis of Israel*, P.D. 25 (1) 7, 47, wherein Justice Agranat voiced a similar opinion – namely, that with regard to a woman, imprisonment is an excessively harsh coercive sanction.

⁹⁰ In a responsum regarding a woman suffering from epilepsy, Rabbi Asher ben Yechiel (*Rosh*) wrote: “The same measures that are used to compel a man to give a *get* are used to compel a woman to receive a *get*. If she refuses [to accept the *get*], he may withhold her maintenance, clothing, and conjugal rights.” *Responsa Rosh*, 42, #1. Following *Rosh*, Rabbi Joseph Caro ruled in *Shulchan Arukh*, Even Haezer, 117:11, that if a woman suffers from epilepsy she may be compelled to accept a *get*, and if she refuses to do so, her husband may withhold her maintenance, clothing, and conjugal rights. See also *Responsa of Maharam of Lublin*, #1. Following the earlier rulings, the Rabbinical courts have ruled that if a woman refuses to accept a *get* when there are grounds for compelled divorce, the husband is exempt from paying her alimony. See Appeal 147/5722, P.D.R. 5, 131-32; Appeal 980/27, P.D.R. 7, 359; and Appeal 281/29, P.D.R. 8, 21.

⁹¹ *Zada*, *supra* note 52. See also Warhaftig, “Coercion,” *supra* note 42, 200-201. However, Warhaftig also mentions a ruling by the Petach Tikva District Rabbinical Court, with *Dayan* Rabbi Solomon Karelitz presiding, in which a woman was compelled to accept a *get* and this court ruled she should be in prison (page 210, n.39).

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

3.2.1 *Restrictive Orders*

Due to the above-noted shortcomings of the *Rabbinical Courts Jurisdiction Law*, particularly when the enforcement level of the divorce judgment was less than that of “compelled” divorce, the *Rabbinical Courts Law (Enforcement of Divorce Judgments), 5755—1995* (henceforth, *Rabbinical Courts Law*)⁹² was enacted in 1995(5755). This law widened the scope for exercising coercive measures against a recalcitrant spouse. The draft law that preceded its enactment explicitly noted that the law was aimed at harnessing a tool in Jewish law—namely, Rabbenu Tam’s isolating measures—for the purpose of alleviating the plight of a spouse who has been refused a *get*.⁹³

The *Rabbinical Courts Law* authorizes the Rabbinical courts to issue a variety of restrictive orders against a recalcitrant spouse. If a Rabbinical court determines, by final judgment, that a man must give his wife a *get*, or a wife must receive a *get*, but the spouse refuses to comply with the judgment, the court may issue restrictive orders for a period of time and with certain conditions which it determines. Section 1 of the *Rabbinical Courts Law* states that these restrictive orders may be issued at all levels of enforcement of divorce judgments. A restrictive order may infringe, among other things, upon the recalcitrant spouse’s civil liberties, such as his or her right of mobility, as well as other rights in whole or in part in various areas.

Sections 2(1) to 2(6) of the *Rabbinical Courts Law* specify restrictive orders against recalcitrant spouses that restrict their rights in the following areas: (1) leaving the country; (2) obtaining an Israeli passport or transit pass as specified in the *Passports Law, 5712—1952*, holding these travel documents or extending their validity (except for their validity for the purpose of returning to Israel); (3) obtaining, maintaining, or renewing a driver’s license; (4) appointment, election to, or service in a profession regulated by law, or in a profession in a supervised authority, as defined in the *State Comptroller Law, 5718—1958*; (5) working in a profession regulated by law, or operation of a business requiring a license or legal permit; (6) opening or maintaining a bank account, or drawing checks from a bank account.⁹⁴

⁹² *Law Book of the State of Israel, 5755—1995*, number 1507, page 139.

⁹³ See the explanation pertaining to the aim of the draft law: *Proposals of Legislation of the State of Israel, 5754 - 1994*, number 2281, page 495.

⁹⁴ For this purpose, the individual against whom the restrictive order was issued will be treated as a special restricted customer in the sense specified in the *Checks Without Coverage Law, 5741—1981*.

A Rabbinical court is also permitted to issue restrictive orders that infringe on the rights of a prison inmate. The purpose of section 2(7) of the *Rabbinical Courts Law* is to alleviate the plight of someone denied a *get* whose spouse was sentenced to a period of imprisonment. The spouse is serving time in prison anyway, so an additional prison sentence might not persuade him or her to give or receive a *get*. This section sets down alternative sanctions that could encourage inmates of this type to comply with a court's verdict. The restrictive orders specified in this section allow a Rabbinical court to issue orders infringing upon prisoners' rights in several spheres, including their rights to be granted special leaves or early release from prison.

As previously mentioned, the concept of "withholding benefit" is an important idea that is relevant in the context of restrictive orders.⁹⁵ Given this rationale, when incarcerated inmates are denied privileges—especially when they are serving time for an offense unrelated to the divorce proceedings—the sanction is indirect: "withholding benefit." Yet, since the inmates undoubtedly long to be released or given leave, denying them privileges in accordance with the authority granted the Rabbinical courts in section 2(7) of the *Rabbinical Courts Law* constitutes a very serious assault on their human rights, and on their free will to grant a divorce. This fact is the foundation of the question: is the imposition of sanctions mentioned in this section of the law a faithful expression of the idea of "withholding benefit," which is the main rationale of Rabbenu Tam's isolating measures? Withholding a relatively trivial benefit is not the same as withholding a significant benefit. The Rabbinical court must surely consider carefully, in light of the level of enforcement, whether it is appropriate to withhold a significant benefit.

Withholding benefit from prisoners that are already serving jail terms unrelated to a refusal to grant their spouses a divorce was considered in a Rabbinical court judgment prior to the enactment of the *Rabbinical Courts Law* in 1995.⁹⁶ In that ruling, Rabbi Solomon Daikhovsky held that the court could permit denying the prisoner a reduction of a third of his sentence for good behavior in an attempt to encourage him to give his wife a *get*. This ruling preceded section 2(7) of the *Rabbinical Courts Law*, which granted the court legal authority to impose such an indirect measure. In the course of the proceedings, the husband had shouted defamatory remarks at the *Dayanim*. Rabbi

⁹⁵ Ibid.

⁹⁶ See S. Daikhovsky, "Compelling a *get* by way of recommendation to reduce a prison sentence by a third," *Techumin* 1 (1980): 248-249[in Hebrew]. (henceforth: Daikhovsky, "Compelling a *get*,").

Daikhovsky had, therefore, held that the court could rule that it would not recommend to the prison authorities that they release the prisoner since only “good behavior” justifies recommending that an early release be granted. However, Rabbi Daikhovsky suggested that the court announce its readiness to forgo the contempt of court charge, and not impose the sanction if the husband would agree to give a *get*.⁹⁷ The basis of the court’s ruling was “withholding benefit.”⁹⁸ In line with Rabbi Daikhovsky’s remarks, the rationale of “withholding benefit” can apply to certain sanctions in section 2(7) of the *Rabbinical Courts Law* that deprive inmates of their rights. These rights can be viewed as privileges that society gives to inmates, which can, under certain circumstances, be denied. Rabbenu Tam himself wrote that a recalcitrant husband who wishes to be freed from prison when he has been incarcerated for a matter unrelated to his divorce may be denied assistance.⁹⁹

The Rabbinical Courts Law was amended in 2000. The amended law adds to the sanctions that may be imposed upon a recalcitrant spouse that is already in prison.¹⁰⁰ Section 2(7) presently allows prisoners to be denied additional

⁹⁷ Ibid. This *Dayan* took into account, among other things, the fact that another legal course of action was available to the court - namely, approaching the prison authorities, reporting the prisoner’s conduct during the proceedings, and requesting that, in light of this conduct, his prison term not be reduced by a third. The court could threaten the prisoner that it could adopt this policy, and tell him it was willing to forgo the contempt of court charge if he would be willing to give his wife a *get*.

⁹⁸ Rabbi Daikhovsky explained that this manner of coercing a *get* is not entirely free of jurisprudential problems in light of the principles of Jewish law. Yet for him the critical factor was the argument that the court’s recommendation to the prison authorities would constitute acting in an indirect manner (withholding benefit) and not a direct act of unlawful coercion. He relied, among other things, on the fact that reduction of a prison term by a third for good behavior is not automatic. Ibid., 523- 525.

⁹⁹ See *Hagahot Mordekhai*, Gitin, #468-469. See also *Responsa Maharik*, #133, #166; *Responsa Mabib*, #22; and Daikhovsky, “Compelling a *get*,” supra note 96,254.

¹⁰⁰ *Rabbinical Courts Law (Enforcement of Divorce Judgments)*, (Amendment no. 4) 5760—2000, in *Law Book of the State of Israel*, number 1732, page 133.

The purpose of the amendment of the law, in light of the explanations offered by Rabbi E. Ben-Dahan, director of the Rabbinical Courts in Israel, at a meeting of the *Knesset* Legislation Committee, February 14, 2000, Protocol no. 83, p. 2, is: “to fill a *lacuna* that became evident over the course of time, when the law existed. There are, on average, about 20 to 30 inmates—the number varies—who [are unwilling to grant their wives a *get*, and] are in prison for all sorts of reasons, including reasons unrelated to the granting of a *get*. Their prison sentence makes it impossible for us to deny them any privileges [by restrictive orders mentioned in sections 2(1)-2(6) of the *Rabbinical Courts Law*], for a prison inmate cannot, in any event, use his driver’s license. ... We are herein suggesting a number of restrictions to be placed on such prisoners,

rights such as their right to purchase articles in the prison canteen, to keep personal possessions, to send and receive letters (except for letters addressed to the court, their attorneys or rabbinic pleaders, or the State Comptroller), and to receive visitors (except for visits from their attorneys or rabbinic pleaders, their clergyman, an official inspector, or their minor children). As these sanctions sometimes have a severe impact, the Rabbinical courts should impose them only in particularly serious cases.

Section 3 of the *Rabbinical Courts Law* also states that a Rabbinical court may issue a restrictive order “*imprisonment* to compel compliance”, which infringes on an individual’s right to walk about freely. This drastic remedy, however, is not free of ambiguities. The explanation accompanying the draft proposal of the law that led to the enactment of the *Rabbinical Courts Law* mentions Rabbenu Tam’s isolating measures.¹⁰¹ Yet, this rationale of the isolating measures most likely does not apply to the sanction of imprisonment in section 3 of this law, since this section deals with the direct measure of sending a spouse who is at liberty to prison so that he or she will consent to give or receive a *get*.

Nevertheless, this rationale might be appropriate concerning the imprisonment in this law according to a possible perspective. According to this outlook imprisonment in section 3 of the *Rabbinical Courts Law* is less severe than the imprisonment mentioned in section 6 of the *Rabbinical Courts Jurisdiction Law*. In the former, the legislator has set various limitations to the authority of the Rabbinical court. First, when a Rabbinical court issues a restrictive order

[they include the] denial of privileges such as the possibility of leave, the possibility of making purchases in the prison canteen, the possibility of watching television. ... We have also suggested the possibility of putting the person into solitary confinement for fourteen days, with a break each time” (page 2).

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

¹⁰¹ See note 93 above.

to compel someone by way of imprisonment, the rules in sections 3(5) and 3(6) of the *Contempt of Court Ordinance* apply to the court that issues the order. According to these provisions, a court that imposes imprisonment to compel compliance is required to notify the Attorney General of its action. The Attorney General, or his proxy, must bring the matter of the prisoner before the Rabbinical court that issued the order for reconsideration whenever he deems it necessary, and not less than once every six months from the beginning of his imprisonment. After giving the prisoner and any other party with standing in the case the opportunity to voice their arguments, the Rabbinical court may reconfirm the order, change it, attach conditions to it, cancel it, or issue another ruling that it deems appropriate.

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

The *Rabbinical Courts Law* further demands great caution when the court issues a restrictive order imposing imprisonment or extending a prison term. Section 3(b) of the *Rabbinical Courts Law* states that the court is obligated, whenever it imposes or extends imprisonment, to examine whether or not that sanction “is necessary for the enforcement of the judgment.” In light of this section, as well as section 4(b) of the law, it appears that the court is required to consider whether there are other means, which are less drastic than denying liberty, that could lead to the same result. This limitation is also new. Section 6 of the *Rabbinical Courts Jurisdiction Law* does not allow the Rabbinical court to exercise its judgment at any stage following the imposition of imprisonment. After the Attorney General and the district court have exercised their judgment and decided to imprison a recalcitrant spouse, there is no later stage at which the court is given another opportunity to examine whether it may be possible to exercise a less severe measure.

With respect to the type of recalcitrant spouse exemplified by Yichye Avraham, who was imprisoned for many years, indeed, until the day he died, it becomes clear that in some cases the denial of liberty will not induce recalcitrant spouses to release their partners from the chains of their marriage. In

such circumstances, when it has become clear that the remedy of imprisonment is ineffective, it would appear that the remedy is not “necessary for the enforcement of the judgment.” The Rabbinical court therefore considers the possibility of ruling that a recalcitrant spouse should no longer be imprisoned. Should it decide to release the prisoner, there is room to consider imposing other restrictive orders if they are likely to influence the recalcitrant spouse’s behavior with respect to the granting or receiving of a *get*. In practice, the Rabbinical court should interpret this exception narrowly, so that even if there is only a small chance that this restrictive order will cause the recalcitrant spouse to give or receive a *get*, it should still be issued. There is reason to fear that a judicial policy that eases the burden of proof required for releasing recalcitrant spouses from prison on the grounds that there is no chance that it will influence their behaviour will cause them to become even more adamant in their refusal.

In 2000, section 3(a) was added to the *Rabbinical Courts Law*, which states that prison inmates may be held in solitary confinement for a period of several days, and then held there again after a break of several days. Based on the principles of Jewish law and the above-noted policies of Jewish scholars and Rabbinical courts in recent generations, even if imprisonment or solitary confinement is permitted as a direct measure to bring about the granting of a *get*, it should only be used as a last resort after less severe alternatives have already been tried, with no results. In the past, when imprisonment was imposed in accordance with the *Rabbinical Courts Jurisdiction Law*, it was only imposed on rare occasions, and only when its implementation was justified due to particularly serious circumstances.¹⁰² It can therefore be assumed that since the principles have not changed, a similar policy should be adopted with regard to imprisonment or solitary confinement in the *Rabbinical Courts Law*. From the perspective of Jewish law, the Rabbinical court must take into consideration the fact that sending a prisoner into solitary confinement is a direct measure, and not merely “withholding benefit.” It must be carefully examined whether the use of this sanction raises the concern that the *get* will be regarded as having been unlawfully enforced, particularly in a case where divorce may not be “compelled.”¹⁰³

¹⁰²⁾ See notes 81–83 above.

¹⁰³⁾ The protocol of the Knesset Legislation Committee (see note 100 above) implies that the new sanctions added in sections 2(7) and 3 of the *Rabbinical Courts Law* in 2000 were enacted after consultation with the judges in Rabbinical courts (*Dayanim*). Their implementation usually meets the requirements of Jewish law for avoiding an unlawfully coerced *get*. However, due to

3.2.2 Restrictive Orders Against Women

Although the *Rabbinical Courts Law* did not initially apply to women that refused to accept a *get*, the law was later amended to allow restrictive orders to be issued against them. A Rabbinical court may issue a restrictive order against a woman when the head of the Supreme Rabbinical Court gives his confirmation. After such a restrictive order is issued, the recalcitrant wife's husband is not permitted to contract an additional marriage until the expiry of three years from the date of issuance.¹⁰⁴ It should be noted that the legal principle underlying these rules discriminates against the husband. Restrictive orders against him are valid without the approval of the head of the Supreme Rabbinical Court, and the request for a restrictive order applying to his wife prevents him, for a time, from contracting an additional marriage. This discrimination is nonetheless permitted, however, given Israeli law's allowance of distinctions that are based on relevant factors.¹⁰⁵ Here, the legislator took into account the fact that the husband's standing in this matter is stronger. The husband can obtain an allowance to contract an additional marriage, but no similar option is available to a married woman. Therefore, the legislator established that when a restrictive order is issued against a woman, the approval of an additional party is required. That party will consider all the relevant factors, as well as examine the alternative of a dispensation to contract another marriage as a solution for the distress of a husband when his wife refuses to receive a *get*.

In practice, the rules set down by the legislator regarding the use of restrictive orders against a woman – in particular the need for confirmation by the head of the Supreme Rabbinical Court – create a situation that is not egalitarian. The restrictive order is a measure that in actual practice is rarely exercised against a woman. In most of the infrequent cases in which the district Rabbinical court issued a restrictive order against a woman, the required confirmation was, in the end, not granted by the head of the Supreme Rabbinical Court.¹⁰⁶

the severity of the infringement of the recalcitrant spouse's exercise of free will, every application of the new sanctions requires careful examination in light of the relevant principles of Jewish law.

¹⁰⁴ See sections 1(3) and 1(6) of the *Rabbinical Courts Law*.

¹⁰⁵ See H.C. 4541/94, *Miller v. Minister of Defense*, (1995) P.D. 49 (4) 94 [Miller]; and H.C. 721/94, *El Al Airlines, Ltd. v. Danilovitz*, (1994) P.D. 48 (5) 749.

¹⁰⁶ I herein rely primarily on conversations with Rabbi E. Ben-Dahan, director of the Rabbinical Courts in Israel, and Rabbi Frank, director of the office of Rabbi Lau, the Chief Rabbi of Israel.

3.2.3 *The Relationship Between the Sanctions in the Rabbinical Courts Law and the Rationale of Rabbenu Tam's Isolating Measures*

The dominant rationale permitting the use of Rabbenu Tam's isolating measures in circumstances that do not allow for a ruling of "compelled" divorce is that these measures are not direct (i.e., taking something away from someone), but rather indirect (i.e., withholding benefit). The Israeli legislator most likely assumed that the state's denial of services and resources to a recalcitrant spouse falls into the category of "withholding benefit." This type of "withholding benefit" is effective in current society in Israel, where many Jews are not religious and do not accept the religious authority of Jewish law and the Rabbinical courts and therefore might not implement the directive of a Rabbinical court to act in light of "Harchakot Rabbenu Tam."¹⁰⁷

The explanation accompanying the draft proposal that preceded the enactment of the *Rabbinical Courts Law* states that the restrictive orders in this law, which deny privileges that the state bestows on its citizens, fit in well with the idea embodied in Rabbenu Tam's isolating measures.¹⁰⁸ However, Rabbenu Tam mentioned other sanctions that may be exercised against a recalcitrant husband, and even the sanctions that were added in later generations differ from those utilized in Israeli law. Indeed, in the responsum where his measures are first mentioned, Rabbenu Tam foresaw the possibility of adding more isolating measures: "And they may add stringent measures as they please, [to be imposed] on anyone." Still, the new isolating measures must satisfy the rationale of the traditional measures. It is thus warranted to examine the degree to which the new restrictive orders that were added by the Israeli legislator satisfy the rationale of the "old" measures.

Moreover, thought must be given to argument the this scholar, that prior to the enactment of the *Rabbinical Courts Law*, Rabbenu Tam's isolating measures were rarely implemented in rulings in general, and in the rulings of the Rabbinical courts in Israel in particular. This was due to the fear that exercising the measures in question might infringe upon the husband's exercise of

¹⁰⁷ Rabbi Shaul Israeli noted the problematic nature of exercising Rabbenu Tam's isolating measures in contemporary Israeli society: "A severe high-pressure tactic exists ... isolating the individual from society by having no business dealings with him... . But it obviously requires that the society be united and disciplined. If the matter is difficult to execute in our day, it is not the fault of Jewish law; the blame rests only on the state of our public affairs." - S. Israeli, "On coercion and consent regarding a *get*," *Torah Shebeal Peh* 12 (1970), 38[in Hebrew].

¹⁰⁸ See note 93 above.

free will in giving a *get*.¹⁰⁹ There is also a sound basis for the argument that the isolating measures of Rabbenu Tam, and consequently also those measures in their modern Israeli form, should only be implemented when the divorce judgment is at the level of “obligation” to divorce or higher.¹¹⁰ It is therefore desirable that whenever the Rabbinical courts issue rulings that include restrictive orders found in the *Rabbinical Courts Law*, they specify the level of the divorce judgment. This should be done in order to satisfy the Jewish scholars who hesitate to implement Rabbenu Tam’s measures, particularly when the circumstances do not justify a judgment by the court that the level of divorce judgment is “obligation” or “compelled” divorce.”¹¹¹

The rationale of “self-duress” – duress inflicted by recalcitrant spouses themselves when they decide of their own free will to remain in the place where the isolating measures were activated – does not apply to every case in which the restrictive orders may be issued according to the new Israeli law. Remaining in their own place does not always attest to the spouses’ true and sincere agreement to assume the burden of the isolating measures. This is particularly true with respect to the isolating measures included under the restrictive orders allowed by the *Rabbinical Courts Law*. These measures apply in Israel wherever the recalcitrant spouse goes, not just in a specific community. One of the sanctions, which can be applied alone or with other restrictive orders, is the restrictive order specified in section 2(1) of the law, which bars exit from the country. In such a case, even the option of escaping the sanction by going abroad does not exist. This being so, in light of the view that the basis for Rabbenu Tam’s isolating measures is the recalcitrant spouse’s choice to remain in his or her locale, it is necessary to carefully examine to what degree the Israeli restrictive orders are consistent with this rationale. Attempts should be made to avoid a

¹⁰⁹ See Beeri, “Legal Means,” supra note 50, 90-95, 96, n.101. However, he added that Rabbenu Tam’s isolating measures were occasionally imposed in judgments of the Rabbinical courts. See also *Responsa Yabia Omer*, 7, Even Haezer, #23; 8, Even Haezer, #25; *Responsa Tzitz Eliezer*, 17, #51.

¹¹⁰ Beeri, “Legal Means,” supra note 50, 81, 91-92.

¹¹¹ See articles written by Rabbis Chaim Gedalia Cymbalist, Uriel Lavi, and Joseph Goldberg in *Shurat Hadin* 5 (1999), 230-297[in Hebrew], wherein they discuss at length the authority to impose the various restrictive orders mentioned in the *Rabbinical Courts Law* in light of the principles of Jewish law. They take into consideration the relevant Jewish legal principles pertaining to Rabbenu Tam’s isolating measures and unlawfully enforced divorce. It may be that such discussion should be a matter of course in Rabbinical courts’ judgments involving imposition of restrictive orders upon recalcitrant spouses.

situation in which there is doubt as to the validity of a *get* given or received as a result of a restrictive order.¹¹²

4. Enforcement of Divorce Judgements: Constitutional Considerations

4.1 *Balancing*

4.1.1 *Balancing in Israeli and Jewish Law – Its Nature and Its Importance*

When a Jewish judge conducting a judicial proceeding decides what is right and just, he must be guided by his set of values as well as by the underlying values of the Jewish legal system. Sometimes the judicial decision requires the weighing and balancing of conflicting values. The judge in a civil court and the *Dayan* in a Rabbinical court must decide what is the appropriate balance between these values, and in certain circumstances, which of them takes priority. Often, “the solution”, according to former Chief Justice of the Supreme Court of Israel, Aharon Barak, “is not a question of all or nothing.” The value rejected is not excluded.¹¹³ Accordingly, where values conflict, the decision is occasionally made by “granting [specific] weight to each of the competing values, and preferring the value which [in these circumstances] has the upper hand.” According to Barak, the essence of the balancing process consists of placing the conflicting values and principles side by side, “[and] giving each of them the appropriate weight.”¹¹⁴ Resolving a conflict of values therefore necessitates resort to a balancing formula.¹¹⁵

Several balancing formulas are used in Israel.¹¹⁶ Balancing must be discharged with great sensitivity and should be tailored to the particular

¹¹² Please see articles referenced in note 111, wherein Rabbis Chaim Gedalia Cymbalist, Uriel Lavi, and Joseph Goldberg address the question of how the restrictive orders can be adjusted to accord with the relevant principles of Jewish law.

¹¹³ See A. Barak, *The Judge in a Democratic Society* (Haifa: Nevo, Keter, Haifa University Press, 2004), 262 [in Hebrew].

¹¹⁴ A. Barak, *Interpretation in Law*, vol. 3, *Constitutional Interpretation* (Jerusalem: Nevo, 1994), 216 [in Hebrew]. (henceforth: Barak, *Constitutional Interpretation*).

¹¹⁵ See C.A. 294/91, *Chevrab Kadisha GHSA Kehilat Yerushalayim v. Kestenbaum*, (1992) P.D. 46 (2) 464 at para. 8 of Justice Barak’s judgment. (henceforth: *Kestenbaum*).

¹¹⁶ For a distinction between the different forms of balancing, see Barak, *Judge in a Democratic Society*, 270-74. Also see: *ad hoc* balancing: Cr. A. 6696/96, *Kahanah v. State of Israel*, P.D. 52, 535, at para. 7 of Justice Barak’s judgment; and horizontal and vertical balancing: H.C. 2481/93, *Dayan v. Wilk*, (1994) P.D. 48 (2), at para. 21 of Justice Barak’s judgment. See also C.A. 105/92, *Re'em Engineers Contractors Ltd v. Upper Nazareth Municipality*, (1993) P.D. 47 (5), at para. 15 of Justice Barak’s judgment (henceforth: *Re'em Engineers*).

circumstances of each case. The weight and stature of different principles or values is “invariably relative ... [and] will always be determined in relation to other values, with which they may clash.”¹¹⁷ Balancing is of special importance in Israeli constitutional discourse.¹¹⁸ Israel’s new Basic Laws – *Basic Law: Human Dignity and Liberty* and *Freedom of Occupation* – influence the manner in which a judge in a civil court deciding concerning balancing when Jewish divorce judgments are enforced in a Rabbinical court and a Jewish judge (*Dayan*) in a Rabbinical court exercise their discretion. Their activity in court is an outcome of a deep inquiry into the principles and values forming Israeli constitutional law. “It (= the balancing process) is a thorough and profound examination of the multitudes and of the contradicting principles and basic values of society. The balancing formula he or she uses should be an appropriate solution of the ‘maze of ... conflicting principles’.”¹¹⁹

4.1.2 *Similar Results of Balance Between Conflicting Values: Jewish Law and Human Rights*

Jewish law grants due weight to peace, and attaches importance to such values as the dignity of all human beings. Therefore, when sanctions are imposed against a recalcitrant spouse, an appropriate balance between conflicting values is often necessary from a Jewish perspective. The paths of pleasantness and peace are important in Judaism. Accordingly, the decision of the Israeli *Dayanim* (sometimes overt but frequently covert) to deny significant weight to the principles of *Basic law: Human Dignity and Liberty* in the Rabbinical courts warrants further examination, and perhaps even second thoughts. Substantively, the balance struck between conflicting values in light of the principles of Jewish law applied in Israeli Rabbinical courts should be similar to the balance struck between conflicting human rights mentioned in *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*. Therefore, the Policy of the Supreme Court of Israel, to subject the Rabbinical courts to the human rights discourse and the balancing mechanisms of Israeli constitutional law within the realm of Jewish divorce law should not be dismissed as an undesirable phenomenon, inconsistent with the principles of Jewish law implemented by the Rabbinical courts.

¹¹⁷ *Re'em Engineers*, *supra* note 116, at para. 16 of Justice Barak’s judgment.

¹¹⁸ Barak, *Constitutional Interpretation*, *supra* note 114, 70-71. With regards to the application of different balancing formulas during the process of interpretation of regular legislation, see A. Barak, *Interpretation in Law*, vol. 2, *Legislative Interpretation* (Jerusalem: Nevo, 1993), 679-704[in Hebrew].

¹¹⁹ Barak, *Constitutional Interpretation*, *supra* note 114, 70-71.

From the perspective of human rights, unnecessary, excessive or disproportionate violation of human rights (such as strong coercion imposed against recalcitrant spouses) is sometimes unacceptable even when it promotes societal values. The same applies to the Jewish values applicable in this realm. There is an inherent need to strike a balance between the conflicting values when a *Dayan* enforces divorce judgments. When adjudicating such matters, the *Dayan* is bound to attach significant weight to human dignity and liberty, which are important values in Jewish law.¹²⁰

4.2 Application of the Principles of Basic Law: Human Dignity and Liberty in Rabbinical Courts

4.2.1 The Extent of Conformity Between the Principles of Israeli Constitutional Law and the Principles of Judaism

In the past, there were *Dayanim* who argued that the principles of *Basic Law: Human Dignity and Liberty* were fundamentally alien to the Jewish ethos, and therefore should be considered inappropriate and inapplicable in Rabbinical court proceedings. Rabbi Abraham Sherman, a *Dayan* in the High Rabbinical Court, espoused this position. This Basic Law, he argued, was premised on the presumption that inherent rights are granted to all human beings. He claimed that the outlook in the draft of *Basic Law: Basic Rights of the Person*, which eventually led to the enactment of *Basic Law: Human Dignity and Liberty*, was foreign and incompatible with the values of Jewish law, since it was based upon the conviction that rights are an expression of “human aspirations.”¹²¹ Rabbi Sherman stressed that in Jewish law, obligations are of greater

¹²⁰ See Gen. 1:27; Lev. 25:55; *Mishnah*, Avot 4:1, 12; M. Elon, *Freedom of the Debtor's Person in Jewish Law* [in Hebrew] (Jerusalem: Magnes Press, 1964), 1-2, 16-37, 255-264 [in Hebrew]; M. Elon, *Human Dignity and Freedom in the Methods of Enforcement of Judgments: The Values of a Jewish and Democratic State* [in Hebrew] (Jerusalem: 1999), 1-2, 16-37, 255-264 [in Hebrew]; S. Warhaftig *Jewish Labor Law* (Tel Aviv: 1969), 2-3 [in Hebrew]; C. Povarsky, *Fundamental Notions in the Jewish Law of Obligation: An Analytical Jurisprudential Examination of the Personal Obligation and the Lien on Property in the Halakha*, 23-47 (Doctoral Thesis, Tel-Aviv University Faculty of Law, 1985) H.C. 5304/92, *Perach 1992 Assistance to Victims of Laws and Regulations for Another Israel v. Minister of Justice*, (1993) P.D. 47 (4) 734-737, 741-743 (henceforth: *Perach*); M. Elon, “Human Dignity and Freedom in the Jewish Tradition,” 12 *Machanaim*, 19-29 (1996) [in Hebrew]; M. Elon, “Basic Laws: The Anchoring of the Values of a Jewish Democratic State,” 13 *Bar-Ilan Law Studies*, 27, 47-48 (1996-5756) [in Hebrew].

¹²¹ A. Sherman, “The Principles of the Basic Human Rights Law, in the Light of the Principles of Jewish Law”, *Human Rights in Judaism*, 305 (G. Frishtik, ed. 1992) [in Hebrew].

importance. In Jewish law, according to his perspective, “a person’s greatest right is the fulfillment of his duties, commandments and mission”.¹²²

This approach is somewhat similar to that of some modern legal scholars, who claim that the element of duty is the most important element in Judaism. For example, the scholar Cover, argued that the key word in Judaism is “*Mitzvah*” (= Jewish commandment) and not rights: “The principal word in Jewish Law, which occupies a place equivalent in evocative force to the American legal system’s ‘Rights’, is the word ‘*Mitzvah*’, which literally means commandment but has a general meaning closer to ‘incumbent obligation’.”¹²³ With regards to a debtor’s obligation to repay a creditor, former Justice of the Supreme Court of Israel, Mosheh Silberg, wrote that from the perspective of Jewish law, “[t]he *Beth Din* [Jewish Court] is not concerned with the debtor’s debt to the creditor, but rather with the debtor’s religious-moral duty to fulfill the commandment incumbent upon him, and the creditor receives his money as an incidental side product.”¹²⁴

This version of the relationship between rights and obligations in Judaism, as expressed in the writings of Rabbi Sherman and Cover, is not undisputed. Indeed, another scholar, Stone, correctly critiqued Cover’s interpretation of the basic outlook of Judaism.¹²⁵ In her view, Judaism consists of both obligations and rights, and the latter are not merely the flipside of the former. Rights are intrinsically important. As such, particular importance is attached in Jewish law to rights in general, and human rights in particular. Although rights in Judaism and modern human rights in contemporary constitutions are not identical, Judaism would certainly not discard the possibility of granting these contemporary human rights to individuals.

¹²² Ibid., 297-98.

¹²³ R. M. Cover, “Obligation: A Jewish Jurisprudence of the Social Order,” *5 J. L. & Religion*, no. 1 (1987), 65.

¹²⁴ M. Silberg, *Principia Talmudica (Kakh darko shel Talmud)* (Jerusalem 5722), 72 [in Hebrew] = M. Silberg, *Writings of Mosheh Silberg*, 509 (Jerusalem 5758) [in Hebrew]. In the context of repayment of a debt, Silberg emphasizes that the duty of repayment is not so much the right of the creditor as it is the religious duty of the debtor, who is commanded to perform a *Mitzvah* and thereby obeys. See M. Silberg, “Law and Morals in Jewish Jurisprudence,” *75 Harv. L. Rev.*, no. 2 (1961-1962), 306, 312.

¹²⁵ See Stone’s critique on Cover’s conception of the duties and rights in Jewish Law in S.L. Stone, “In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory,” *Harv. L. Rev.* 106, no. 4 (1993), 813, 865-887. Regarding the general discourse concerning rights, see Joseph Raz, “Hart on Moral Rights and Legal Duties,” *4 Oxford J. Legal Studies*, no. 1 (1984), 123-131; Joseph Raz, “On the Nature of Rights,” *Mind* 93, no. 370 (1984), 194-214.

4.2.2 *The Importance of Human Dignity in Jewish Law*

Just as every Jew is commanded to honor the Creator of the World, he is also commanded to respect each and every human being created in the image of his Creator. The dignity of a human being created in the image of his creator bears a certain resemblance to the dignity of the Creator himself and is compared to it: “You have made him a little less than divine and adorned him with glory and majesty.”¹²⁶ The importance attributed by classical Jewish sources to human dignity flows from man’s creation in Go-d’s image.¹²⁷ Rabbi Akiba interpreted the biblical verse, “In G-od’s image did He create man,”¹²⁸ as follows: “Beloved is man for he was created in the image [of G-od]; he was bestowed a greater love, as he was created in the image; for it is written, ‘In the image of G-od made he man’.”¹²⁹ This principle is the basis of religious humanism in Judaism.¹³⁰ The special significance attributed to to “the dignity of people”, or the “dignity of the community”, in Jewish law finds expression when there is a conflict between these values and other basic principles of Jewish law. For example, the Babylonian Talmud states: “Great is human dignity, which overrides negative precepts in the *Torah* (= Jewish Law).”¹³¹

¹²⁶ Ps. 8:6. On the meaning of man’s creation in his Creator’s image according to Psalms 8, see M. Weinfeld, “God the Creator in Genesis 1 and in the Prophecy of the Second Isaiah,” 37 *Tarbiz* (1968): 105-132[in Hebrew].

¹²⁷ The scholar Hillel stressed that the dignity of an individual must be preserved since he was created in the image of his Creator. See *Leviticus Rabbah* 34:3: “When Hillel took leave of his students, his students would ask him, ‘Rabbi, where are you going?’ [He would answer]: I am going to perform a *mitzvah* (= Jewish commandment).’ ‘Which *mitzvah*, Hillel?’ ‘I am going to the bathhouse.’ [They asked him], is this a *mitzvah*?’ He replied: ‘Yes, in order to cleanse the body. Know that this is so. ... I who have been created in the Divine image and likeness, as it says: ‘For in the image of G-od He made man!’”

¹²⁸ Gen. 9:6.

¹²⁹ *Mishnah*, *Avot*, 3, 14. On the meaning of the expression, “Beloved is Man for he was created in the Image,” see A. Lichtenshtein, “Human Dignity,” 5 *Machanaim* (1993), 8, 12 [in Hebrew]; C. Kasher, “Beloved is Man for he was created in the Image: Conditional Humanism (according to Maimonides) as Opposed to Unintended Humanism (according to Leibowitz),” 41 *Daat* (1998), 19 [in Hebrew]. On the importance attached by the Rabbis in the period of the Talmud to the value of every human being who was created in the image of the Creator of the world, see also Y. Lorberbaum, “Man, Blood, and Image: On Death by Beheading in Tannaitic Literature,” 9 *Bar-Ilan Law Studies* (1999), 429, 454 [in Hebrew].

¹³⁰ See N. Zohar, *Life, Freedom and Equality in Jewish Tradition* (Jerusalem, 1991), 12-13, 17-23 [in Hebrew].

¹³¹ *Babylonian Talmud*, *Berakhot*, 19a. According to this Talmudic passage, human dignity overrides negative precepts in the *Torah* (= Biblical law), namely the rabbinic prohibitions stemming from the authority granted to the Rabbis in the Biblical commandment “thou shall not deviate.” The status of these prohibitions is *de-rabbanan* [Rabbinic norms] and not *d’oraitta* [in the *Torah*]

4.2.3 *The Application of the Principles of Basic Law: Human Dignity and Liberty in the Rabbinical Courts*

The Israeli legislator determined that the rules of Basic Law: Human Dignity and Liberty apply to “all governmental authorities.”¹³² At the first stage of interpretation of these words, some legal scholars claimed that a religious court—such as a Rabbinical court—is one of those Jewish authorities. However, *Dayanim* claimed that the provisions of *Basic Law: Human Dignity and Liberty* are not applicable in the Rabbinical courts, which in their view do not constitute “a governmental authority.”¹³³ However, this interpretation was not accepted in the Supreme Court of Israel. According to former Chief Justice Barak, when the legislator stipulated that the law applies to “all governmental authorities” the intention was that the law should apply, *inter alia*, to the judicial branch in its entirety—including religious courts operating on behalf of the State of Israel and funded by it.¹³⁴ At a later stage, in the *Lev* case, it was determined that the Rabbinical court too is bound by the provisions of *Basic Law: Human Dignity and Liberty*, including the provision of section 6 of the law, regarding freedom of movement. Therefore, just like the civil court, this court must conduct itself with restraint and caution in considering the limitation of a person’s freedom of movement by preventing his departure from the country. The *Lev*¹³⁵ case implements the principle requiring the Rabbinical courts in Israel to grant due weight in their rulings to Israeli legislation that promotes human dignity and liberty.¹³⁶

In the *Sabag* case, the Rabbinical court exercised its authority to prevent the husband from leaving the country as a means of pressuring him to grant a

(Biblical law)]. See: Y. Blidstein, “Great is Human Dignity” - the Peregrination of a Law”, 9-10 *Shenaton Ha-Mishpat Ha-Ivri*, 127, 131-138 (1982-1983)[in Hebrew] (henceforth: Blidstein, “Great is Human Dignity”); Ibid, 140 - 141, where he mentions a number of cases in which Rabbinic norms, which are not prohibitions according to the law of the *Torah* (Biblical law), are overridden in an attempt to enhance human dignity.

¹³² *Basic Law: Human Dignity and Liberty*, sec. 11, states: “All governmental authorities are bound to respect the rights under this Basic Law.”

¹³³ This is the position of Rabbi S. Daikhovsky. See Appeal (Rabbinical High Court) P.D.R. 14, 321-322(5790-1990); S. Daikhovsky, “Secret Wiretapping,” 11 *Techumin*, 299, 312 (1990) [in Hebrew]; and S. Daikhovsky, “Secret Wiretapping,” 36 *Torah Shebeal Peh*, 69-72 (1995) [in Hebrew].

¹³⁴ See Barak, *Constitutional Interpretation*, supra note 114, 458-459.

¹³⁵ See *Lev*, supra note 11, at 491. C.f.H.C. 732/84, *Tzaban v. Minister of Religious Affairs*, (1986) P.D. 50 (4) 141, 152. See also H.C. 4358/93, *Tzuk v. High Rabbinical Court of Jerusalem*, (1994) P.D. 48 (4) 563, 570-572.

¹³⁶ See Barak, *Constitutional Interpretation*, supra note 114, 458.

Jewish divorce writ to his wife. The majority opinion in the Supreme court held that although refusal to grant a *get* is a grave problem and a painful phenomenon for the spouse, the solution to this problem should not involve forcing the jurisdiction of an Israeli Rabbinical court on an individual lacking sufficient connection to this country, especially when the prevention of this individual's exit from Israel to his permanent place of residence in another country severely violates his constitutional right to freedom of movement. The Supreme court herein stated that "the appropriate solution cannot be in conflict with the fundamental principles governing the propriety of legal proceedings, and these are not commensurate with the resolution of disputes by means of coercion and pressure that lack any legal basis, notwithstanding the gravity of the disputes."¹³⁷

The minority opinion in this Supreme court case was that of Justice Rubinstein, who felt that the Rabbinical court was justified in its exercise of its jurisdiction. In his decision, he also attests to the importance attached to the principles of freedom of movement and balancing: Indeed, freedom of movement [including the right of departure from Israel] is a basic right (Basic Law: Human Dignity and Liberty, section 6(a)). The petitioner requests his freedom, his human dignity and his freedom to movement ... He denies the respondent a freedom of her own, of no less and perhaps even more significance, which is the freedom to live her life without being bound to him. Isn't this actually freedom versus freedom? Aren't the chains of *igun* [the chains of undesirable marriage to a recalcitrant spouse] a violation of human dignity and liberty? I see no flaw in making a requirement [by the Supreme Court] that the exercise of the petitioner's basic right [to leave Israel to the country he came from] will be contingent upon a [monetary] guarantee he submits that will ensure his payment of maintenance [to his wife in proceedings in the Rabbinical court].¹³⁸

In his view, on the one hand, the right of movement of the husband should be taken seriously and therefore he should be permitted to leave the country. On the other hand, measures must be taken for the benefit of the wife who wishes to receive a *get*. The appropriate balance between conflicting values and principles in this case can be achieved, according to his perspective, by obligating the husband to pay his wife's maintenance, as determined by the Israeli Rabbinical court, until the date of his giving her the *get*. He should be granted the right to leave Israel only after he submits a guarantee that will ensure this payment of her maintenance.

¹³⁷) *Sabag, supra* note 11.

¹³⁸) *Ibid.*, 865.

The *Vazgiel* case¹³⁹ dealt with the interpretation of laws adopted prior to the enactment of the *Basic Law: Human Dignity and Liberty*, which are preserved in a section of this Basic Law. In this case, the relevant laws were the *Secret Wiretapping Law*, 5739—1979, and the *Protection of Privacy Law*, 5741—1981. The Supreme Court of Israel held that the interpretation of the rules comprised in laws adopted before *Basic Law: Human Dignity and Liberty*, should be in light of this Basic Law's principles.¹⁴⁰ The Supreme Court also held in the *Vazgiel* case that the Rabbinical courts are indeed granted an inherent right to determine their own procedure. However, when they do so, they must act in fairness, good faith, and a reasonable manner, and should take seriously the requirements of Israeli constitutional law concerning respect for human rights including the right to privacy. The judgment of Justice Strassbourg-Cohen indicates that the judgment of the Rabbinical court in this case should have been void since the court had not adopted this policy. However, the Supreme Court refrained from declaring that the judgment of the Rabbinical court in this case was invalid, and preferred instead the indirect path of subtly instructing the Rabbinical court concerning the desirable policy in these circumstances in light of the principles of Israeli constitutional law.

Concerning evidence presented to the Rabbinical courts, the Supreme Court in the *Galam* case stated that “Israeli law obviously acknowledges the tremendous importance of the right to privacy.”¹⁴¹ It also stressed that there is an evident interaction between the right to privacy and the right to dignity: “The right to privacy is, *inter alia* one of the derivatives of the right to dignity. Recognition of privacy means the acknowledgement that a person is an autonomous unit, entitled to recognition, and of his uniqueness as different from others. The uniqueness of an individual enables him to draw strength from his own personality, which is meaningful, and is worthy of being honored. A person's privacy is his dignity and also his property.”¹⁴²

In the *Plonit v. Netanyah District Rabbinical Court* case,¹⁴³ the Supreme Court of Israel once again set guidelines for the activity of the Rabbinical

¹³⁹ See H.C. 1135/02, *Vazgiel v. High Rabbinical Court in Jerusalem*, (2002) P.D. 56 (6) 14.

¹⁴⁰ Regarding the policy pertaining to the interpretation of the rules of the old law that were maintained in the *Basic Law: Human Dignity and Liberty*, see Cr. A. 537/95, *Ganimat v. State of Israel*, (1995) P.D. 49 (3) 355, 415(1995); and Additional Appeal 2161/96, *Sheriff v. Head of Home Front Commander*, P.D. 50 (4) 485, 490(1996).

¹⁴¹ Cr. A. 2963/98, *Galam v. State of Israel*, Takdin-Elyon 99 (2) 1149, at para. 9 of Justice Ariel's judgment.

¹⁴² *Ibid.*

¹⁴³ H.C. 6650/04, *Plonit v. Netanyah District Rabbinical Court*, (2004) Takdin-Elyon 2006 (2) 1736.

courts in cases pertaining to the protection of privacy. In light of the principles of *Basic Law: Human Dignity and Liberty*, former Chief Justice Barak ruled that there is a correlation between the extent of the breach of right to privacy and the parallel increase in the weight granted by the court to the requirement to protect this right. According to his point of view, the Rabbinical courts should adopt this policy when they balance between conflicting rights, such as the right to privacy and other rights. Justice Barak stressed that “[t]he right to privacy is one of the most important human rights ... In 1992 the right to privacy was recognized as a constitutional right in Basic Right: Human Dignity and Liberty (section 7) ... The civil courts and the Rabbinical Courts are ‘governmental authorities’ ... This is ... also the law that is applicable in the Rabbinical Courts.”¹⁴⁴

After the Supreme Court of Israel ruled in the *Lev* case that the provisions of *Basic Law: Human Dignity and Liberty* were also applicable in the Rabbinical courts, a new policy is occasionally evident in the Rabbinical courts. Although the *Dayan* Daikhovsky was initially opposed to any attempt to subject the Rabbinical courts to the principles of this Basic Law,¹⁴⁵ following the decision in the *Lev* case he sometimes ruled that a Rabbinical court should apply severe measures against recalcitrant spouses and used the terminology mentioned in this Basic Law in an attempt to justify his policy. He stressed that when a husband refuses to grant a *get*, his behavior is a violation of the right to dignity and freedom of the wife.¹⁴⁶ This policy is also evident in a judgment of the High Rabbinical Court concerning implementation of coercive measures against recalcitrant spouses. Here, the *Dayanim* Mordekhay Eliyahu, Shlomo Daikhovsky and Yosef Nadav wrote:

¹⁴⁴ Ibid., at paras. 8–12 of Justice Barak’s judgment. In paragraph 9, Justice Barak explains that there is a substantive elevation of the status of the right to privacy in light of the enactment of *Basic Law: Human Dignity and Liberty*.

¹⁴⁵ Initially, the Rabbinical courts stated they were not bound by the rules of *Basic Law: Human Dignity and Liberty*, and many *Dayanim* in Rabbinical courts claimed that *Basic Law: Human Dignity and Liberty* was not applicable in these courts. See note 132 above.

¹⁴⁶ Many of the judgments of Rabbinical courts in Israel, which have made either implicit or explicit use of the principles of *Basic Law: Human Dignity and Liberty* have not been published. See citations from these judgments in Y.S. Kaplan, “A New Trend regarding the Fulfillment of Divorce Judgments: Policy Considerations in light of the Principles of Jewish Law and Basic Laws,” 21 *Bar-Ilan Law Studies*, 609, 657, n.153(2005) [in Hebrew]. In these judgments one of the Jewish judges was Rabbi Daikhovsky, who had ruled at an earlier date that *Basic Law: Human Dignity and Liberty* was not applicable in the Rabbinical courts. See note 132 above.

The enactment of the Basic laws, and especially Basic Law: Human Dignity and Liberty, resulted in a legal revolution. This revolution finds its expression not only in the [Basic] laws as such, but also in their influence on other laws ... [T]he Hon. Justice Barak wrote in his book *Interpretation in Law*, [3], p. 289 (5754), that the interpretation of fundamental human rights in the Basic laws should be ‘generous’, and not ‘legalistic’ ... ‘generous interpretation’ that protects [human rights of] individuals, especially when these individuals are citizens and residents of Israel. Consequently, if until now the [Israeli] case law was influenced by the well known comments of Justice Berenson (H.C. of Justice 3/73, 29 (1) P.D. 449), that the public welfare requires the limitation of the [scope of] jurisdiction of the Rabbinical Courts, at least [in cases] where there is a serious violation of human liberty and dignity, [after the enactment of the Basic law] one should prefer the expansive and generous interpretation [concerning jurisdiction of this court, when it assists the wife of the recalcitrant spouse].¹⁴⁷

4.3 *Application of Coercive Measures: Balancing in Light of the Perspectives of Judaism and Human Rights*

The dilemma of a husband whose recalcitrant wife refuses to accept a *get* is solved when he is granted a permit to marry another woman, while remaining married to his recalcitrant wife. However, the option of receiving this permit is not available for the wife of a recalcitrant husband. Women are unable to use the option of marriage to another spouse in an attempt to free themselves from the chains of an unwanted marital connection. As a result of this basic difference in the options available to men and women in this sphere in Jewish law the wife can suffer more than the husband from the approach of the more conservative *Dayanim* in Rabbinical courts, who are very careful before they impose sanctions upon recalcitrant spouses. These *Dayanim* fear an interventionist policy will lead to the granting or receiving of an invalid “coerced” *get*.

This more conservative policy is not the only option in Jewish law. Jewish scholars can adopt a policy that coincides with one of the basic principles in constitutional law—namely, gender equality. The imposition of effective means of coercion against the recalcitrant husband, given the more lenient approach to the law pertaining to coerced divorce in Jewish law, which enables the imposition of restrictive orders in more divorce disputes in Rabbinical courts, is necessary in order to achieve an equal treatment of both spouses. This policy can assist a wife who wishes to be liberated from the chains of her marriage upon her husband’s refusal to grant a writ of divorce.

¹⁴⁷ Appel to High Rabbinical Court 00B621530-64-1 (1998) (not published).

4.3.1 *Appropriate Balance Between Conflicting Values in Light of the Principles of Jewish Law*

Within Jewish law, there are two important considerations that justify the imposition of effective measures of enforcement against recalcitrant spouses. These considerations effectively balance the opposite concern of Jewish scholars regarding the use of excessively harsh measures that can invalidate a *get*. The first consideration is that the terminology in Jewish sources concerning the wife of a recalcitrant husband, especially in the modern period, is *agunah*. The second consideration is that Jewish scholars have assisted wives and husbands of recalcitrant spouses when they have claimed “*mais alai*” (“I feel my spouse is repulsive”).

When the wife was an *agunah*, such as the wife of a soldier missing after a battle, Jewish scholars have stated that a far-reaching policy of leniency is required. The Rabbis always adopted a lenient policy, especially concerning evidence, in an attempt to ameliorate the plight of the *agunah*. Legal constructions that were not used in regular circumstances were adopted in an attempt to release a woman whose husband had disappeared from the chains of her marriage. The Rabbis were willing to rely upon evidence that normally would have been inadmissible when this evidence could support a decision that the *agunah* could marry a new husband.¹⁴⁸

When a husband refuses to give a *get* to his wife she is technically a *mesurevet get* (wife of the recalcitrant husband), and not an *agunah*. However, in Jewish legal scholarship, especially over the past few generations, scholars have employed the terminology of *agunah* when addressing the plight of women whose husbands will not give them a *get* in order to justify a more lenient policy of the Jewish court concerning coerced divorce that can alleviate the plight of the wife of the recalcitrant spouse. Therefore, it could be appropriate to use the special lenient policy, which is usually applicable when the fate of the *agunah* is determined when Rabbinical courts decide about the appropriate sanctions against the husband or wife of a recalcitrant spouse.¹⁴⁹ For

¹⁴⁸ See Y. Z. Kahana, *Takkanat Agunot*, (1947); Y. Z. Kahana *Sefer Ha-Aggunot*, (1954).

¹⁴⁹ The attempt to rule in a lenient manner, which is used in cases pertaining to the plight of the *agunah*, should also apply when Rabbis and Rabbinical courts adopt an appropriate divorce policy that could release wives from the chains of an undesirable marriage. This policy is evident in certain sources. See *Commentary of Rabbi Solomon Yitzchaki (Rashi)* on bGitin 3a, s.v. *mishum igunah akilu beih*; *Sefer Hayashar of Rabbenu Tam*, Responsa, #4; *Responsa of Rabbi Meir of Rothenburg (Kremona)*, #94; *Responsa of Rabbi Meir of Rothenburg (Prague)*, #946, #993; *Mordekhai*, Ketubot, #186; *Ibid*, Gittin, #446; *Hagahot Maimoniot*, Ishut, 14, #13; #30; *Responsa Maharil Ha-Hachadashot*, #206; *Responsa of Rabbi Joseph Kolon (Maharik)*, #26, #29, #63, #71,

example, in Spain at the end of the thirteenth century, Rabbi Solomon ben Aderet (*Rashba*) discussed the case of “someone who had spread a rumor that a particular woman was betrothed.”¹⁵⁰ In his view, under these circumstances the Jewish court should impose a ban obliging all who knew anything about the matter “to come and testify”, since the court could use the information obtained from these individuals in a decision that liberates this woman from the chains of an unwanted marriage. He explained that this policy is necessary “because of the enactment [of ancient Jewish scholars] on the behalf of the *agunah* and because of the enactment [of ancient Jewish scholars] on the behalf of the *mamzerim*(= children of the *agunah*, from another man, when the Rabbis did not liberate her from the chains of her marriage) ... several enactments [of ancient Jewish scholars] were enacted on the behalf of women who are *agunot*.”¹⁵¹ Although this woman was married, the word *agunah* and the policy concerning an *agunah* were used.

This approach is also evident after the medieval period. In recent generations, a number of Jewish scholars have used the terminology *agunah* when justifying a more lenient policy on behalf of the wife of a recalcitrant spouse (*mesurevet get*). Rabbi Ovadiah Hadayah used the terminology *agunah* in two of his responsa. He explained that Rabbis and Rabbinical courts should assist the wife of the recalcitrant husband since : “it is certain that there are no grounds for justifying his actions and to place a sword in his hand [that will be used by him] to rebel against his wife and to desert her ... The daughters of Israel are not like prisoners of war, with whom one(= the husband) can do as he wishes”¹⁵²; “[T]his may wreak terrible results, for if she sees that the Jewish court has not found her a remedy [imposed effective sanctions against the recalcitrant husband], and she does not agree to return to her suffering, then she may begin to mix in disreputable society [she can have undesirable relationships with men], and who can take the responsibility for being the cause of this harm G-od forbid [adultery and perhaps also birth of children that are *mamzerim*] and in these circumstances we should not cause her to be chained

#74, #141, #157; *Responsa of Rabbi Moses Mintz(Maharam Mintz)*, #11; *Responsa Rashba*, 1, #870, #871; *Responsa Ha-Rosh*, 43, #8; 43, #13 ;45, #25; *Responsa Rivash*, #57; *Tur*, Even Haezer, #126, #154; *Tashbetz*, 1, #1; #132; *Responsa Rashbash*, #46, #498, #530; *Shulchan Arukh*, Even Haezer, 154:8; *Responsa Heikhal Yitzchak*, Even Haezer, 1, #1; *Responsa Yabia Omer*, 3, Even Haezer, #10; Appeal 321/13,4 P.D.R., 245 (1962); Warhaftig, “Coercion,” supra note 42,212.

¹⁵⁰ *Responsa Rashba*, 4, #3; See also *Tashbetz*, 1, #132.

¹⁵¹ *Ibid*.

¹⁵² *Responsa Yaskil Avdi*, 6, Even Haezer, #26.

[in an undesirable marriage] by not [imposing effective measures of coercion] which will result in the decision of the husband to grant a *get*.”¹⁵³

A second consideration—which counterbalances the fear of Jewish law scholars that as a result of the imposition of sanctions against the recalcitrant spouse the *get* will be considered as unlawfully coerced (*meuseh*), is the attitude of important Jewish scholars toward a wife’s claim that she finds her husband repulsive (*mais alai*).¹⁵⁴ As a result of the amendment of Jewish scholars in the past to the law concerning this matter, a wife’s claim of *mais alai* was originally a powerful claim that she could use in an attempt to end an undesirable marriage.¹⁵⁵ However, in the Middle Ages (from the period of Rabbenu Tam in the twelfth century, onwards) this ground for divorce became less powerful. Following the medieval period, most of the Jewish scholars did not share the point of view of scholars from the geonic period and Maimonides,¹⁵⁶ that when the wife claims *mais alai* a divorce is imposed by the Jewish court and the level of enforcement is the most powerful level (i.e., that of *kofin*). Yet, even after the decline of the significant power of coercion against the husband, when the wife claimed *mais alai*, there were many Jewish scholars who stated there was a continued relevance and applicability to *mais alai* as a ground for divorce. The degree of divorce in these circumstances was said to be lower than “*kofin*”, especially “*chiyuv*” (i.e., obligation to divorce). These Rabbis adopted this policy when they were concerned that if they did not take seriously the statement *mais alai*, Jewish women would begin “to tread foreign paths.”¹⁵⁷ In the thirteenth century, one of the prominent scholars of Franco-German (*Ashkenazi*) Jewry, Rabbi Eliezer ben Yoel Halevi (*Raavyah*), wrote that when

¹⁵³ Ibid., #106. See also the possibility that the woman will adopt the behaviour of “bad company” as a reason for exercising effective sanctions against the recalcitrant husband in the responsa of Rabbi Ovadyah Hadayah, *Responsa Yaskil Audi*, 10, Even Haezer, #24.

¹⁵⁴ For a comprehensive discussion of this subject, see Elimelech Westreich, “The Rise and Fall of the Grounds of *Moredet*,” *Shenaton Ha-Mishpat Ha-Ivri* 21 (1998-2000), 123 [in Hebrew].

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ In literature from the geonic period regarding the amendment concerning “*mais alai*”, occasional mention is made of Rabbi Natrai Gaon’s explanation that the purpose of this enactment was to ensure “that the daughters of Israel do not begin to tread foreign paths.” *Responsa of the Geonim, Chemdah Genuzah*, # 89. See also *Or Zarua*, *Responsa*, #69; Z. Falk, “The Rebellious Wife,” *Sinai* 49 (1961), 182 [in Hebrew]; Warhaftig, “Coercion,” supra note 42, 186; A. Beeri, *The Husband’s Obligation to Support his Wife in Israeli Law: The Rebellious Wife and her Right to Maintenance* (PhD diss., Bar-Ban University, 1982), 227, 282 [in Hebrew] (henceforth: Beeri, *The Husband’s Obligation*).

the rebellious woman (*moredet*), claims *mais alai* Jewish scholars “should ensure, in light of the circumstances, that necessary measures are taken, so that the daughters of Israel do not stray from the proper path.”¹⁵⁸ There were Jewish scholars who wrote that the man whose wife claims *mais alai* is coerced to divorce her, under appropriate circumstances, when it serves as a remedy for the woman (= she will not tread foreign paths) and when it (= coerced divorce in these circumstances) “is required at this period”.¹⁵⁹ The “remedy for the woman” refers to fear of a situation of prolonged recalcitrance of the husband, which will result in “the straying of the woman from the path of propriety and degenerating into apostasy and promiscuity.”¹⁶⁰

In recent generations, influential Rabbis have stressed that this concern is especially relevant in the reality of a permissive society. At present, when a woman does not wish to continue her marriage to her husband, and Jewish law scholars do not provide her with a sufficient remedy that will enable her to put an end to an undesirable marriage, she could choose a sinful lifestyle. Therefore, when the Rabbis adopt a policy regarding this matter they should take into consideration the possibility that women may choose the path of a forbidden extra-marital conjugal connections. Rabbi Ovadyah Yosef stressed:

Even the Jewish scholars who rule that usually the husband cannot be forced to divorce and the degree of enforcement is “kofin” when the woman declares *mais alai*, have to take into consideration the fact that there are those who claim that in these circumstances the husband is commanded to divorce his wife and the divorce judgment is at the level of “kofin”, and all the more so in these times of freedom and promiscuity, where the fear exists, that by delaying her freedom, she will leave her husband and attach herself to a society of sinners. Our experience leads us to the conclusion that when women state *mais alai* and leave their husbands, and wait without being released by a *get*, eventually they will live with other men, [although they are married] they are not ashamed ... and as a result of the sinful relationship with men they will give birth to children who are *mamzerim* and cause the proliferation of *mamzerim* in the world... [In these circumstances] it is appropriate to take into consideration the geonic enactment [concerning coerced divorce when the woman claims *mais alai*], and all the more so when this woman is young and there is a real concern she will stray from the path, and in light of the analyses of the circumstances the Rabbis conclude that the probability she will return to her husband is low. In these circumstances a Rabbi that adopts the policy of the Geonim [that divorce can be coerced in these circumstances and the divorce judgment is at the level of “kofin”] is adopting a justified policy. He can rely upon the enactment of the Geonim [who were concerned that if the Rabbis will not implement effective measures that will result in the granting of a writ of divorce by the

¹⁵⁸⁾ *Mordekhai*, Ketubot, #186. See also *Responsa Tzitz Eliezer*, 4, #21.

¹⁵⁹⁾ See *Tashbetz*, 4, Hatur Hameshulash (Lemberg, 1891-5651), #35.

¹⁶⁰⁾ Beeri, “The Husband’s Obligation,” supra note 157,288.

husband] this woman “will stray from the path” ... [A]ll should be done [concerning Jewish divorce] according to the needs and reality of the relevant period.¹⁶¹

Rabbi Eliezer Yehuda Waldenberg also wrote that in the modern period, under certain circumstances in which the wife is a *moredot* and claims *mais alai*, “it is evident that the wife is unable to accept the reality of her being permanently in this miserable situation, and heaven forgive [she] is liable to stray from the proper path.”¹⁶² He therefore concluded:

[T]here are firm grounds for considering the possibility of coercing the husband [where the divorce judgment is at the level of “kofin”] to grant a writ of divorce in the case of a well substantiated claim of *mais alai* [when the sincerity of the claim *mais alai* is proven, in terms of the objective reason for the subjective emotional statement *mais alai* and subsequent rebellion] and the Jewish court believes it is “the need of the time” to coerce the husband into granting a divorce, so that wife does not stray from the path.¹⁶³

In view of the aforementioned policy of Rabbinical courts in recent generations, it would seem that an appropriate application of the principles of Jewish law requires that the *Dayanim* strike a balance between two conflicting considerations pertaining to enforcement of divorce judgments. On the one hand, the application of sanctions against the recalcitrant spouse mandates caution in order to prevent the use of excessive and unjustified force that can invalidate the *get*. On the other hand, every effort should be made within the framework of the principles of Jewish law to enable an appropriate solution for the wife of a recalcitrant husband (i.e., through analogy to an *agunah*, and serious consideration of *mais alai* claims).

4.3.2 *The Balance in Israeli Constitutional Law between Conflicting Human Rights in Light of the Requirements of the Limitation Clause.*

The *Rabbinical Courts Law* authorizes a Rabbinical court to impose restrictive orders against a husband or wife who does not fulfill its ruling to give or accept a *get*. These restrictive orders permit, under appropriate circumstances, an action of Israeli public authorities that constitutes a violation of constitutional rights in the abovementioned Basic Laws, such as the rights to property, movement, dignity and liberty of an individual against whom the restrictive orders

¹⁶¹ *Responsa Yabia Omer*, 3, Even Haezer, #18. See also A. Rosen-Zvi, *Israeli Family Law: The Sacred and the Secular* (Tel Aviv: 1990), 256, 263 [in Hebrew].

¹⁶² *Responsa Tzitz Eliezer*, 4, #21.

¹⁶³ *Ibid.*

are issued. The provisions of the *Rabbinical Courts Law* that enable the imposition of restrictive orders were enacted after the enactment of the new Basic Laws. Since the imposition of the restrictive orders is a violation of human rights anchored in the new Basic Laws they must satisfy the requirements in legislation - the limitation clause in the basic laws.

The limitation clause states as follows: “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent not greater than is required, or by regulation enacted by virtue of express authorization in such law.”¹⁶⁴

4.3.2.1 “By a Law”

The *Rabbinical Courts Law*, is a specific law of the Israeli House of Representatives (*Knesset*). It enables the violation of human rights when the Rabbinical courts impose restrictive orders. Therefore, in the case of the *Rabbinical Courts Law* an explicit statutory arrangement of the legislator grants authority to the Rabbinical courts to impose restrictive orders upon recalcitrant spouses and as a result of this fact the violation of human rights in this law is possible since it is: “by a law ... or by regulation enacted by virtue of express authorization in such law.”

4.3.2.2 “Befitting the Values of the State of Israel”

Legal scholars generally contend that the phrase “values of the State of Israel” in the limitation clause of the new Basic Laws, should be interpreted in the light of the more specific phrase “Jewish and democratic state” that appears in the “purpose” sections of the new Basic Laws.¹⁶⁵ The interpreter of this phrase should also grant due weight to the values mentioned explicitly in the Basic Laws, such as those included in the section concerning “basic principles” in *Basic Law: Human Dignity and Liberty*—namely, “the value of the

¹⁶⁴ *Basic Law: Human Dignity and Liberty*, sec. 8; and *Basic Law: Freedom of Occupation*, sec. 4.

¹⁶⁵ The sections that are devoted to the purpose of the law in *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation* state that the goal of the Basic Laws is to anchor in a basic law the values of the State of Israel as a Jewish and democratic state. With regards to the interpretation of the phrase “Jewish and democratic state” see H. H. Cohn, “The Values of the State of Israel as a Jewish and Democratic State: Studies of Basic Law: Human Dignity and Liberty,” *Ha-Praklit Jubilee Volume 9*, (1994) [in Hebrew]. See also A. Bendor, “Defects in the Legislation of Basic Laws,” *Mishpat Umimshal 2* (1994): 433, 451 [in Hebrew], and Barak, *Constitutional Interpretation*, supra note 114, 517, 615-616. On the implementation of Jewish values in Israeli case law, see C.A. 506/88, *Shefer v. State of Israel*, (1993) P.D. 48 (1) 87.

human being, the sanctity of human life, and the principle that all persons are free.”¹⁶⁶

For our purposes, there is no need to determine the precise relationship between “Jewish” and “democratic” values because from both a Jewish and a democratic perspective the result of the balancing process is similar. This fact obviates the need to determine the relationship between the two perspectives, of “Jewish” and “Democratic”, in this context. From a Jewish perspective, on the one hand, there is value, or interest, in liberating the husband or wife of a recalcitrant spouse compared to an *agunah*, from the chains of an undesirable marriage. This includes the spouse that claims *mais alai*. On the other hand, there is an interest in preventing unjustified over-enforcement that transforms a valid *get* into an invalid one. A balance between these two values- or interest must be struck in an attempt to prevent an illegally coerced *get*. From a human rights perspective tied to the principles of a democratic state, the balance must be struck between the conflicting human rights and interests of those who are actively refusing to give or accept the *get*, and those who are the victims of such refusal. The proportionate imposition of sanctions against the recalcitrant spouse, in light of all the requirements mentioned in section 4 of the *Rabbinical Courts Law* including the evaluation of all relevant circumstances and the ability of the recalcitrant spouse to maintain those who are receiving financial support from him after the imposition of restrictive orders, and the implementation of the principle of proportionality, mentioned in the limitation clause of the new Basic Laws, lead to a similar balance. Consequently, the balance achieved within the “sacred” Jewish law, on the one hand, and that achieved within the “secular” rules of the *Rabbinical Courts Law* and the principle of proportionality which is implemented in a human rights framework, on the other, are similar when Rabbinical courts impose restrictive orders.

4.3.2.3 “Enacted for a Proper Purpose”

In the *Bank Hamizrachi* case,¹⁶⁷ Justice Barak wrote that a proper purpose is a purpose intended to realize human rights or other social goals that are important for the maintenance of a social framework.¹⁶⁸ Justice Shamgar claimed that a proper purpose is a worthy purpose from the perspective of human

¹⁶⁶ *Basic Law: Human Dignity and Liberty*, sec. 1.

¹⁶⁷ C.A. 6821/93, *Bank Hamizrachi Hameuchad Ltd. v. Migdal Cooperative Village*, (1994) P.D. 49 (4) 221 (henceforth: *Bank Hamizrachi*).

¹⁶⁸ *Ibid*, 434.

rights and societal values. Occasionally, the human rights of both parties are in conflict. Under these circumstances, the proper purpose is the product of a reasonable and fair balance between the rights of different people with competing interests.¹⁶⁹ The proper purpose must serve the crucial goals that are necessary for the existence of the state and the society. In addition, it is required that the goal of the law which violates human rights must be deemed sufficiently important and crucial to the society and state and therefore could justify the violation of protected rights.¹⁷⁰

In the draft bill that preceded the *Rabbinical Courts Law*, the Israeli legislator explained that the purpose of this law was to utilize a mechanism within Jewish law-Rabbenu Tam's isolating measures- in an attempt to ameliorate the plight of the husband or wife of a recalcitrant spouse.¹⁷¹ The legislative purpose of the *Rabbinical Courts Law* was to utilize a recognized and accepted sanction against a recalcitrant spouse in Jewish law for the promotion of the plight the husband or wife of this spouse. The rules of the Israeli law prior to the enactment of the *Rabbinical Courts Law* did not satisfy the needs of many husbands, and particularly wives, of recalcitrant spouses. Many times the remedy of imprisonment was impossible or was not an effective solution, which could ameliorate the plight of the husband and wife of the recalcitrant

¹⁶⁹ In H.C. 153/87, *Shakdiel v. Minister of Religious Affairs*, (1988) P.D. 42 (2) 221, 242, Justice Elon wrote: "No basic right is absolute, but only relative, and its existence and protection are in the form of finding the appropriate balance between the differing, legitimate interests of two individuals or of the individual and the public, these interests being anchored in and protected by the law." Along the same lines, A. Barak has argued: "Such legislation is for an appropriate purpose when the protection of a human right and its violation are consistent with the 'internal balance' between human rights, as dictated by the essence of human rights themselves." Aharon Barak, *Constitutional Interpretation*, supra note 114, 519.

Regarding the determination of the legislative purpose in view of the balance between conflicting human rights in Canada, Justice Lebel wrote the following in his majority opinion in *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, [1993] RJQ 375, 102 DLR (4th) 289 (CA) at 319: "The jurisprudence suggests rather that one should determine whether, in its defense of the limitation of a constitutional guaranteed right, particularly in matters of socio-economic policy and the balancing of opposed social interests, the State has offered evidence which indicates the existence of a reasonable foundation for the measure chosen. What must be demonstrated is that the choice adopted by the legislation falls within the realm of possibilities." For an analysis of the legal arguments in this judgment, see Rob Cunningham, "R.J.R.-MacDonald Inc. v. Canada (A.G.): Reflections From the Perspective of Health," 40 *McGill L. J.* (1994-5), 229, 241-43. (henceforth: Cunningham, "R.J.R.-MacDonald,").

¹⁷⁰ See *Bank Hamizrachi*, supra note 167, at 342-343. See also the guidance to the courts in pages 306,326,348.

¹⁷¹ See note 93 above.

spouse.¹⁷² Therefore, when the *Rabbinical Courts Law* was enacted, the legislator's goal was to provide new sanctions that could be effective against recalcitrant spouses in the Rabbinical courts. These new means of coercion could release the wife or husband of a recalcitrant spouse from the chains of their marriage. This is a crucial and important goal, and thus the new law was "enacted for a proper purpose."¹⁷³

A general examination of whether the legal framework concerning restrictive orders imposed on the recalcitrant spouse in the *Rabbinical Courts Law* is appropriate in light of principles of constitutional law – including the requirements pertaining to a proper purpose and proportionality – is necessary in order to establish the constitutionality of the law. In light of this examination the general legal doctrines of a law could be appropriate from a constitutional perspective. However, this is not the only necessary constitutional evaluation. Another constitutional evaluation, of the court, in light of the circumstances of the case, should be evident in the decisions of the courts concerning the imposition of restrictive orders. When the court has to confirm that the application of the restrictive orders against the recalcitrant spouse is appropriate in each case it should also examine the proper purpose and the proportionality in this case in light of the principles of Israeli constitutional law. The particular circumstances of each case should also be evaluated, given that the imposition of harsh restrictive orders may not be justified in specific circumstances despite

¹⁷²) The abovementioned draft bill explains that its goal is to resolve the plight of the wife of the recalcitrant spouse (*mesuravet get*) by the implementation of the Jewish coercion method: "har-chakot Rabbenu Tam." This method is applicable also when there are no grounds for granting a judgment of a Rabbinical court to enforce the divorce judgment at the level of "kofin" but the level of enforcement is lower, such as "obligation" to divorce. This was an improvement. In these circumstances, in the period preceding the enactment of the *Rabbinical Courts Law*, when imprisonment was the method of enforcement in the legislation of the State of Israel, there were many cases in which there was no effective means of enforcement. See supra note 80.

¹⁷³) Justice Barak explained in his book that sometimes legislation enacted after the Basic Laws permits certain violations of human rights, which are anchored in these Basic Laws. However, in light of the rules of the limitation clause, such legislation is considered valid when it is intended to promote social aims: "Legislation can violate human rights provided that this violation is required in order to maintain and develop the social structure, which also protects human rights." Barak, *Constitutional Interpretation*, supra note 114, 521-22, 525. The extent of the permitted violation of human rights is closely related to the importance of this social objective. According to Barak, "to the extent that the violation of human rights is more pervasive and acute, so too the goals required to justify it must be of greater importance and urgency" (page 526).

In Canada, too, the degree of importance attached to a legislative goal is directly related to the third component of the proportionality principle. This component dictates the adoption of

the constitutional appropriateness of the law's general framework. The examination of the application of a rule of the legislator concerning the authority of the Rabbinical courts in Israel, in a specific case, is sometimes evident in decisions of the Supreme Court of Israel. In these decision this court acts in light of the assumption that the policy concerning the enforcement of a particular legislation pertaining to the Rabbinical courts, where this enforcement might be inconsistent with the human rights anchored in the new Basic Laws, must be determined in accordance with the criteria set forth in the limitation clause of the Basic Laws.¹⁷⁴

4.3.2.4 Proportionality: “To an Extent not Greater Than is Required”

There are three secondary tests for examining proportionality that must be met by a law that violates human rights that are protected by the new Basic Laws.¹⁷⁵

4.3.2.4.1 Suitability Between the Goal and the Means. There must be consistency between the goal and the means (i.e., the means must rationally lead to the realization of the goal). For our purposes, the restrictive orders must be suited to the goal of attaining a valid Jewish writ of divorce. If the restrictive order is ineffective to the extent that it will not achieve this goal, due to the *get* being regarded as having been unlawfully coerced according to the principles of Jewish law—the result would be that the means adopted are not suited to the goal, and as such they do not comply with the “suitability” test.

Evidently, the legislator of the *Rabbinical Courts Law* was not concerned about the possibility of an illegally coerced *get*. The law was accepted after the legislation committee of the parliament of Israel (*Knesset*) had considered the

a judicial decision based upon an appropriate balance that takes into consideration the importance of the goal and the consequences of the restriction of human rights protected by the Canadian constitution. In other words, when a law is adopted that infringes upon certain human rights anchored in the *Canadian Charter of Human Rights and Freedoms*, this law may nevertheless be approved if its goal is deemed sufficiently important to outweigh the human right violation. When this goal is more important, there is a great probability that the law that violates these human rights will be approved. The extent of violation of human rights is evaluated in light of the principle of proportionality. See Cunningham, “R.J.R.-MacDonald,” supra note 169,240.

¹⁷⁴) See supra notes 16-22, infra notes 176-177.

¹⁷⁵) See Barak, *Constitutional Interpretation*, supra note 114, 536, 620-624. These three subdivisions of the principle of proportionality are broadly accepted in Israel, and find expression in the writings of scholars such as Dalia Dorner, “Proportionality,” in *Berenzon Book*, vol. 2, (Aharon Barak and Chaim Berenson (ed.) (Jerusalem:2000), 281, 289-290. They are also evident in Supreme Court judgments, such as H.C. 1715/97, *Israeli Investment Managers Bureau v. Minister of Finance*, P.D. 50 (4) 367, 384, 385 (henceforth: *Investment Managers*).

point of view of the representatives of the Rabbinical courts in Israel and granted due weight to this point of view. The law is applied by the *Dayanim* of the Rabbinical courts, and presumably they exercise their authority intelligently, imposing restrictive orders only in cases in which there is a reasonable chance of influencing the recalcitrant spouse to give or accept a *get* and where there is no concern that such a *get* will be regarded as invalid since the recalcitrant spouse was illegally coerced according to the principles of Jewish law.¹⁷⁶

4.3.2.4.2 The Necessity Test, or the Ladder Test. The second requirement mandates that the means adopted for attaining a proper purpose be those that result in the least violation of human rights in the circumstances of a given case. When there are alternative measures that can be used to attain the same goal that cause a less severe violation of constitutional rights, such measures must be implemented in order to comply with this requirement. Therefore, from among various alternatives, the court that implements the law must begin from the least offensive measure and slowly ascend the ladder just until it reaches the level of violation of human rights that enables the achievement of the legislator's proper purpose without an unnecessary severe violation of constitutional rights.

In several of its judgments, the Supreme Court of Israel examined whether the Rabbinical courts had used the sanction of imprisonment in a disproportionate manner (i.e., excessively in light of the circumstances of a given case). In the *Uriel* case,¹⁷⁷ for example, the Jewish court sent a husband to prison for three months for disturbing the court twice, despite having been warned in advance not to disturb the court. Justice Barak ruled that although the Jewish court had not exceeded the boundaries of its legal authority through the imposition of imprisonment as such, the Rabbinical court's policy was problematic with regards to the disproportionality of the measure. He cited the proportionality rules set forth in the *Ben Attiah* judgment.¹⁷⁸ In accordance with these rules, Justice Barak ruled that the petitioner should be released, having already been in prison for several days on the day of the hearing. He gave the following rationale for his decision:

[T]he sanction imposed was disproportionate. In this context too the Jewish court must act in accordance with the principle of proportionality. It must first choose moderate sanctions

¹⁷⁶ See supra notes 111-112.

¹⁷⁷ Cr. A. 6057/95, *Aryeh Uriel v. The Ashdod District Rabbinical Court*, (1995) Takdin-Elyon 1995 (3) 1172.(not published).

¹⁷⁸ H.C. 3477/95, *Ben Attiyah v. Minister of Education, Culture, and Sport*, (1995) P.D. 49 (5) 1, 12-13.

and slowly ascend the ladder of severity until it adopts the sanction that ensures the goal of the punishment, while involving the smallest possible infraction of rights. It seems to me that the imposition of three months of imprisonment, which constitutes the imposition of the gravest possible measure [in this law pertaining to disturbance of litigants in Rabbinical courts], exceeds the required degree.¹⁷⁹

The proportionality test was also taken seriously – albeit implicitly – in the judgment of Justice Cheshin in the *Rider* case,¹⁸⁰ relating to the decision of the Petach Tikvah Rabbinical Court to incarcerate Ms. Rider for a period of two weeks for “disturbing and failure to comply with judgment.” In this case, Justice Cheshin ruled that Ms. Rider’s rights had not been properly protected. *Inter alia* the court dwelt upon the fact that failure to indicate the reasons for the decision precluded an examination of the extent to which the actual exercise of the sanction was justified under the circumstances, and whether the appropriate factors had been considered regarding proportionality.

Although the above-noted cases demonstrate adherence to the principle of minimal impairment, the question nonetheless remains regarding the possibility of drawing definitive conclusions – including explicit or implicit guidelines- from these judgments concerning the imposition of imprisonment. In these cases litigants were imprisoned for having disturbed the hearings of a Jewish court. Are the same guidelines applicable concerning the imposition of restrictive orders on the recalcitrant spouse? The circumstances are sometimes different, for in the judgments in the sphere of “disturbance” to the hearings of a Jewish court there is no opposing litigant whose rights are violated as a result of the insistence that the Jewish court exercise its authority to impose a sanction in a milder and proportionate manner. On the other hand, with respect to the enforcement of divorce judgments, the goal of the measure being adopted is the fulfillment of that judgment, and strict insistence that the violation of human rights of one party be in a manner that does not exceed that which is necessary might not coincide with the right of the other party to be released from the chains imposed by the recalcitrant spouse. However, as above mentioned, in recent years there are short statements of the Supreme court of Israel which indicate that the principle of proportionality should be a relevant consideration also in the sphere of enforcement of divorce judgments.¹⁸¹

¹⁷⁹⁾ The *Aryeh Uriel* case, supra note 177, 1172.

¹⁸⁰⁾ See also Cr. A. 2022/98, *Rider v. Rabbi Ochayon*, (1988) P.D. 52 (2) 86, 92.

¹⁸¹⁾ See supra notes 21-22.

The Rabbinical court should try to impose restrictive orders on the basis of an ascending scale. Initially, infringement of the rights of the recalcitrant spouse should be relatively mild. The imposition of increasingly drastic measures only becomes justified if, and to the extent that the implementation of the milder measures is ineffective, failing to induce him or her to give or accept the *get*. Here it bears mention that despite the fact that both men and women are affected by the acts of recalcitrant spouses, they differ with respect to the remedies available to them. Whereas the man-refusee can resolve his problem by way of receiving permission to marry another wife, this avenue is not available for the woman-refusee. It would therefore seem that even where the circumstances are identical, the Rabbinical court should be more lenient in the adoption of restrictive measures against the husband who refuses to grant a writ of divorce to his wife, than against the wife who refuses to receive a divorce writ from her husband.

4.3.2.4.3 Proportionality Test in the Narrow Sense, or the Test of the Proportionate Measure. There must be a reasonable relationship between the means and the goal. This test requires consideration of the relationship between the benefit gained by the public as opposed to the damage to the individual from the application of the measure. In other words, the requirement is that the harm to the individual must be outweighed by the benefit gained thereby. In an attempt to ensure that when restrictive orders are imposed the violation of human rights in the Rabbinical court does not “exceed that which is necessary”, section 4(b) of the law establishes certain guidelines for the imposition of restrictive orders on the recalcitrant spouse. The rule in this section requires the implementation of the discretion of the *Dayanim* in the Rabbinical Courts when they impose restrictive orders on the recalcitrant spouse. This section includes a provision that requires consideration of the particular circumstances of every case, as well as the state of health of the person against whom the restrictive orders are issued. The provisions of section 4 of the *Rabbinical Courts Law* ensure that severe sanctions mentioned in this law, such as imprisonment and the solitary confinement of a prisoner, will only be applied in particularly grave circumstances. During the period of this law’s enactment, the Chairman of the Israeli House of Representatives’s Legislation Committee, Law and Justice, Mr. Tzucker, explained that the Rabbinical courts would be required to conduct themselves according to the principle of proportionality following the law’s enactment (i.e., the severity of the recalcitrant spouse’s

behavior would determine the severity of the measures adopted against him or her).¹⁸²

Section 4(b) of the *Rabbinical Courts Law* specifically imposes upon the Jewish courts an obligation to provide reasoned judgments when they impose any particular measures against recalcitrant spouses. This requirement further encourages the *Dayanim* to exercise their authority in this sphere in a proportionate manner. The obligation of the Rabbinical courts to write reasoned decisions for all their judgments,¹⁸³ and the rule pertaining to enforcement of divorce judgments in the abovementioned section 4(b), are important because they enhance several goals: They enable the litigant to confront the decision of the court in other legal forums; enable the appellate court to properly examine the decision; expose the judicial branch to public criticism, including that of the media; enhance the quality of the decision; prevent hasty, intuitive decisions, and reduce the possibility of mistake; promote the values of uniformity, consistency, continuity and equality in the actions of the courts entrusted with the power of deciding about the fate of individuals; and ensure the public dimension of the process of doing justice in courts, and thus maintains public trust in the legal system.¹⁸⁴ Finally—and perhaps most importantly for the present discussion—when there is a reasoned decision of the Rabbinical court that imposes restrictive orders upon a recalcitrant spouse, it is possible to determine whether this Jewish court acted in accordance with the proportionality principle.

5. The Desirable Balance

The proportionality test should be implemented in light of the particular circumstances, such as the ground for divorce and the severity of actions of the

¹⁸² See *Knesset Proceedings*, volume 7233, page 6774 (1995).

¹⁸³ See also the general rule in Rabbinical courts pertaining to the obligation to write reasoned decisions, found in regulations 114 and 115 of *Procedural Regulations of the Israeli Rabbinical Court*, 5753, Y.P. 2298.

¹⁸⁴ This rationale is relevant for all decisions of courts, including those of the Rabbinical Court. Concerning this rationale See Cr. A. 446/01, *Rodman v. State of Israel*, (2000) P.D. 56 (5) 25, 30. See also R. Gavison, “The Court and the Obligation to State Reasons,” 2 *Mishpatim*, 89, 92-93; and Y. Dotan, “The Obligation of Administrative and Elected Bodies to give Reasons,” 19 *Bar-Ilan Law Studies* (2002), 5, 7-9.

recalcitrant spouse. A mild policy when the restrictive orders are imposed might be an obstacle that prevents an effective solution of the problem of the husband or wife of a recalcitrant spouse. In this context, as opposed to some other cases discussed in the case law in Israel concerning the debate between the state and the individual,¹⁸⁵ we are not concerned with the balance between the human rights of an individual and the “public interest” – such as the preservation of public order, public peace, or state security. The state might be very powerful and in an attempt to prevent an abuse of power perhaps it is preferable if it uses milder means of enforcement. This policy grants more weight to the protection of human rights of the individual. When divorce judgments are enforced the legal debate is a conflict between two individuals. When restrictive orders are imposed, the court must balance between two competing and conflicting sets of human rights belonging to the opposing parties—namely, the “refusee” and the “refuser.” A minimal violation of the human rights of one party inevitably dictates a maximal violation of the rights of the other party. The subdivision of the principle of proportionality, requiring a minimal violation of human rights, as much as possible, is more appropriate in the context of balancing between a particular human right and public interests, and is not always suited for balancing between conflicting human rights, since a minimal violation of the rights of one party could mean a maximal violation of the rights of the other party. An appropriate balance between conflicting human rights—the rights of the “refuser” in spheres of freedom of movement, freedom of occupation, human dignity and liberty etc. and the rights of the “refusee” to exercise his or her autonomy by being able to exit an undesirable marriage, the right and societal interest pertaining to gender equality etc.—is desirable. These conflicting rights and interests should be balanced in a sensitive and thoughtful manner when restrictive orders are imposed upon the recalcitrant spouse.

The human rights of the woman and man who are victims of the recalcitrant spouses are important. They are entitled to be released from the bonds of an undesirable marriage and in certain circumstances they wish to give birth to children only in the framework of marriage and their desire to be parents too is an important human right warranting consideration by the *Dayan* issuing a restrictive order. However, coercive measures adopted against the recalcitrant spouse in order to convince him or her to grant or receive a *get*, especially when these are severe measures, such as imprisonment or solitary

¹⁸⁵ Such as in the cases of *Investment Managers*, *supra* note 175; and H.C. 6055/95, *Tzemach v. Minister of Finance*, (1999) 53 (5) P.D. 241.

confinement, also violates their human rights. Therefore, the Rabbinical court should impose sanctions against a recalcitrant spouse in a proportionate manner, striking an appropriate balance between the degree of violation of the human rights of the husband or wife of the recalcitrant spouse, on the one hand, and the degree of violation of these rights of the recalcitrant spouse on the other.

6. Conclusion

It appears from the perspective of Jewish law scholars who are concerned that a *get* will be considered to have been unlawfully enforced that the use of more severe sanctions—such as imprisonment, solitary confinement, or a combination of several restrictive orders—must be the last means adopted for the purpose of enforcing a divorce judgment. Such imprisonment, like the imprisonment of debtors, which in the end was also allowed in Jewish law because of the pressing needs of society, is not meant to be punitive. Rather, it is intended to serve as a coercive measure to compel a person to fulfill his obligations. Regarding a debt, a certain responsibility exists on the part of the debtor, for he took upon himself an obligation and did not fulfill it. Similarly, when a judgment is issued that, in the opinion of the court, obliges a *get* to be given or accepted, the spouse who refuses does not fulfill his or her obligation. Therefore, just as the imprisonment of a debtor is the final option, to be used only after all other means of collection have proved unsuccessful, so too is the imprisonment of a recalcitrant spouse is a drastic final option, which may only be implemented after less drastic measures have been exercised with no effect.

The argument is sometimes heard that in the clash between the rights of the recalcitrant spouse and those of the spouse refused a *get*, it is justified to favor the rights of the latter and allow him or her to turn to Jewish scholars and request that they will impose severe measures of coercion, including imprisonment, upon the other spouse, regardless of the circumstances. For an imbalance exists in this context between the recalcitrant spouse and the spouse refused a *get*. The freedom of the spouse refused a *get* is infringed upon in a manner that the refused spouse cannot repair, whereas the infringement of the freedom of the recalcitrant spouse can be ended at any moment—namely, as soon as that spouse recognizes his or her partner's right to be freed from an unwanted marital bond and subsequently agrees to give or accept a *get*. Thus, according to those who put forward this argument, there is justification for imposing harsh sanctions that seriously infringe upon the freedom and dignity

of the recalcitrant spouse, regardless of the circumstances. The sanctions may be harsh, but the prison keys are in the hands of the recalcitrant spouse, who may at any time release himself or herself from incarceration.¹⁸⁶

This argument, however, is not acceptable. A patient may not be given a medication with clearly negative side effects before an attempt has been made to cure him with drugs that are less harsh and dangerous. Overly hasty and extensive use of imprisonment for the purpose of alleviating the plight of spouses who are refused a *get* significantly infringes upon the right of any individual, including recalcitrant spouses, to have their dignity and freedom defended; a right that is of great importance in Jewish and Israeli law. It should be noted that in this context, according to Jewish law, divorce is not forced upon the parties by the court, but rather depends on the cooperation of the husband and wife. The cases in which the imposition of coercive measures against recalcitrant spouses is permitted are exceptional special cases.¹⁸⁷

It stands to reason that it would be proper to specify, either by law or by a special ruling of the Supreme Rabbinical Court, a hierarchy of the various possible sanctions, or combinations of sanctions. Severe sanctions must be used as a last resort because they deprive the recalcitrant spouse of his or her rights in the most drastic way. Therefore, a severe sanction, such as an order of imprisonment, should not be given before other, less severe, restrictive orders have been used.

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

¹⁸⁶) See *Yichyeh and Orah Avraham*, *supra* note 12; and *Baruch Even Tzur*, *supra* note 12.

¹⁸⁷) See *supra* notes 35–45.

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

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

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

The imposition of harsh sanctions, such as imprisonment to compel compliance, solitary confinement, and the imposition of several restrictive orders together, should be undertaken with great caution. The wisdom in the statement of the Sages: “If you take hold of something too large, you will lose your hold,”¹⁸⁸ is often correct guidance. The Jewish scholars tended to employ harsh coercive measures when they regarded the case for divorce as being particularly strong, for example, when the recalcitrant spouse’s behavior was considered especially grave, or after a long period of refusal to give a *get*.¹⁸⁹ It is impossible to determine with certainty in every case the relative strength of the cause for divorce. However, the Rabbinical Courts should nonetheless

¹⁸⁸) *Babylonian Talmud*, Rosh Hashanah 4b; *Babylonian Talmud*, Yoma 80a.

¹⁸⁹) Concerning the linkage between a long period of refusal to grant a *get* and a justified decision of a Rabbinical court in Israel that the husband is obligated to grant a *get*, which could lead to the imposition of appropriate sanctions, see H.C. 1791/07, *Ploni v. The High Rabbinical Court*, (2007) (not published). In this case as well as in others—H.C. 1371/96, *Refaeli v. Refaeli*, (1997) P.D. 51 (1) 198, 203; H.C. 1804/07, *Ploni v. The Regional Rabbinical Court*, (2007) (not published); and *Ploni*, *supra* note 7—the Supreme Court explicitly stated it is not a court of appeal that evaluates the policy of a Rabbinical court in the sphere of Jewish divorce law. The Rabbinical courts should, to the degree possible, set a uniform policy in order to preclude large discrepancies between different panels of *Dayanim*.

consider the circumstances of the case and the grounds for divorce carefully, and choose the appropriate restrictive orders accordingly. An attempt should be made, to the degree possible, to set a uniform policy in order to preclude large discrepancies between different panels of *Jewish* judges (*Dayanim*).

Just as caution must be exercised when imposing drastic direct and indirect sanctions upon the recalcitrant spouse, consideration must also be given to the severe distress suffered by the victim of the recalcitrant spouse, especially women, who is refused a *get*. While a man whose wife refuses to accept a *get* can solve his problem by obtaining a dispensation to contract an additional marriage, such an option does not exist when a man refuses to give his wife a *get*. Therefore, in addition to the caution required when imposing harsh sanctions on the recalcitrant husband, serious consideration must also be given to expanding the use of the less drastic sanctions that Jewish and Israeli law allows.