Unilateral Divorce against the Husband's Will

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Dr. Zvi Zohar is Chauncey Stillman Professor of Sephardic Law and Ethics at Bar Ilan University, where he teaches in the Faculty of Law and in the Faculty of Jewish Studies. He is a Senior Research Fellow at the Shalom Hartman Institute of Advanced Judaic Studies in Jerusalem, where he heads the Alan A. and Loraine Fischer Family Center for Contemporary Halakha. This article appears in issue 23 of Conversations, the journal of the Institute for Jewish Ideas and Ideals.

1. Does Such a Possibility Exist under Torah Law?

The Torah (see Deut. 24:1) describes a divorce occurring through a "writ of [marriage] termination" (sefer kritut) given by the husband. Indeed, the Mishnah (Yevamot 14:1) states: "A woman can be divorced when she agrees and when she does not agree; but a man divorces only at his will." Thus, there seems to be no way in which a woman can receive a divorce if her husband is recalcitrant.

However, our most ancient rabbinic sources state that such a possibility exists. In vaYikra 1:3, the Torah notes that in certain circumstances, a person must bring a sacrifice, and he is required to do so willingly (yakriv oto lirtzono). This seems to be an oxymoron: Either an act is mandatory and one is obligated to perform it, or one is free to act at one's own personal discretion; can these seemingly contradictory elements be reconciled? The ancient halakhic Midrash answers in the affirmative: "We apply pressure upon him, until he says 'it is my will to do so.'"[1] In other words, an act that is mandated by the Torah will be considered as having been performed willingly even if such "will" was formed under pressure by legitimate agents of Torah. The Sifra does not extend this principle beyond the issue of sacrifices, but the Mishnah ('Erkhin 5:6) does. After stating that a sacrifice is considered as brought willingly after the person was pressured until he says, "It is my will to do so," the Mishnah adds: "and the same is true for women's bills of divorce." [2]

Several explanations may be offered for this principle. One explains this in light of the general halakhic principle, “What a person harbors in one’s heart is halakhically irrelevant.” [3] Thus, when the Mishnah refers to “will,” it is not relating to an internal psychological disposition, but rather to an externally verified condition. Thus, if a person declares: “I do not want to do X”—we hold that performing X is against his will, and are not concerned with his internal thoughts. Conversely, if he declares: “I want to do X”—we hold performing X to be in accordance with his will.[4] Others suggest that if a husband refuses to divorce a wife who hates him and will in no case remain with him, he is acting only out of spite in order to deny her to others.[5] Such behavior, denying to others something that in any case cannot bring the individual any benefit, is halakhically unacceptable; we can therefore apply the general principle kofin ‘al middat Sedom. A third explanation was given by Maimonides:

Since he was compelled, why is this divorce not invalid? … Because a person who was overcome by his evil inclination to desist from performing a positive mitzvah or to commit a transgression, and who was then coerced [by the authorities] until he did what he ought to do or desisted from what he was forbidden to do, is not considered to be acting under compulsion …since he does want to be a Jew, he ipso facto wants to fulfill the commandments and to refrain from sin, but his evil inclination overcame him. When he was beaten, his evil inclination weakened, and so when he says “I want [to divorce]”—the divorce is in accordance with his will. (Laws of Divorce, 2:20)

Maimonides has a theory of human personality that recognizes several “levels” of will that can be in simultaneous conflict. The “will” required for divorce is not a subjective feeling but an objective mental position, which is assessed according to the overall context of a person’s life choices. A person who wants to be a Jew, surely consents at heart to what is entailed by being a Jew. If according to Torah he should in the case at hand divorce his wife, his refusal to do so is in conflict with what he deeply assents to. By physical coercion, the court is merely enabling him to overcome a powerful urge that conflicts with his own deeper and more serious will.

2. Who May Coerce a Husband to Divorce?

Having seen that Torah law contains the option for coercing a husband to divorce, the question arises: Who may do so? It should be pointed out that today, with a get regarded as a document required only because of adherence to a religious tradition, physical coercion to give a get flies directly in the face of the principle of freedom of religion. When we discuss today physical coercion of a get, we are

therefore arguably doing something analogous to discussing the death sentence as a punishment for adultery, i.e., marking certain actions as worthy of extreme censure. With this in mind, let us return to the question: When physical coercion was a real operative option, who might be involved in this? The upshot of the talmudic discussion in Gittin 88b seems to be that physical coercion of divorce is not a matter that should (or may!) be undertaken by individuals. No matter how much I personally may be convinced that Zalman (for example) should really divorce his wife Rivka, I am not allowed to take matters into my own hands and beat him up in order to get him to agree to do so. Indeed, if he does give a divorce after being manhandled by self-appointed guardians of Torah (or by thugs they employ), the get thereby produced may well be halakhically invalid. Rather, it is only legitimately appointed communal leaders who were authorized to decide to apply such physical coercion. Having reached such a decision, they could appoint agents—whether Jews or non-Jews—to actually do so (in much the same manner that civil courts today direct law-enforcement officials to act against those who refuse to follow court rulings).

3. What Circumstances Justify Coercion of a Husband to Divorce His Wife?

If in general a husband divorces his wife only at his will, but in certain cases legitimate community leaders may coerce him to do so, the question arises: What are those “certain cases”? The Mishnah (Ketubot 7:10, cited at Bavli Ketubot 77a) gives a very specific and very short list of men whose extreme objective physical repulsiveness justifies coercing them to divorce if their wife demands a get. The more interesting case, however—not discussed by that Mishnah—is when a wife declares that her husband is subjectively repulsive to her and demands a get. This matter comes up with regard to a “rebellious” wife, i.e., a wife who openly refuses to have intimate relations with her husband. The Mishnah (Ketubot 5:7 cited at Bavli Ketubot 63a) states, that the communal authorities are not allowed to physically force her to change her mind, but that economic sanctions may be employed to cause her to reconsider, i.e., they may sanction her by impairing her right to payment of ketubah, thus threatening her with a situation in which her husband can divorce her not only against her will, but at no cost to himself. However, in the talmudic discussion Ameimar (c. 400 CE) states, that the above does not apply to a wife who justifies her refusal to remain with her husband by explaining that she finds him repulsive (ma-ees ‘alai). Well then, what is to be done when a woman so declares? Here the picture becomes really interesting, because we have at least three variant wordings of the talmudic phrase defining what is to be done in such a case. The printed text of the Talmud (based of course on manuscripts the first printers had before them), states:

But if she says ma-ees ‘alai—we do not coerce her.

On this version, it is not the business of the court to in any way pressure such a woman to have sex with her husband. If he is fed up with such a situation, he can divorce her. Of course, in those times, polygamy was also an option: if he was sufficiently well to do, the husband could simply take a second wife. But the court will take no sides in this marital crisis. This version seems to have been the one known to most rishonim, including Rabbenu Hananel (d. 1055), Rabbi Yitzhak AlFasi (1103), and many others.
However, a second version exists, in a talmudic manuscript known as ms. Firkovich-Leningrad. In that manuscript, the Talmud states:

But if she says ma-ees ‘alai—we coerce him.

On this version, the court will actively intervene on behalf of the rebellious wife who declares her husband repulsive, and coerce her husband to divorce her! Thus, in addition to the short list in the Mishnah of physically repulsive men who are coerced to divorce, a husband who is subjectively repulsive to his wife is also so coerced. Rabbenu Gershom, “Light of the Exile” (c. 960–1028), the greatest scholar of Ashkenazic Jewry of his time, ruled that if a woman found her marriage so unbearable that she was willing to totally forfeit her ketubah if only her husband would divorce her—the court is required by Torah law to coerce her husband to do so. As he writes (Teshuvot Rabbenu Gershom Meor haGolah, #42):

If she wants to be divorced and forfeits her ketubah, and he does not want to divorce her, the authorities must coerce him to give her a get. As the rabbis taught […] “We apply pressure upon him, until he says ‘It is my will to do so.’” And such is the actual halakha.

Note that the Mishnah stating that a husband could be coerced to give a get when the Torah mandates this, did not state when the Torah so mandates a divorce; it is Rabbenu Gershom who determined that Torah so requires whenever a woman is so desperate for a divorce that she is willing to forfeit her ketubah!

Another great authority who held this to be Torah law was Maimonides, who ruled that coercion of a divorce when a woman declared ma-ees ‘alai was mandated by the Torah (Hilkhot Ishut/Laws of Relationships, 14:8; note that at 14:14 he rejects post-biblical legislation on this issue):

If a wife declares “I find him repulsive, and am unable willingly to have sex with him”—the authorities immediately coerce him to divorce her. For she is not a captive of war, who must have sex with a man she despises.

This brief ruling reflects Maimonides' assumptions about the basics of marriage. He holds that the status of a married woman is not like that of a captive enemy, and that she is under no obligation to submit to the sexual advances of a man she finds repulsive—even if that man is her lawful husband. He also clearly assumes that sex is an essential component of marriage, that a woman cannot be expected to be bound in a sexless marriage, and that divorce is therefore an absolute necessity in such situations. Now, the Torah never expressly states either of these things about marriage. While some biblical passages might seem to support such views of marriage, others might be cited against them, as in Psalms 45:11 where the bride is enjoined, "He is thy lord, and do homage to him." Clearly, Maimonides' decision that the Torah here requires an immediate, forced divorce is dependent upon his value-laden understanding of what marriage is all about—an understanding that informs his reading of the Torah no less than it derives from such reading. And such an understanding may well have been what led Rabbenu Gershom to also mandate coercion in such cases—and what informed the talmudic author of ms. Firkovich-Leningrad, who wrote: "But if she says ma-ees 'alai—we coerce him."

A third variant of this talmudic phrase was proposed by Rabbenu Yaakov ben Meir (also known as Rabbenu Tam, France c. 1100–1171), but it can be understood only after tracing developments in the halakhic history of coerced divorce from the time of Ameimar to the twelfth century.

4. Waiting 12 Months—and What Then?

The talmudic discussion of the rebellious wife concludes with the following cryptic sentences: "And we delay her reception of the get for 12 months. And during those 12 months, she receives no financial support from her husband" (Bavli Ketubot 64a). This seems to be referring to a rebellious wife whose husband has not been coerced to divorce her, and a strange situation is thereby created. On the one hand, unlike other husbands who under talmudic halakha may divorce their wife whenever they want, the husband whose wife has rebelled against him may not do so until 12 months have passed. On the other hand, unlike other married women whose husbands must support them, the husband of a rebellious wife is free of that burden. Their marriage is thus in limbo for 12 months. To what end? Some say (e.g., Rashi): This time period is designed to give the wife further cause to reconsider if she indeed wants to find herself divorced with no ketubah. And some say: The 12-month wait would prevent a husband who wants to be quickly and cheaply rid of his wife from mistreating her (thus causing her to rebel) and then being able to immediately divorce her without a ketubah. Knowing that

he will have to wait 12 long months will (in this view) deter him from choosing such an option.

Whatever the purpose of this 12-month delay, the question arises: Once that time has passed—what then? Specifically, may the husband (whether or not he has taken a second wife in the interim), who can now divorce without paying any ketubah—decide not to do so, holding the rebellious wife in eternal limbo as an agunah? The Talmud itself says nothing on this matter. However, it seems that the interpretive tradition of the Babylonian academies was that such an option is a moral non-starter, and therefore the Talmud must have held that any husband attempting to do so is coerced to change his mind. As Rev Sherira Gaon explained: “After these 12 months, the authorities physically coerce the husband and he gives her a get.”[6] However, for Rav Sherira Gaon, as well as for almost all other rabbis until Rabbenu Tam, the interpretation of the talmudic view on this matter was a purely intellectual exercise, as all knew that talmudic halakha on this matter had been superseded by a post-talmudic takanah (rabbinic legislation).

5. Dramatic Change: Whenever a Wife Requests a Divorce, Her Husband Is Coerced to Give a Get

Around the year 650 CE, a dramatic legal enactment (takanah) was instituted by the halakhic leaders of Babylonian Jewry, immediately following the Muslim conquest of that area in 637–650:

When our masters in the times of the Sevora’im saw that Jewish women were going to the Gentiles and with their assistance were obtaining forced divorces from their husbands, and the husbands were writing bills of divorce under compulsion and these were illegally forced divorces—and this resulted in disaster—they enacted, with regard to a woman who rebels against her husband and demands a divorce, that … we compel her husband to divorce her immediately. [7]

In contrast to the policy of the Sassanid Persian kingdom that previously ruled in Babylonia, Muslim legal authorities provided succor to Jewish women seeking divorce, and forced their husbands to acquiesce and issue a writ of divorce. However, as we saw above (section 2), if a husband is unlawfully forced to write a bill of divorce, it is invalid. Therefore, the Muslim coercion resulted in divorces that were halakhically invalid but at the same time made it impossible for the rabbis to prevent the women from re-marrying, because doing so would enrage the Muslim authorities who had validated the procedure. The result was a

disaster, because since the divorces were invalid, the women's second marriages were adulterous, and children born from such unions were mamzerim who would never be able to marry legitimate Jews. Since the rabbis could not change the political-legal reality of Muslim rule, they decided to institute a change in halakha via the mechanism of takanah. From then on, any Jewish woman demanding a divorce (not only on the grounds of sexual repulsiveness) would get it immediately—no questions asked—from a Jewish court! And since a writ of divorce lawfully imposed upon the husband by a Jewish court was valid, any subsequent marriage of the divorcee would be lawful, and children born by her after receiving such a coerced get would be fully "kosher" according to halakha.

The Sevora'im knew full well that the persons directly benefitting by their dramatic takanah were specifically those women who knowingly acted against the Torah and against halakha by refusing to rely upon Jewish rabbinical authorities and instead relying upon Gentile courts—as well as those Jewish men who disregarded the (in)validity of those divorces and married women of such questionable status. But it was precisely for such halakhically deviant/marginal women and men that the rabbis needed to provide a viable alternative—for the good not only of these sinners themselves, but of the entire Jewish community.

The decision of these rabbis to enact such a takanah rested upon an underlying premise that it is important to explicate, that is to say, the premise that within the realm of values recognized by the Torah, it is possible for rational human beings to recognize a hierarchy and to prioritize accordingly, and that the responsibility to do so rests primarily upon rabbis. While the Torah generally granted a husband the prerogative of not issuing a divorce against his will, it also regarded the prevention of adultery and mamzerut as a major value. It was crystal-clear to the rabbis at that time that if historical conditions required prioritization of one of these values, then prevention of adultery and mamzerut should be given preference—even if this meant denying a privilege explicitly granted to husbands by the Divine Lawmaker, and granting to women a privilege He had denied to them. Obviously, the fact that they knew that in certain cases the Torah itself had extended to women the privilege of a coerced divorce enabled them to enact the extension of such privilege to a new range of cases.

For half a millennium after the institution of this takanah (from the mid-seventh to the mid-twelfth centuries), a de facto equality had been obtained between men and women with regard to unilateral divorce: A husband could divorce his wife unilaterally, and a woman could unilaterally achieve freedom from her marriage, since the court would immediately coerce her husband to divorce her.

It is important to note, that this legislation superseded talmudic halakha not only in Muslim-ruled Babylonia but throughout most of the Jewish world, including not only the Middle East, North Africa, [8] and Spain, but also countries where the Gentiles never considered intervening on the side of a women to compel her husband to divorce. Thus, in Catholic Germany, where divorce was anathema to the Christian authorities, Rabbenu Gershom knew of the Babylonian takanah and declared it to be binding in his time and place, i.e., although Torah law allowed coercion of the husband only when a wife was willing to forfeit her ketubah, praxis in Ashkenaz should (and did) follow the takanah, so that the Jewish authorities would coerce the husband of any wife demanding a get to give her a divorce (see his responsum cited above). A century later, in Catholic France, Rashi's grandson Shmuel ben Meir and other members of the Paris Bet Din also followed suit, demonstrating that such coercion was standard operating procedure in all of Ashkenaz (see Sefer haYashar, responsa, beginning of responsum #24). But all this was to change, because of an almost single-handed effort embarked upon by none other than Shmuel ben Meir's brother Jacob, known as Rabbenu Tam.

6. Reversal of the Tide: Rabbenu Tam's Campaign against Coercing Divorce

Rabbenu Tam heard of an incident in which a woman demanded a divorce, and his brother Shmuel and other rabbis in Paris ruled (in line with generally accepted praxis) that the husband should be coerced to do so. In a lengthy halakhic epistle (Sefer haYashar, responsa, beginning of responsum #24), Rabbi Jacob ben Meir critiqued their action. Beginning in a minor tone, he first expressed concern lest "the enemies" claim the get was invalid, because the Bet Din in Paris had not waited for 12 months as required by the Talmud. At this point it seems to the reader that he is not contesting the validity of coercion after the 12 months are over (i.e., he seemingly accepts Sherira Gaon's tradition, that already in talmudic times the husband was forced to divorce after that interim period). But he is definitely contesting immediate coercion—in other words, he is contesting the Sevora'ic takanah.

Indeed, Rabbenu Tam proceeds to state that there could never have been such a takanah. Why? Because the power to enact takanot contrary to Torah law in matters of marriage and divorce existed in talmudic times—but not after that. Thus, talmudic rabbis were authorized to decide that a get could be coerced in circumstances where the Torah had not allowed that.[9] But if post-talmudic rabbis were to enact such a takanah, they would be acting ultra vires. However, the post-talmudic rabbis were very great, and would never have so acted. Something that could not have happened, obviously never happened. Therefore,

such a takanah had never been enacted. The conventional view in Ashkenaz (and wherever else it might be held), that such an enactment had indeed been made, was simply a counterfactual myth.

The only possible source that could authorize rabbis to coerce the husband of a rebellious wife to divorce her was, therefore, the Talmud itself. Rabbenu Tam writes to his brother: “I will now explicate for you; line by line, the talmudic sugya in Ketubot about the rebellious wife,” and proceeds to do so. In the course of that explication, he explains that the Talmud recognizes two types of rebellious wives. Both want to terminate the marriage and receive a divorce. The difference between them is this: Do they also demand payment of their ketubah? The rebellious wife who says ma-ees ‘alai is willing to receive a divorce without any payment of ketubah. It is with regard to her that Ameimar states (according to Rabbenu Tam’s citation of the Talmud):

But if she says ma-ees ‘alai—we do not coerce him.

Rabbenu Tam explains that this means that we do not coerce the husband to wait before divorcing her. Rather, he may immediately divorce her, as she in any case has waived payment of her ketubah. But what if despite her waiver of ketubah, the husband does not want to divorce her? Rabbenu Tam is very clear on this: “In the entire talmudic discussion, there is no mention at all of coercing the husband to divorce, and no other interpretation of the sugya has any validity.” Since, as Rabbenu Tam argues, there never was a post-talmudic takanah enabling coercion, and the Talmud itself does not authorize coercing the husband of a rebellious wife to divorce her, the upshot is clear: Any Jewish court that applies such coercion is acting illegally, and the resulting get is invalid. If the wife remarries, she and her new partner will be adulterers, and their children will be mamzerim. Therefore, “It is better that she remain an agunah, than that aspersion be cast upon the status of her children.” And if the rabbis of Paris were to respond, that for hundreds of years the custom had been to coerce husbands to divorce, and that a general maxim in Ashkenaz was “custom overrides halakha (minhag ‘oqer halakha)—Rabbenu Tam is not impressed: “Heaven forbid that we follow this maxim, when the result will be forbidden adultery and mamzerut.”

Rabbenu Tam is known for his bold reliance upon his own best understanding of the sources, even when this flies in the face of accepted halakhic praxis. Thus, he argued that the conventional arrangement of the four biblical passages inside the tefillin was mistaken, thereby ruling inter alia against his own grandfather Rashi. He also explained that the conventional view that Shabbat begins at sunset was completely mistaken, and that it began only when darkness had fallen. However,

his overturning of the ancient tradition that when a woman demands a divorce her husband is coerced to do so—was certainly his most dramatic reversal of halakhic praxis. What could have been the reason for him to do so? Why would he want once again to place the wife at a disadvantage vis-à-vis her husband?

Having phrased the question thus, the answer is immediately obvious. In twelfth-century Ashkenaz, the enactments attributed to Rabbenu Gershom (herem de rabbenu Gershom) had become totally accepted. These enactments had deprived men of two of their major marital advantages vis-à-vis women: They could no longer be married to more than one wife, and they could no longer divorce their wife against her will. However, Rabbenu Gershom had not deprived the woman of her right to have the court force her husband to divorce her! The situation was therefore asymmetrical—to the advantage of the wife! It was this asymmetry that Rabbenu Tam effectively cancelled … by denying that women had ever legitimately possessed such a right.
Post-Rabbenu-Tam, neither the husband not the wife could opt out of a marriage by imposing a divorce upon the other. Divorce was only possible by mutual consent.

7. How to Justify Rabbenu Tam’s Ruling: Rabbi Asher ben Yehiel’s Portrayal of Women

Some 200 years later, Rabbi Asher ben Yehiel (also known as as Rosh) re-located from Ashkenaz to Spain. In Ashekenaz, Rabbenu Tam’s denial of a coerced get to women had by then become totally accepted. In Spain, however, coercion of the husband to divorce was still quite widely practiced. This was apparently especially so in cases where the woman stated that she found her husband repulsive and declared ma-ees ‘alai. How indeed could one go against Maimonides’ value-judgment that a woman may not be compelled to have sex with a man repulsive to her? Rabbi Asher ben Yehiel responded:

Is this a reason to force a husband to divorce, and thereby permit a married woman [to other men]? Let her not have sex with him, and remain a straw widow to the end of her days! In any case, a woman is not commanded to have children. Can it be, that because she wants to follow her headstrong desires, and has fastened her eyes on another man and desires him more than the champion of her youth, that we should fulfill her lust and force the man, who still loves the woman of his youth, to divorce her?! God forbid that any rabbi should rule thus! […] In this generation, the daughters of Israel are cheeky, and if a wife will be able to extricate herself from under her husband by saying “he repulses me,” not a single daughter of Abraham will remain with her husband; [rather] they will

fasten their eyes on another and rebel against their husbands! [10]

According to this view, women are not interested in marital stability but in following their lust and desire. Indeed, if given the choice, not a single woman would remain married to her present husband! One might argue that if that is truly what women want, perhaps they should be freed from their current unwanted state? But this is not the view of Rabbi Asher. His analysis reflects a deeply-held understanding of the purpose of marriage. Marriage is a bulwark against socio-sexual chaos. Such chaos will occur if women will be able to follow their desires for men other than their husbands by forcing him to divorce against his will. Therefore, it is only by absolutely closing such options that social stability can be ensured.

This does not mean that Rabbi Asher is in favor of forced sex. If a wife claims that she finds her husband repulsive, she need not have sex with him. But that does not entitle her to a divorce. Better that she remain without sex for the rest of her life, he argues, than that her husband be forced to capitulate and give her up, against his will! Unlike Maimonides, who holds that a sexless marriage is a moral oxymoron and must be terminated by divorce, Rabbi Asher holds that if such a divorce will enable a woman to seek sexual satisfaction with another man, it is absolutely preferable morally that she remain married against her will—and if she will not have sex with her husband, let her not have sex at all.

However much a contemporary reader may be turned off by this view—and whether or not Rabbenu Tam himself held such a view of women—it is very important to note that this is not a formal-authoritative presentation of halakha. Rather, Rabbi Asher bases his position on what he holds to be central Torah values: the sanctity and stability of marriage, the suppression of social chaos, the preference for marriage without female sexuality over an alternative of lust and licentiousness. And while it is quite probably true that today very few Jews (of either gender) agree with the Rosh’s view of women, the halakhot of divorce remain as they were formulated in twelfth-century Ashkenaz: A husband or a wife who seeks divorce is effectively hostage to his or her marital partner, without whose consent he or she cannot become divorced.

8. Conclusion

When I was growing up, I was taught that the holiness of Jewish marriage is based on the serious commitment of man to woman and of woman to man, expressed (inter alia) in their entering a relationship in which neither party can cast off the other against his or her will. Later, when I leaned in the Yeshiva, I became aware

that such had not always been the case: Originally, “in the time of the Torah” (and indeed, also the time of Hazal and the first millennium of the Common Era), a husband could arbitrarily be rid of his wife whenever he wanted. Only later, in the eleventh century CE, did Rabbenu Gershom decide to come to the aid of Jewish women and defend them against such a possibility by forbidding divorce without the woman’s consent. From time to time, a strange question would pop up in my head: Did Torah and Hazal not know that a true Jewish marriage means a serious commitment that cannot be unilaterally terminated by one of the parties?

Subsequently, I became more acquainted with the sources, and realized that over the course of time, holy Jewish marriage with huppah and kiddushin has undergone many metamorphoses. Originally, a husband could divorce a wife against her will, but a wife could not be divorced without her husband’s agreement (pace, e.g., Rabbenu Gershom and Rambam, who hold that under original Torah law any woman really fed up with her husband could forfeit her ketubah and receive a coerced divorce). Later, at the end of the talmudic period or at least from the seventh-century Rabbanan Sevora’ei, halakha moved to a symmetrical situation: Not only the husband but also the wife could unilaterally end the marriage. Then, after Rabbenu Gershom forbade the husband to unilaterally divorce his wife, the pendulum swung to the opposite pole: For about a century, only the wife could coerce the husband to divorce her, while he was forbidden to do so against her will. At this time, halakha (at least in Ashkenaz) was directly contrary to Torah law. After that, Rabbenu Tam restored symmetry between the spouses—but in a manner opposite to what had been the case until Rabbenu Gershom: Now, not only the man but also the woman could not exit the marriage unless the partner concurred. For the first time since Mount Sinai, both partners entering a Jewish marriage knew that they might become hostage to the other.

In recent years, the ideal of no-fault divorce has become prevalent in many societies around the globe: Marriage should not be a prison in which each side holds the only key to the other’s freedom. Hearing rabbis speak (nay, sermonize), one gets a clear message: Such is not the way of the Torah. Our marriage is holy, and that is why it is called kiddushin. And marriage cannot be holy unless it is a total, unconditional commitment that can be abrogated only after much travail and by mutual consent. No-fault divorce is thus a halakhic non-starter.

After reading this article, one thing should be clear: Whatever this or that rabbi may think of no-fault divorce, such was exactly the character of Jewish divorce for

a very long time. According to Rabbenu Gershom and Maimonides (et al.), this was original Torah law from the time of Moshe Rabbenu (and according to many others, from the sixth or seventh century until Rabbenu Tam, i.e., for at least half a millennium). Was Jewish marriage not holy then? Similarly, if today, or in several years, halakhic authorities find the will and the courage to (re)institute halakhic no-fault divorce, this will not at all undermine the holiness of marriage under huppah and kiddushin. In fact, the opposite may well be true.

[1] “Kofin oto ‘ad she-yomar rotze ani.”Sifra, ad loc. (Dibbura di Nedava, 3).
[2] “veKhen b’gittei nashim.”
[3]“Devarin she-baLev einam devarim.”
[4]See e.g., Tosafot on Gittin 32a s.v. mahu de-teima.
[5]See Rashbam on Bava Batra 48a s.v. hatam nami neima.
[6]Responsum of Rav Sherira Gaon, Otsar HaGeonim to tractate Ketubot, no. 478. This responsum was known to the rishonim. See e.g. Rabbi Yesh’aya di Trani (thirteenth-century Italy), Tosfot RID on Ketubot 64a–b.
[7]Responsum of Rav Sherira Gaon, Otsar HaGeonim to tractate Ketubot, no. 478.
[8]Rabbi Yitzhak AlFasi (Morocco and Spain, 1013–1103) ruled that the takanah was in force throughout the Jewish world. Rabbenu Hannanel (d. 1055) does not mention the takanah, and thus some have held that he rejected its validity. But this is not self-evident.
[9]To prove the categoric difference between talmudic and post-talmudic authority, Rabbenu Tam cites the talmudic statement (Bava Metzi’ah 86a) “Ravina and Rav Ashi are the termination of instruction (sof horaah).” However, the notion that these words teach that after the Talmud no enactments authorizing coerced divorce are possible—may well be an original interpretation of Rabbenu Tam.
[10]Responsa of Rabbi Asher ben Yehiel section 43:8.