The Tort of Get Refusal: Why Tort and Why Not?

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The problem of the agunah—the woman whose husband refuses to give her a Jewish divorce—challenges the viability of Orthodoxy in a modern world that stands, if I may be given some poetic license, on the three pillars of equality, human rights, and the autonomy of the individual. How can it be that a Jewish woman in the twenty-first century is still dependent on the whims of her husband for her marital freedom?
In this article, I have three goals:

1. To describe the development of the tort of get refusal as a response to the problem of the agunah in the Diaspora and in Israel.
2. To explain why tort has gained popularity as a rejoinder to get refusal.
3. To argue that, although the tort of get refusal is not a systemic solution to the dilemma of the agunah, it is a step that may inspire the halakhic community to rise to the challenge of resolving this problem once and for all.

In recent years, various solutions have been proffered to end the problems of Jewish women and divorce. They include: prenuptial agreements (spanning the spectrum from the conservative Willig/RCA contract[1] to the more progressive tripartite agreement of Rabbi Michael Broyde[2]); annulment based on a major defect (Rabbi Rackman)[3]; and civil marriage.

Despite these solutions, agunot abound. I specialize in them, in particular since 1997, the year that I began my career as a cause lawyer, first as the founder and director of Yad L'Isha (1997–2004); and since 2004 as the founder and director of The Center for Women's Justice. For the past ten

years or so, I have had the privilege to initiate the first and then a series of successful damage claims against recalcitrant husbands in the Israeli civil courts—referred to in legal parlance as "tort" cases. The term torts comes from the Latin, tortus, which means: twisted, crooked, dubious—like the husbands who refuse to give their wives a get—and refers to acts that are wrong, cause harm, and should be redressed by law. The idea behind these cases is that a husband who refuses to give his wife a get is intentionally causing her emotional distress, and he should be obligated to make her whole for all the damages that ensue—including the infringements on her autonomy, her ability to remarry and have children, her pain and suffering—in the same way that he would be held liable for damages if he intentionally assaulted a third party.

The idea of using tort law as a response to get refusal was first raised in the United States, to the best of my knowledge, in the 1980s in two law review articles (one by Barbara Redman[4]; another by David Cobin[5]); and by Rabbi Prof Irving Breitowitz in an entire chapter in his book The Plight of the Agunah[6] entitled “Tort Law Theories." Although Redman and Cobin enthusiastically supported using tort as a remedy for the problem of get refusal, Breitowitz objected, noting possible U.S. Constitutional problems (church and state separation), as well the “classic” halakhic problems when it comes to divorce—the specter of the “forced divorce,” get me’useh.[7]

Some History

In the Diaspora

Notwithstanding the problem of separation of church and state, or issue of the “forced divorce,” Jewish women have turned in desperation to the civil courts all over the world to find relief from get refusal. To give just a few examples:

· Since the 1950s, French courts have consistently awarded damages to wives whose husbands refused to remove barriers to their remarriage despite their civil divorce, declaring that such actions inflicted mental distress in violation of section 1382 of the French Civil Code. [8]

· In 1967, a London court awarded Mrs. Brett a delayed lump sum payment of £5,000 for spousal support if her husband did not grant her a get within three months.[9] The judges held that the conduct of the husband “preclud[ed] the possibility of the wife remarrying and thus finding some other man to support

her”; and that the husband was trying to “use his power to bargain and avoid payment of part or any maintenance award.”[10]

· In 1980, a family court in Sidney, Australia, citing Mrs. Brett’s case, issued a decision awarding 2,000 Australian dollars in deferred alimony to Mrs. Steinmetz, claiming that her husband was using “his power to prevent the wife from remarrying and gaining the benefit of additional financial support which might come to her from marriage.”[11]

· In 1985, the New York State legislature passed a law (familiarly known as the “First New York Get Law”) requiring plaintiffs, as a prerequisite for filing for divorce, to declare that they had removed, or were willing to remove, the barriers to remarriage of their spouse.[12] Since then, Canada,[13] England and Wales,[14] Scotland,[15] and South Africa[16] have passed similar statutes.

· Not satisfied with the deterrent impact of the 1985 New York Get Law, in 1992 the New York legislature passed the “Second New York Get Law,” which allowed a judge to take into consideration the failure to remove barriers to remarriage when awarding alimony or dividing up marital property.[17]

· Isolated family courts in the United States have held that the ketubah requires husbands to give their wives a divorce and then ordered husbands to do so;[18] or that extortionist divorce agreements could be invalidated as unconscionable.[19]
In 2000, Judge Gartenberg of the New York Family Court voided an unconscionable agreement in which Mrs. Giahn gave up almost all of her rights to marital property in exchange for the get. Despite the agreement and the fact that the wife had fulfilled her part of the bargain, Mr. Giahn sadistically failed to give his wife a get for eight years. The judge held that the “coerced, unconscionable, and overreaching” divorce agreement “exploit[ed] the power differential between the parties” and invoked principles of “equity” and the “intentional infliction of emotional distress” to award all the marital property to the wife (about $400,000).[20]

In Israel

In Israel, rabbinic courts have sole jurisdiction over matters of marriage and divorce.[21] So it was within the halls of the rabbinic courts, and in accordance with Jewish law, that we women lawyers and political activists first tried to find

relief for the woman caught in the mire of Jewish divorce law. We asked the rabbinic courts to issue more orders against recalcitrant husbands, even to put them in jail. We asked the rabbinic judges to expand the grounds for interfering with a husband's free will to give a get. We drafted prenuptial agreements that allowed for increased spousal support. And in the meantime, we collected growing numbers of agunot.

In 1999, Hanna came into my office. She was thirty-six years old and had lived apart from her husband since she was twenty-six. In 1994, the rabbinic court had tried to convince Hanna to give up all her property rights and to waive child support for her five children in exchange for the get.

She refused and saw no reason to return to the rabbinic court for relief of any sort. Suing her husband for damages was her last resort.

In 2000, I filed a claim for damages for Hanna against her husband for get-refusal. We argued that his refusal to divorce her caused emotional harm and infringed on her basic rights to marry and have children. In December 2001, on the same day that Hanna's husband agreed to give her a get in exchange for the dismissal of her tort claim, the Hon. Judge Ben-Zion Greenberger of the Jerusalem Family Court denied a motion to dismiss the complaint (File 3950/00); and held that get-refusal is a tort since it violates a woman's personal autonomy protected under the Basic Law: Human Dignity and Freedom. Similar law suits followed. All held that damage cases were within the sole jurisdiction of the family courts. All resulted in the husband giving the get in exchange for the dismissal, with prejudice, of the damage claims.

In December 2004, a particularly stubborn husband gave Judge Menachem HaCohen the opportunity to rule on the merits of a case. Judge HaCohen awarded a wife, another of my clients, 325,000 NIS in damages, and 100,000 NIS in aggravated damages (about $100,000 in total) (File 19270/03). HaCohen held that get-refusal was a "tort" because it was unreasonable behavior that fell under the rubric of negligence, section 35 of the Tort Ordinance.[22] In 2006, Judge Tzvi Weitzman, following the logic of Judge HaCohen, ordered the estate of a man to pay his wife 711,000 NIS in damages (about $180,000) (File 19480/05).

In 2008, three more women were awarded damages for get-refusal. The awards ranged from 377,000 NIS to 700,000 NIS (awarded to a woman who lived with her husband for only three months and had been refused a get for eleven years). In 2008, Judge Nili Maiman also denied a motion to dismiss a complaint against a mother, two brothers, and a sister, holding that a cause of action could prevail against family members for aiding and abetting get-refusal.

Since 2000, more than thirty women have filed for damages against their recalcitrant husbands. In many of these cases, the husbands agree to give the get in exchange for waiving the damage claims. In all of these cases the Bet Din was only too happy to be done with these cases and arrange for the get.
All this notwithstanding, in March 2008, the Supreme Rabbinic Court held that the filing for damages in the family court would invalidate subsequent divorces because of the “forced divorce” (File no.7041-21-1); and threatened that attorneys who advise their clients to file tort cases are liable for malpractice. Attorneys continue to file these cases; and men continue to give the get, or not. It all depends on them.

Why Tort?

In an article that I have written for Brandeis “From Religious Right to Civil Wrong: Using Israeli Tort Law to Unravel the Knots of Gender, Equality and Jewish Divorce,” [23] I explain that tort law is an important tool in the hands of innovative cause-lawyers who want to reform Israeli divorce law, and whose vision of an ethical Israeli society is one that is both Jewish and democratic. Tort law allows these cause lawyers to articulate and reframe the problem of Jewish women and divorce in a manner that makes room for such vision. Such reframing is far reaching in its goals and theoretical underpinnings. Reframing is an act of translation in which an interpretive code ("schema") is transposed from one setting to another. This act of translation and renaming allows the legitimacy of the familiar (harms should be redressed) to be attached to the strange (a Jewish husband gives a divorce of his free will).[24] Translation is a creative but difficult balancing act in which the translator-cause-lawyer must maneuver adroitly between tradition and change, politics and justice, words and visions. The translator must try to resonate with existing laws and customs, and at the same challenge them. Cause lawyers who reframe a Jewish husband’s "right" to deliver a get at will into a civil "wrong," translate simultaneously in more than one direction. They reframe tort law to include get-refusal; and they reframe religious law to recognize the forced divorce as an actionable injurious act. They translate transnational human rights principles (women have the right to divorce[25]) down into civil tort claims; and they translate local religious practice (only the husband can give the get) into tort

violations.

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posit that these delicate acts of translation and reframing allow cause lawyers to define and delineate the problem of Jewish women and divorce; rally consciousness and unite women; demystify an act of power; defrock a religious act; and bring the State in to redress the harms inflicted on its citizens. Moreover, by constructing the tort of get-refusal, cause lawyers draw attention to the conflict of values between religious divorce laws and civil/human rights, and force a dialogue that the rabbinic courts would otherwise avoid.

Why Not?
Freedom's just another word for nothin' left to lose,
And nothin' aint worth nothin' but its free
“Me and Bobby McGee" Kris Kristofferson, Fred Foster
The women who bring these claims against their husbands have waited on average of ten years before bringing them. Once filed, either they receive their gets, because their husbands agree to give them of their own free will--and the rabbinic courts, in fact, have arranged for those divorces without raising any question regarding their validity; or the husbands refuse to give the get of their own free will, and the court awards damages to the wives. Sometimes the women collect on these judgments; and sometimes they don’t. If they do, it’s when their husbands are financially solvent. If they don’t collect, they offer up their decisions as a sacrificial deterrent for the benefit of other agunot.

The only reason to stop bringing these lawsuits would be if Orthodox rabbis finally acknowledge that the problem of Jewish women and divorce must be solved. They must take the power to give a get,
or not, out of the hands of the husband. The problem of the “forced divorce” must be understood as a euphemism for giving unfettered and unilateral dominance to men over their wives. The rabbis must change the Jewish marriage ceremony at its core, or allow for marriage to be entered into on conditions that guarantee proper divorce rights for women.[27] Until that happens, women must keep filing tort cases.

[1] “The Prenuptual Agreement, Halakhic and Pastoral Consideration,” Basil Herring and Kenneth Auman, eds. 1996, 45–53. See also Susan Weiss, Sign at Your Own Risk: The "RCA" Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement, 6 Cardozo Women's L.J. 49 (1999).
[2] Response of Rabbi Broyde to Rabbi Dr. Aviad HaCohen’s “Tears of the Oppressed,” Edah online journal.

[3] Susan Aaranoff, Two Views of Marriage, Two Views of Women: Reconsidering. 3 Nashim 199 (Spring– Summer 2000); but see Rabbi J. David Bleich, Kiddushei Ta'ut: Annulment as a Solution to the Agunah Problem, 33:1, Tradition 90, 115 (1998).
[4] Barbara Redman, What Can Be Done in Secular Courts To Aid the Jewish Woman? 19 Geo. L. Rev. 389, 416 (1984—1985).
[5] David M. Cobin, Jewish Divorce and the Recalcitrant Husband: Refusal to Give a Get as Intentional Infliction of Emotional Distress, J. L. & Religion 405 (1986); Breitowitz, The Plight of the Agunah, supra note 42, 239–249.
[6] Irving A. Breitowitz, Between Civil and Religious Law, the Plight of the Agunah in American Society 286–291 (1993).
[7]
Orthodox lore maintains that a Jewish divorce is only valid if a get is given by a husband to his wife of his free will. A divorce that is given after applying pressure that impinges on a man's will is invalid (literally a forced divorce, a get me'useh)
unless such pressure is applied by a Jewish court, within the limited parameters of the causes of action recognized by Jewish law. See M. Yebamot 14:1 (T.B. Yebamot 112b): "A
man who divorces is not like a woman who is divorced because the woman is divorced with her consent or against her will, while the man divorces only with his own free will." See also Rambam, Dinei Gerushin (Laws of Divorce), Chapter 1, Laws 1 and 2.
[8] See Jean Claude Niddam, Emdatam Shel Batei Mishpat HaEzrahiyim BeTzorfat Klapei Tviot Neged Ba'alim Yehudiyim LeMisirat Get [The Position Taken by the French Civil Courts in Suits for a Jewish Divorce Against Recalcitrant Husbands] 10/11 Diné Israel 385 (1981–1983) (includes translation into Hebrew of six French cases decided between 1955 and 1980). Despite attempts by French husbands to claim that damage awards violate the halakhic
prohibitions against the forced divorce, French rabbis have held that, insomuch as such damage awards relate to time past (and not to the future), they do not violate Jewish law. Memorandum from Annie Dreyfus (in French) (on file with author).
[9] Brett v. Brett 1 All ER 1007 (1967).
[10] Ibid., at 1011, and 1015.
[11] In the Marriage of Steinmetz, 6 Fam LR 554 (Fam. Ct., Aust., Sydney) (1980).
[12] N.Y. Dom. Rel. §253 (McKinney 1988).
[13] Canadian Divorce Act §21; Ontario Family Law Act, Section 56 (5), Limitations on Separation Agreements.
[14] England and Wales, #000000">Divorce (Religious Marriages) Act 2002

(came into force on 24th February 2003).
[15] http://www.scotland.gov.uk/library/documents-w8/isfl-03.htm (recommends adopting the law in England and Wales).
[16] South Africa, §5a The Divorce Amendment Act 95 (1996).
[17] N.Y. Dom. Rel §236B Section 5(h).
[18] Stern v. Stern, 5 Fam. L. Rep. (BNA) 2810 (N.Y. Sup. Ct. 1970); Burns. v. Burns, 223 N.J. Super. 219, 538 A 2nd 438 (N. J. Super. 1987); In re Goldman 196 Ill. App. 3d 785, 554 N.E. 1016 (Ill. App. Ct. 1990); But see Breitowitz, Plight of the Agunah, supra note 41, at 77–96 (criticizing the courts' interpretation of the ketubah as an implied contract to give a get).
[19] Perl
v. Perl, 126 A.D.2d 91, 512 N.Y.S.2d 372 (1987); Golding v. Golding,
176 A.D.2d 20, 581 N.Y.S.2d 4 (1992); Schwartz v. Schwartz, 153 Misc.2d
789, 652 N.Y.S.2d 616 (1997).
[20] Giahn v. Giahn (Sup. Ct. N.Y) (April 2000) available at http://www/jlaw.com/Recent/giahnhtml. See also Weiss v. Goldfeder NYLJ, Oct. 26, 1990 (maintains that withholding of the get may be tantamount to the intentional infliction of emotional distress).
[21] §1 Rabbinic Courts Jurisdiction (Marriage and Divorce) Law 5713–1953 (“Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinic courts.”)
[22] On December 5, 2007, The Supreme Court of Canada awarded damages to a woman whose husband breached an agreement to give her a get, citing Judge HaCohen’s decision is support of same.
[23] In Gender, Culture, Religion, and Law (Publication Pending).
[24] See Patrick Ewick and Susan S. Silbey, The Common Place of Law (1998); Austin Sarat and Stuart Scheingold, The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice (2005) (discusses how lawyers use schemas creatively).
[25] CEDAW (Convention for the Elimination of Discrimination against Women).
[26] Meir Simha HaCohen Feldblum, “The Problem of Agunot and Mamzerim: A Proposed Encompassing and General Solution,” 19 Dinei Yisrael 203–215, 212–3 (1997–8).
[27] See Eliezer Berkovits, T'nai beNisuin veGet (Conditional Marriages and Divorces) (1967).