SHLOMO DEICHOWSKY

Appropriate Judicial Practice in the Rabbinic Courts

I. A Letter to my Fellow Dayyanim[1]

A. Men of Valor

I AM ABOUT TO CONCLUDE my term of office after serving thirty-two years in the rabbinical court system, twenty years of which on the Supreme Rabbinical Court. As I take leave, I wish to share some thoughts with my fellow *dayyanim*, a summary of my path on the court during all those years of joint effort.

. . . Yitro proposed to Moshe that he should choose judges with the following qualities: "You shall provide out of all the people men of valor, such as fear God, men of truth, hating unjust gain" (Ex. 18:21). But later it says: "And Moshe chose men of valor out of all Israel" (Ex. 18:25)— only "men of valor." Rabbi Ovadiah ben Jacob Seforno explains that, "after searching and not finding people having all the virtues mentioned by Yitro, he chose men of valor, who were proficient and diligent in clarifying and elucidating [the law]."[2] *Ramban* explains:

> Yitro spoke using a general statement followed by specifics. He [first] told [Moshe] to provide men worthy of leading the great people in judgment, and [then] specified that they be God-fearing men of truth who hate unjust gain, for they cannot be valorous in judgment without these qualities. There was no need to mention their wisdom and understanding, for that is clearly included in 'men of valor.' And when it says later, 'And Moshe chose men of valor'— that includes everything; they were God-fearing men who hated unjust gain, and wise and understanding people.[3]

Seforno and *Ramban* do not fundamentally disagree. They both agree that "valor" is vital for executing justice and that without this attrib-

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ute one cannot be a judge, it being the root of all the other qualities. Seforno maintains that we can make do with judges who are "men of valor" and hope that over the course of time they will develop the other positive qualities. *Ramban* maintains that "men of valor" are people who have already developed all the other qualities. Who, then, are "men of valor"?

Rambam proposed the following definition:

> Elsewhere it is said, "men of valor" (Ex. 18:21), that is, men mighty in the performance of the commandments, and strict with themselves, men who control their passions, whose character is above reproach, whose youth is of unblemished repute. The phrase "men of valor" implies also that they must have a courageous heart to rescue the oppressed from the hand of the oppressor, as it is said: "But Moshe stood up and helped them" (Ex. 2:17). And just as Moshe, our master, was humble, so every judge must be humble.[4]

How is it possible to reconcile these two qualities—"valor" and "humility"—which appear to be contradictory? A man of valor must recognize his own strength and use it against the guilty party, whereas the humble man must efface himself before his fellow man, in keeping with the verse, "and what are we" (Ex. 16:7)?

There is, in fact, no contradiction. Humility is an important trait when a person is not serving in the capacity of a judge. When, however, he sits on the judicial bench, it falls upon him to be a man of valor in the full sense of the term. Our Sages[5] said that a judge must view himself as if Gehinnom were lying open below him (*Sanhedrin* 7a). *Rambam* writes: "A judge should always view himself as if a sword were lying on his neck and Gehinnom were lying open below him."[6] Some people are humble and righteous, and when they hear that Gehinnom is below them, they flee in order not to enter into danger. The Sages did not have such people in mind. Just as a judge cannot run away from a sword lying on his neck, so, too, he cannot run away from Gehinnom. What the Sages mean is that a judge must be prepared to enter Gehinnom and be wounded by the sword because of his judicial rulings. He must accept responsibility and assume risks, even when the danger exists that he will fall in. When a person goes out to war, he can never be sure of his safety. Rabbi Yosef Ben Moshe Babad writes that in time of war—optional wars included—the laws of *piku'ah nefesh*, saving life, do not apply.[7] Someone who is afraid to endanger his life falls into the category of the fearful and fainthearted who may not go out to battle. He who is fearful and fainthearted cannot be a judge.

Rav Shlomo Luria writes about a family that had previously enjoyed a presumption of untainted lineage, and slanderous rumors began to spread about some blemish:

> The Sages were ready to die, in order to demonstrate the fitness of a family about whom a false rumor had spread. All the more so in our day when there is no danger involved in demonstrating the fitness of a family about whom a rumor of unfitness had spread, that we must act with all our strength to silence and nullify such a rumor.[8]

We see from here that part of a judge's job is to endanger himself in this world and in the world-to-come in order to give judgment.

B. Excessive Humility

In the well-known story of Kamtza and Bar Kamtza, Rabbi Zekharyah ben Avkulas refuses to offer the sacrifice sent by the king through Bar Kamtza, who had cast a blemish in a spot in its eye, lest people say: Animals with blemishes may be offered as sacrifices on the altar. He also refuses to kill Bar Kamtza who had brought the sacrifice, lest people say: Someone who casts a blemish in a sacrifice is liable to the death penalty. The Gemara there concludes: "The humility ("*anvatanuto*") of Rabbi Zekharyah ben Avkulas destroyed our Temple and burnt our sanctuary and exiled us from our land" (*Gittin* 56a).

What is the meaning of "*anvatanut*" in this context? What is the connection here to modesty and humility? It seems that the matter can be understood as follows. Rabbi Zekharya ben Avkulas was faced with a genuine halakhic dilemma: on the one hand, concern about offering a blemished sacrifice or causing harm to Bar Kamtza; on the other hand, concern about the destruction of the people, the Temple and the Land. There is a well-known statement of Rabbi Pinhas ben Yair that humility is located between piety that is found below it and the fear of sin that is above it (*Avodah Zarah* 20b). A person serving as a judge cannot be humble; and he cannot run away from responsibility. He must be ready to issue a problematic or forced ruling, even in the face of halakhic concerns so as not, God forbid, to be the cause of destruction. Humility is an inappropriate quality for a judge. "Who am I and what am I, I am mere dust and ashes" are words that he may utter before God in the course of prayer, or to his friends with respect to his private affairs. But when he sits in judgment, just the opposite is true: "He must be brave like a lion."

In one of his rulings, Rav Yosef Shalom Elyashiv writes that no paragraph in the *Shulhan Arukh* is free of disagreement, but, nevertheless, in every paragraph the law is decided. And the law is not always in accordance with the more stringent position for, oftentimes, halakhah follows the more lenient view. Regarding this matter, *Even ha-Ezer* is no different than *Orah Hayyim*. Here, too, we must not fear disagreement; the law must be decided, and not always in accordance with the more stringent position!

A judge cannot always follow the path of "*glatt*." He must often rule for a time of pressing need or as an emergency measure, in order not to cause a greater calamity, as was caused by Rabbi Zekharyah ben Avkulas owing to his great humility. "A bill of divorce given under duress" frightens me less than the state of "no bill of divorce." There are ways to deal with a coerced bill of divorce, and it is often valid, at least after the fact. But there is no way to deal with the situation of "no bill of divorce."

I, therefore, ask my fellow *dayyanim* to assume responsibility, and I wish to present a few relevant points:

1. Without outside consultations.

"Do not be afraid of any man" (Deut. 1:17)—this includes important and distinguished people. The responsibility is yours, and so, too, is the authority.

The Torah commands: "Then both of the men, between whom is the controversy, shall stand before the Lord" (Deut. 19:17). Judgment is executed when the two litigants and the witnesses stand before the judges. There is a great difference between one who sits in judgment and one who is asked a question without the parties being present. And, furthermore, the outside authority offering a theoretical response is usually unaware of the minute details because the case file does not lie before him and the questioner contents himself with a brief question. A question regarding an isolated point in a complex case is liable to prompt an inappropriate answer. A judge who sits in judgment receives Divine assistance, for "God stands in the Divine assembly; in the midst of the judges He gives judgment" (Ps. 82:1).[9] Divine assistance is only provided to the judge who sits with the parties, but not to someone who is not directly involved in the case and is merely presented with a halakhic question.

2. Immediate Rulings.

It is the *dayyan's* obligation not to delay judgment and to issue a ruling as soon as possible following the court hearing. *Rambam* writes that, with

the close of the hearing in a capital case,

> On that day, the [members] of the Sanhedrin would meet in couples to study the case. They would reduce eating and not drink wine the entire day. And they would debate the matter all night, each one with his partner or with himself at home, and the next morning, they would rise early and come to court. He who favored acquittal would say . . . and he who favored conviction would say. . . .[10]

This is the manner in which judges conducted themselves in days of old—consultations among themselves, but not with others. A verdict was given the next morning and, all night long, the judges would toil over its formulation. Even in capital cases, they made do with a delay of only one night, during which they sat with themselves or with another judge sitting on the court; they would eat little and deal exclusively with issuing a ruling. They would not delay the matter for days, and certainly not for months and years.

A judge must be aware of the urgency of issuing a ruling as if, God forbid, a member of his family were lying in the hospital, whom the doctors say needs emergency surgery or medical treatment, and an immediate decision is necessary. Even if he wishes to consult with other medical experts or a rabbinical authority, he would do so in the course of minutes, or hours or, at the most, within the next few days. Under no circumstances would he wait weeks or months and certainly not years. The litigants appearing in court are lying on the surgical table, and it is absolutely forbidden to drag out the judicial process beyond the most necessary minimum.

3. Not to Challenge the Civil Courts.

Throughout the years, I led the fight to enhance the authority of the rabbinical courts, but never did I create a tumult or engage in shouting. I made use of the legal weapons used by the civil courts and, with the help of God, I achieved no small number of successes. Not only do clamorous rulings miss the mark, but occasionally they even lead to a curtailing of authority. It is sometimes even advisable not to enter into a confrontation with the civil courts regarding a particular case, so as not to lead to greater damage regarding many other and more fundamental matters.

4. Poorly Formulated Rulings.

Not infrequently rabbinical court rulings are formulated in a "telegraphic" mode, and sometimes even in corrupt Hebrew. A few lines of rul-

ing decide the fate of families, without providing them with the minimal means to understand why and wherefore. Relying on the protocol, which is generally defective, does not help; when the case reaches the stage of appeal, it is impossible to understand anything. If the case reaches a civil court—usually the Supreme Court—the judges scorn such rulings and the results are clear. Procedural law demands the writing of reasoned rulings that include the background of the case and the arguments of the parties. Without these things, the possibility of appeal is severely impaired, the authority of the court is greatly diminished, and most importantly, a mockery is made of the entire process.

5. Defiance of the Rulings of the Supreme Rabbinical Court.

There is another problem concerning rulings issued by the Supreme Rabbinical Court that are not accepted by the regional rabbinical courts. This creates an untenable disruption of the entire court system and causes unnecessary expenses for the parties involved. This issue has yet to be resolved, and I have warned about it on more than one occasion.

Thus far has been the letter to my fellow *dayyanim*. I wish now to illustrate my views regarding appropriate judicial practice in the rabbinical courts.

II. A Get Me'useh (a Bill of Divorce Given Under Unlawful Duress)

A. Definition of Light and Heavy Duress

The fundamental principle standing before me when I cast sanctions on husbands who refuse to give their wives a *get* is "proportionality." I dealt with this issue in my article, "Proportionality in Compelling a *Get*."[11] The gist of the article: Not every act of compulsion renders the *get* a '*get me'useh*' (a bill of divorce given under unlawful duress). The compulsion must be proportional to the result. Rav Yitzchak Herzog wrote as follows:

> We must also consider that perforce not every imposition of a sum of money should be regarded as absolute duress. In this context, we do not say that the law governing a single perutah is the same as the law governing a hundred perutot. Consider for yourself: If a small sum is cast upon an exceedingly wealthy man, would this be considered divorcing his wife under duress. . . . It is only a get me'useh when we cast upon him something that he cannot bear, e.g., bodily afflictions, or a huge sum of money that would destroy him. But not a sum that doesn't cause him

> serious harm. On the contrary, this is the test: If he divorces his wife on account of this, he is not divorcing her under duress. It is, however, difficult to establish standards on the matter, but rather in every case it falls upon the court to examine and establish the measure and the rate.xii

This also follows from what Rabbi Yaakov of Lisa, Rabbi Menachem Mendel Schneersohn, and Rabbi Moshe Feinstein wrote.[13]

My conclusions in that article were as follows:

1. Heavy duress is duress leading to total collapse and loss of discretion. This type of coercion turns a *get* into a *get me'useh*. Light duress is duress that is painful, but does not lead to collapse. It does not impair judgment, and therefore does not turn a *get* into a *get me'useh*.

2. Duress must be proportional to the issue on account of which it is activated. Duress in the case of divorce is measured in terms of a man who does not want to separate from the woman he loves. If a man is prepared to divorce his wife because of light duress, this is a sign that essentially he wants to divorce his wife, and it is merely for monetary reasons or out of spite that he is withholding the *get*. In such a case, the *get* is not regarded as a *get me'useh*.

I wish to propose a criterion for establishing when duress invalidates a *get*. A person will not forgo his home because of a small measure of duress. Every one of us would prefer to suffer financial pressure, and even a short prison term, rather than surrender his home. Rabbi Yose said: "'His house'—this refers to his wife" (*Shabbat* 118b, *Gittin* 56a). Any pressure that would not bring a person to give up his home should not be considered invalid pressure regarding a *get*.

A husband who does not love his wife, even if he fulfills all his obligations toward her, can be obligated to give his wife a *get*. The Talmud states that if a woman takes a vow and her husband remains silent, so that her vow takes effect, he is obligated to divorce her: "Here where she took a vow and he remained silent; she thinks that since he remained silent, he must hate her" (*Ketubot* 72b). We are dealing here with a husband who fulfilled all his obligations toward his wife and took no active steps against her. All that he did was hear her take a vow forbidding herself to him and not annul the vow. Nevertheless, the woman can take this as a sign that he hates her and, therefore, the Mishnah states that he is obligated to divorce her. We see, then, that hatred constitutes halakhic grounds for obligating a *get*, even when there is no indication of active hatred. This ruling was codified as law.

A husband who is prepared to divorce his wife because of light duress retroactively demonstrates that, in fact, he hates her, but needs a little push

to divorce her. This, in itself, is cause for a *get*. Accordingly, there is no room to speak of a *get me'useh* in the case of light duress when the husband, himself, hates his wife and is obligated to divorce her.

In my opinion, even in a case where the court rules that the husband is obligated to divorce his wife but does not issue a ruling compelling divorce, the imposition of a short prison term—up to a month—does not turn the *get* into a *get me'useh*. A man who loves his wife will not give her up because of a month in prison.

We should add to this the argument put forward by Rav Yitzchak Herzog that imprisonment in our day is different than imprisonment in earlier times.[14] Today, imprisonment does not fall into the category of unlawful duress; it merely prevents free movement, similar to a court order forbidding a person to leave the country, which is routinely issued by the rabbinical courts.

When I raised this issue at a rabbinical court conference in Shevat 5768, the objection was raised that certain husbands live with their wives in a "so-so" marriage, but with a little push they are ready to divorce them. In such cases, even light duress should turn the *get* into a *get me'useh*. I disagree! Married couples are obligated to live in "love and harmony, peace and companionship." This is what is written in the *tena'im* document where the terms of marriage are formulated, and these words are not merely meant as good advice. According to Rabbi Joseph Colon Trabotto, the *tena'im* document has obligating force: "They will neither abstract nor conceal from one another any property whatsoever, but, rather, they will live in love, in truth and in peace."[15] According to him, we have here a halakhic commitment not to hide assets from each other, even though we are dealing with parties who fulfill their mutual obligations to each other. I have dealt with this at length elsewhere.[16]

When we talk of imposing a limited, short-term punishment, we are not dealing with an ordinary husband. Rather, we are dealing with a wicked man whom the court has decided is obligated to give his wife a *get*, only that the drastic means of enforcement are not applied to him, because the court did not issue a ruling compelling a *get*. Regarding such a husband, a limited punishment—even if it results in the giving of a *get*—retroactively demonstrates that, to put it mildly, he does not love his wife, and in fact he hates her and was looking for an opportunity to get rid of her. Thus, it is possible to use a limited monetary or bodily punishment in order to bring him to give a *get*.

B. Imprisonment as an Emergency Measure

Rambam wrote:

> A court has the right to flog someone who is not liable for flogging and execute someone who is not liable for the death penalty, not to transgress the words of the Torah, but to erect a fence around the Torah. When the court sees that the people are acting in unrestrained manner, they must repair the breach and strengthen the matter as they see fit, all as a temporary measure. . . . Similarly, [the judge] has the right to bind hands and feet, and to imprison in jail. . . . All these things, as the judge sees befitting and that the hour requires it.[17]

So, too, ruled Rabbi Yaakov ben Asher,[18] and Rabbi Yosef Karo.[19] See also Rabbi Isserles' comment that "*shiv'ah tovei ha'ir*," "the seven notables of the city," have similar authority.[20]

In today's unrestrained generation, we are all aware of the overriding importance of bringing a failed marriage to a quick resolution. Neither husbands nor wives are prepared to wait indefinitely for the sought after *get*, and if the proceedings drag on too long, they will make their own rules. The rabbinical courts in our time—whose authority is certainly no less than that of the "seven notables of the city"—have the full authority to work in accordance with emergency measures in certain cases. A rabbinical court can and must make use of the means brought by *Rambam* as emergency measures—including imprisonment—in order to arrive at a speedy resolution. *Get me'useh* does not constitute a halakhic stumbling block when the matter is arranged by a rabbinical court in accordance with the accepted law, as is stated in Rambam's well-known words.[21]

Therefore, there is room to consider the use of imprisonment—at least limited imprisonment —based on the laws governing the Sanhedrin and the laws governing rabbinical judges, as an emergency measure in difficult cases, even when it is impossible to impose coercive measures based on the laws governing divorce.

To illustrate the matter, I have chosen several examples from cases in which I was involved.

C. Imprisonment and Habeus Corpus

In a certain case, I found myself in serious disagreement with my colleagues. The case dealt with a husband who had disappeared and, despite arrest orders, the authorities did not succeed in locating him. The woman leveled very serious charges against him, but it was impossible to verify them or to

arrange for a confrontation between her and her husband. It should be noted that, owing to the severity of the charges, we were forced to forbid him to communicate in any manner, even by telephone, with his children.

There is a problem with issuing an arrest order without possibility of bail for, in such a case, the police are required to bring the alleged criminal before the court within twenty-four hours. It is not always possible to assemble the court on such short notice and, in any event, more than one court session is necessary. Unlike a civil court, a rabbinical court is not authorized to arrest a person until the end of proceedings. Issuing consecutive arrest orders is not practical. The possibility remained to obligate the husband to divorce his wife owing to his disappearance and turning his wife into an *agunah* and to impose a short-term prison sentence (for a month), during the course of which, it would be possible to establish whether there was room to impose the coercive measure of an extended prison sentence. The imprisonment could be imposed in accordance with paragraph 3 of the Divorce Ruling Enforcement Law, which allows the imposition of a prison sentence even in a case of recommended divorce, and all the more so in a case of obligatory divorce.

This was my opinion, but my colleagues on the court refused, and in the meantime nothing was done. The woman remained an *agunah* and her husband was free with nothing to fear, because arrest orders are ineffective. It should be noted that in a case of real imprisonment, the police make serious efforts to apprehend the criminal. In the case of arrest orders, the efforts made are minimal.

Some time later, my colleagues in the case agreed to a compromise, according to which a ruling would be issued that does not obligate divorce, but states that, within ten days, the husband must decide between two alternatives: appearing in the rabbinical court in order to answer the woman's charges; or granting a *get*. If he does not choose either alternative, or if he fails to respond, it would then be determined that he must divorce his wife, without the *get* being obligatory. And if he fails to obey, he would then be declared a husband who refuses to give his wife a *get*. Then—and only then—would it be possible to impose upon him some of the restrictive orders sanctioned by the law, even though he would not be sent to prison.

My colleagues struggled to issue a ruling that does not impose imprisonment or obligate a *get*, so that, God forbid, they do not enter the realm of a *get me'useh*. It seems to me that about such a situation it is stated: "Be not righteous overmuch" (Prov. 7:16).

D. Compelling an Additional Get *as a Stringency*

In this case, we encountered an interesting issue. The case dealt with a husband, whose wife had brought serious charges against him in the realm of their intimate relations and regarding child abuse. We imposed a prison sentence upon the husband should he refuse to give his wife a *get*. The prison sentence was never imposed, because the husband agreed to divorce his wife. According to two members of the court, the *get* that we had arranged was valid only *bedi'eved*. According to the minority opinion—that of the head of the court—the *get* was valid *lekhathilah*. Inasmuch as the parties involved were members of the haredi sector, the woman had a problem remarrying based on her *get* that was valid only *bedi'eved*. It was, therefore, decided, by majority decision, to force the husband to give his wife another *get*. Here, however, there arose a problem: The legal possibility of coercion is limited to a husband who refuses to give his wife a *get*, but a husband who already gave a *get*, and it is valid *bedi'eved*, cannot be forced to give another *get*. From his perspective, he already divorced his wife and she is permitted to remarry.

My only alternative was to assemble an expanded court that included the head of the Supreme Rabbinical Court, in which the head of the court's position was unanimously accepted that the original *get* was absolutely valid *lekhathilah*. This still did not satisfy the haredi circle to which the woman belonged, and an additional *get* was finally arranged, after the husband was persuaded to cooperate with the help of a considerable sum of money that he received.

E. Conditioning a Get on Payment of the Ketubah

An interesting issue arose in another case as well. A regional rabbinical court obligated a husband to give his wife a *get* and pay her *ketubah* in the sum of 500,000 shekels. The court, however, determined that it would not arrange the *get* unless the husband pays the *ketubah* at the same time. If the husband fails to pay, he would be regarded as a husband who refuses to give his wife a *get*, and restrictive orders would be issued against him. The husband was very interested in giving his wife the *get*, but he was not prepared to pay her *ketubah*.

In my opinion, the rabbinical court erred in its action. The husband was not refusing to give his wife a *get*; he was refusing to fulfill a financial obligation. The restrictive orders in question, both according to Halakhah and according to Israeli law, are meant to prevent refusal to give a *get*, and not refusal to make monetary payments. The court should first have

arranged the *get*, and then activate any means at its disposal to collect the *ketubah*, but it cannot use coercion regarding divorce as a tool for collecting the *ketubah*. The *ketubah* issue was a separate problem, owing to the exaggerated sum recorded therein, but that should only have been discussed after the *get* was granted.

III. A Get Given in Error

In a certain case (Family A), there was a very long delay in issuing a final ruling, owing to serious disagreements between the *dayyanim*. The case involved a husband who at first refused to give his wife a *get*, but later agreed to divorce her after the rabbinical court persuaded the woman to sign a divorce agreement, in which she agreed that her husband would only have to pay 500 shekels a month as child support for their daughter. Immediately after receiving the *get*, the woman turned to the civil courts in the name of her daughter, and there the husband was ordered to pay 1700 shekels a month of child support. The regional rabbinical court angrily declared the *get* to have been given in error, and ruled that the woman's name be included in the list of people disqualified for marriage and that she return the additional sum of child support awarded to her by the civil court.

In the framework of the appeal, I was of the opinion that the rabbinical court's ruling should not be accepted, for several reasons:

a) It is customary for the authority arranging the divorce to make the following declaration before the *get* is handed to the woman: "The *get* that is about to be given is final, and not subject to nullification in any manner. Should disagreements arise between you, they are grounds for a legal hearing, but they will not affect the validity of the *get*." Thus, the validity of a *get* cannot be challenged because of a breach of agreement.

b) Even if such a declaration was not made in this case, since the rabbinical court only confirmed the agreement after the husband was given the opportunity to consult a lawyer, it may be presumed that the lawyer clarified his client's legal position with him, informing him that a rabbinical court ruling regarding child support is not final, and that the woman can still sue for child support in the name of her child in a civil court.[xxii]

c) No deception was involved, for the rabbinical court had warned the husband that his wife was entitled to turn to the civil courts regarding the matter of child support, and gave him the opportunity to consult with a lawyer. Thus, the husband gave his consent after having accepted upon himself the risk.

My colleagues disagreed with me, though they conceded that if the woman were to become pregnant, the children would not be regarded as *mamzerim*. There was no alternative but to issue a ruling that a second *get* was necessary, and that the husband could be coerced to comply. At the same time we cancelled the regional rabbinical court's ruling that obligated the woman to return to her husband the additional money that she had collected as child support based on the civil court's ruling.

We are dealing here with a real problem concerning the validity of the *get*. Similar disagreements and claims of a fundamental breach of the divorce agreement are found in many cases, sometimes arising only years later. The civil courts have ruled that rabbinical courts are not authorized to deal with fundamental breaches of divorce agreements after the giving of a *get*.[23] Should we view the *get* given in all such cases as retroactively invalid and determine that the children born to the woman after receiving the *get* are *mamzerim*?

It seems to me that there is no alternative but to operate on two fronts: on the one hand, establishing exclusive authority for the rabbinical courts in cases of breach of a divorce agreement after the giving of a *get*; on the other hand, instructing those in charge of arranging a *get* to be meticulous about informing the parties that the *get* is final, and that any future disagreement about the divorce arrangement will not effect the validity of the *get*.

One more point: A rabbinical court should not give its hand to a divorce agreement that allows the husband to pay what amounts to hunger rations, merely in order to secure a *get*. Had the rabbinical court awarded the woman appropriate child support, the civil court would never have gotten involved.

IV. A Conditional Get

A. The View of the Maharashdam was Never Accepted

A regional rabbinical court (Family Z.) refrained from issuing a ruling compelling the husband to give his wife a *get*, because he had agreed to divorce her if he would be granted custody of their son. If it would be decided that custody would be granted to the mother, he would only give her a *get* if the Supreme Court issued such a ruling.

This ruling does not seem right to us. Without mentioning this, the ruling relies on the position of Rabbi Samuel ben Moses di Medina (acronymally known as Maharshdam) that even a husband who is obligated to give a *get* and can be compelled to do so, has the right to attach conditions to the *get*.[24]

We have written in the past that Maharshdam's position has not been accepted and that many authorities disagree with him.[25] These authorities preceded Maharashdam, and we should certainly rule in accordance with them. And furthermore, Rabbi Jacob Castro cited Maharshdam's view and rejected it.[26] There is no reason to rule in accordance with the view of a single authority, when major authorities disagree.

In any event, the husband cannot introduce a stipulation concerning the child, for the child is not a transferable object, just as he cannot introduce a stipulation regarding any other third party. Moreover, Maharashdam speaks about a stipulation that is "easy to accept," whereas the stipulation here regarding the child is a stipulation that we would not accept, even if the woman were forced to agree. Therefore, the stipulation in question is not "easy to accept," for we are dealing with the child's welfare.

I wish to note that using Maharashdam's position to avoid compelling a *get* in a case where the husband attaches a stipulation to his agreement is something new that has only arisen in recent years. In all my 12 years on the regional rabbinical court and my 20 years on the Supreme Rabbinical Court—to the exclusion of the relatively recent past—the great *dayyanim* never relied on this position. When they decided on compulsion, they attached no significance to the husband's stipulations. Surely the reason is that they saw no grounds to rely on this view.

In similar fashion we were forced to overrule another ruling of the regional rabbinical court (Family Sh.), which involved a newly-religious husband who had endangered and abused his son, but nevertheless demanded custody over him as a condition for the *get*, and the court acceded to his demand. It seems to me that it is forbidden to issue such rulings! In accordance with this approach, we upheld a different ruling of the regional rabbinical court in Tiberias (Family G.) which obligated the husband to give his wife a *get*, and did not accept his demand to condition the validity of the *get* on a cancellation of his obligation to pay his wife her *ketubah*. A man who is obligated to give a *get* cannot attach conditions to free him from obligations that fall upon him by law.

B. Conditioning a Get *on the Cancellation of Court Imposed Obligations*

Some rabbinical courts have ruled that we can act in accordance with Maharashdam's view in a case where the woman illegally seized money belonging to her husband. In such a case, even if the husband is compelled to give a *get*, he can condition the *get* on the return of the money that she owes him. Some rabbinical courts went even further, and ruled that in any case where the woman was awarded a property settlement or alimony in a

civil court, the husband who can be compelled to give a *get* can condition the *get* on a new hearing regarding the property and alimony in the rabbinical court.

In my opinion, there is no room for such rulings. This may be compared to what Rabbi Shlomo ben Aderet wrote regarding a rebellious wife who conditions her return to her husband on the payment of her debts for which he is liable:

> But if she hinders the matter on account of payment of loans that she had taken—it seems to me that he is not obligated to pay for her maintenance. For it seems to me that this is one of the ways of the rebellious wife, who says, I wish [to remain married to] him, but I want to cause him pain. For, whomever says this, has a claim because of which she wants to cause him pain. And this woman, too, found a reason to cause him pain and hangs it on the payment of loans that she had taken.[27]

We see from here that we are not to mix financial and marital obligations. A woman is not permitted to rebel against her husband, even if the husband fails to meet his financial obligations toward her. The same is true about a husband who is obligated to divorce his wife, and has financial claims against her—he is not permitted to withhold the *get* because of those claims.

There is another issue here. Most husbands are not well-versed in Torah law, and handle all their affairs in civil courts. Clothing themselves in piety and righteousness when it comes to a *get* turns the Torah into "a spade with which to dig"—not for love of the Torah, but to exploit Halakhah for personal gain. In such a case as well, we can apply the verse: "Be not righteous overmuch."

This can be compared to what earlier authorities have said that a woman should not be viewed as one who disregards Jewish custom when her husband, himself, disregards that custom, and that is the norm of his life. Here, too, we must not help the husband who refuses to give his wife a *get*, because regarding this matter, and regarding this woman, he wishes the issue to be decided according to Halakhah. When we are dealing with a husband who has been obligated to give a *get* or may be compelled to give a *get*, we are clearly dealing with a man who is violating Halakhah. He cannot demand that Halakhah be followed on financial matters when he refuses to obey Halakhah with regard to the *get*. At best, he can first give the *get*, and then submit claims on any issue that he wishes.

Conclusion: We must not help sinners who try to turn their wives into *agunot* under the protection of Halakhah.

NOTES

1. From "A Letter of Farewell, on the Occasion of my Retirement," that was read and distributed at a conference of *dayyanim* in Israel in Shevat 5768. It was first published in *Tehumin* #28. Our thanks to Rabbi Deichowsky and Rabbi Yisrael Rosen, editor of *Tehumin*, for permission to translate and reprint the letter here.
2. Seforno, Ex. 18:25.
3. *Ramban*, Ex. 18:21.
4. Maimonides, *Mishneh Torah*, *Hilkhot Sanhedrin* 2:7.
5. Rabbi Shmuel ben Nahmani, quoting Rabbi Yonatan.
6. Maimonides, *Mishneh Torah*, *Hilkhot Sanhedrin* 23:8.
7. R. Babad, *Minhat Hinukh* #425.
8. Responsa *Maharshal* #12.
9. See Maimonides, *Mishneh Torah*, *Hilkhot Sanhedrin* 23:9.
10. *Hilkhot Sanhedrin* 12:13.
11. "*Midatiyot BeKefiyyat LeGet*," *Techumin* 27 (5767): 300-303.
12. *Heikhal Yitzhak*, *Even ha-Ezer*, no. 158.
13. *Torat Gittin*, 134:4, *Tzemah Tzedek*, *Even Ha-Ezer* #262, and *Iggerot Moshe*, *Even Ha-Ezer* #137, respectively.
14. Referenced in Rav Sh. Yisraeli, *Amud ha-Yemini*, Introduction to no. 19.
15. *Maharik*.
16. "'*Hilkhot Shituf': Ha-Im Dina D'Malkhuta?*," *Tehumin* 18 (5758), 25.
17. *Hilkhot Sanhedrin* 24:4-10.
18. *Tur, Hoshen Mishpat* 2.
19. *Shulhan Arukh, Hoshen Mishpat* 2:1.
20. Ad loc.
21. *Hilkhot Gerushin* 2:20.
22. It should be noted that this matter constitutes a great stumbling block that causes the parties to appear before two different courts regarding the same issue. There is no room for distinction between a woman's claim on behalf of her children in the rabbinical court, and her claim in the name of her children in a civil court.
23. *Bagatz Sima Amir*.
24. Cited by Rabbi Judah ben Simeon Ashkenazi, *Be'er Hetev*, *Even HaEzer* 154:1. See also Rav David Bass, "*Hatzavat Tena'im al Yedei Ba'al ha-Mechuyav be-Get*," *Tehumin* 25 (5765), 149-162.
25. See, for example, Rabbi Solomon ben Simon Duran, Responsa *Rashbash* 353: 1, Rabbi Shimon ben Tzemach Duran, Responsa *Tashbetz* IV, *Hut ha-Meshulash*, no. 6.