

# BETH DIN OF AMERICA

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ז' מרחשון תשנ"ט  
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Dear Chaverim of the Rabbinical Council of America ז"י:

This letter is being written to all members of the Rabbinical Council of America in response to an advertisement (Jewish Week, August 28, 1998) entitled "Halachic Principles and Procedures for Freeing Agunot". Because the issues involved have such acute *halachic* consequence, we feel that it is important to issue this response.

The ad advances three rationales, each characterized as "Kiddushei Ta'ut", for explaining the conduct of the "Beit Din Zedek LiBaiayot Agunot" directed by Rabbi Moshe Morgenstern and Rabbi Emanuel Rackman. After presenting each rationale, the ad concludes that a bet din "may dispense with the get and release the woman with a p'tur." However, upon an analysis of the arguments and the sources cited, we cannot find any merit with any of the rationales. Most disturbingly, according to the reasoning advanced in the ad, no Jewish marriages are valid nowadays. Not only is such an approach without support in the *halachic* community, but it would constitute the eradication of the institution of Jewish marriage (which itself would be reason to reject the new bet din's arguments).

We will now address the three specific rationales advanced by this new bet din, which are listed below, and explain why they are invalid.

## I. Lack of Informed Consent to Kinyan

This new bet din attempts to argue that all marriages are void from the moment of their inception since modern women "would in no way agree to the *kinyan*/acquisition nature of marriage" which according to the ad seems to constitute some form of slavery. Thus "there is no informed consent by women to *kinyan* at the time of marriage and the marriage is void ab initio."

This argument is not correct. According to Torah principles, a man does not acquire his wife during a marriage ceremony in the same manner that he acquires a car, cow or slave. Jewish marriages are a joining of individuals in an act of holiness, and thus the term קידושין - sanctification - is used to describe a Jewish marriage. While the form of marriage is acquisition ("האשה נקנית") its substance in no way implies monetary ownership or slavery. By Torah law, the "acquisition nature" of the marriage ceremony does not even affect a wife's right to own property. It only forbids relations with (and precludes marriage to) anyone other than her husband. When a woman marries, she does agree to these restrictions, and therefore is married to her husband.

## II. Lack of Informed Consent when Kefiya (Coercion) is Impossible

The next argument advanced by this new bet din is similarly inconsistent with a principled understanding of the Jewish tradition. In essence this new bet din argues that women think that when they enter into marriages, the rabbis must have some way to free them from the marriage. According to the ad, "had these women known at the time of marriage that they were agreeing to a union in which they could be virtually imprisoned by an unscrupulous husband, they never would have consented (to marriage)."

This argument is simply wrong as a factual matter. Despite the great publicity about the *agunah* problem, women continue to marry, fully aware that a woman may on occasion be trapped in a bad marriage. Moreover, the desire of many trapped women to receive a *Get* proves that they want to marry again in accordance with Jewish law and tradition. Were Jewish women not interested in strong Jewish marriages - which despite the plight of the *agunah* continue to happen with considerable frequency - they would categorically refuse to be married in a Jewish ceremony; indeed, the *brachot* under the *chupa* would be *brachot l'vatala*.

Not only is the argument wrong, but the ad mistakenly cites a *Rashba* in *Gittin* 88b in a way that may lead one to think that the *Rashba* agrees with this argument. Such is completely untrue. The *Rashba* makes no mention - not a single word - of even the possibility of a woman being able to exit a marriage without receiving a *Get*. Similarly, the *teshuva* of Rav Yitzchok Elchanan Spektor cited in the ad allows for coercion to force a *Get*, but not the release of a woman from marriage without a *Get*.

Moreover, like the previous argument, this argument of the new bet din would lead to the unbelievable conclusion that no Jewish woman is married nowadays since no woman would enter into marriage given the possibility that she may be trapped in the marriage if her husband refuses to give her a *Get*.

## III. Error at the Time of Marriage (or "A Sallient Defect")

The final point that this new bet din addresses is the application of the classical grounds of *kiddushai tauv* to modern times. Rabbi Moshe Feinstein in several places in *Igrot Moshe* argues that when a husband suffers from a serious defect prior to the marriage which was hidden from the wife, and the wife would not have married him, if she knew of the defect, the marriage may be deemed invalid if the woman is unable to receive a *Get*, although a woman should in the first instance try to receive a *Get* even in such a case. Rabbi Feinstein applied this rule to cases of homosexuality, insanity and impotence and considered applying it in cases of hidden apostasy.

The question of whether and when to apply קידושי טעות is a matter of controversy (see, e.g., *Otzar HaPoskim* 39:32:16-17) and this is a serious matter that respected *batei din* deal with when it is pertinent. At a minimum, applying the principle of קידושי טעות requires that (1) a woman discovers a serious blemish present in her husband that (2) she was unaware of at the time of marriage and (3) which was actually present at the time of the marriage, and (4) she immediately leaves him upon discovery of the blemish. There is no dispute that at a minimum, all four conditions must be present.

While this new bet din uses the phrase קידושי טעות and the ad cites *teshuvot* that clearly require these four conditions, it is clear that this new bet din is not adhering to the rules of any *posek* in this area. Indeed, not only does the new bet din expand the scope of קידושי טעות far beyond the cases cited by

Rabbi Feinstein but it also, in opposition to Rabbi Feinstein, applies the concept of קידושי טעות to potential defects which are not yet manifested at the time of the marriage.

According to this new bet din: "A beit din may recognize other intolerable defects as grounds for kiddushei ta'ut [including] psychological abuse, adultery, sexual molestation, abandonment, criminal activity, substance abuse and sadism (the withholding of a get may be viewed as indicating a sadistic nature)." The new bet din continues this line of thought by adding that: "A beit din, applying a psychoanalytic concept of human nature, may hold that the seeds of such deviant behavior are present in the groom at the inception of the marriage though they may not yet have expressed themselves in overt behavior."

This approach is erroneous because (1) improper behavior by a party in a marriage (such as psychological abuse, adultery, sexual molestation, etc.) cannot be assumed to have been present earlier in the form of "seeds"; (2) potential psychological tendencies do not create טעות especially since they may remain undeveloped; (3) many persons marry even though they are well aware of their spouse's emotional and psychological problems; and (4) many women continue in marriages even after aberrant behavior of their husbands becomes manifest. Therefore, even if a woman really did not know about her husband's psychological problem (assuming that one can be demonstrated) before the marriage, there is no categorical assumption that she would not have married him had she been aware of the problem. Consider, by contrast, the argument that emerges from the logic of this new bet din: if withholding a *Get* is sadism, and its latent seeds obviate the marriage, then whenever a *Get* is withheld, the woman was never married. This approach taken in the ad - that such a woman is not married - is completely contradicted by the extensive talmudic and rabbinic discussion of how to procure a *Get* from a man who wrongfully withholds it.

The ad also claims that the problem of *mamzerut* is an "illusion", citing a *Maharsham* who devised a *mamzerut* solution in a particular case. In actuality, *Maharsham* considered a remedy for *mamzerut* only in a case when the husband actually issues a *Get* and later nullifies it not in the presence of the agent. In all other cases, the fear of *mamzerut* is very real and tragic, far from an "illusion", even according to *Maharsham*.

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To summarize: The arguments presented in the ad promulgated by the Beit Din Zedek LiBaiayot Agunot are without support from the perspective of Jewish law. All of us desire to help *agunot*. Indeed, as many of you know, the Beth Din of America and other respected *batei din* regularly work to help *agunot* within the framework of *halacha* without fanfare or publicity. However, the approach taken by this new bet din, which would effectively eradicate Jewish marriage, is not the solution. There are not even minority opinions that adopt the view taken by this new bet din. Therefore, as we have previously written, we must presume that the women released by this new bet din are still married. It would be a violation of *halacha* for any member of the Rabbinical Council of America to perform a wedding based on a *psak* of this new bet din.

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