

DIVORCE IN JEWISH LAW

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THE whole system of the divorce institution in Jewish law is built upon the short passage in the Book of Deuteronomy,¹ which states: 'When a man hath taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he hath found *some uncleanness* in her: then let him write a bill of divorcement, and give it in her hand, and send her out of his house.' This ancient right of the husband to divorce his wife at his mere will, is the central thought in the entire system of Jewish divorce law, and the Rabbis could not set it aside as, in theory, no reforms may be introduced in Jewish law which are in direct conflict with a specific Biblical provision. However, as we shall see, they tempered its severity by numerous restrictive measures. The Jewish law recognized the validity of divorce in all cases, and only sought to prevent its abuse by moral injunction and judicial regulation. The Biblical provisions, written at a time when the domestic law of the patriarchal family was in full vigour, accepted divorce as a matter of fact—as an institution which had existed since time immemorial; and in our own days, no stigma is attached to divorced persons.

The earliest restrictions upon the patriarchal right of the husband to divorce his wife at will are found also in the Book of Deuteronomy, where the cases of the ravisher, and he who falsely accuses his wife of ante-nuptial incontinence are considered.² But an outspoken attack against hasty divorce is already voiced by the prophet Malachi, with the words: 'Because the Eternal has been a witness between you and the wife of your youth against whom you have dealt treacherously, yet she is your companion and the wife of your covenant. . . . Let none deal treacherously against the wife of his youth. *For I hate him who puts away his wife*, said the Eternal God of Israel . . .'³

When we reach the Mishnah⁴ period we find that, while the patriarchal right of the husband to divorce his wife is retained, yet it does not pass unchallenged. Thus, in the first century B.C., the Schools of Hillel and Shammai are giving radically different inter-

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¹ 24: 1.

² 22: 13-19; and 28-9.

³ 2: 14-16.

⁴ The name given to the oldest collection of Jewish legislative writings aside from the Pentateuch. It obtained great importance from the first century B.C. until its final editing by Rabbi Judah ha'Nasi, c. 200 A.D., in which form it exists.

pretations. The School of Shammai applied the strict literal interpretation of the Bible to legal cases, so it held that a man could not divorce his wife unless she was found guilty of gross immorality. This doctrine, completely at variance with the customary right of the husband, was based on the School's interpretation of the Hebrew term 'Ervath Davar' ['some uncleanness'], and it was claimed that the literal meaning being 'nakedness of matter' it signified gross immorality and, therefore, the Biblical law recognized this as the only legitimate ground for divorce.⁵

The Hillel School, which represented the liberal interpreters of Biblical law, held that the husband need not assign any reason at all for the divorce, and could, if he wished, divorce his wife for 'spoiling his food'.⁶ This school interpreted the Deuteronomic term 'some uncleanness' to mean anything offensive to the husband. This view was followed a century later by Rabbi Aqiba (c. 135 A.D.), and was extended by him to include even the case where the husband found another woman, more beautiful than his wife 'for it is written "if she find no favour in his eyes"'.⁷

Two centuries later, we find the Amora⁸ Raba giving his decision in a case where he was asked whether a man may divorce his wife without any ground of unchastity or objectionable conduct generally. He stated: 'About the case which you enquire, whatever the husband has done, is done. If he divorces her without cause he cannot be compelled to take her back'.⁹

However, the old patriarchal theory of unlimited right of the husband to divorce his wife was gradually being modified, and before long, the exceptions to the general unrestricted right of the husband grew more numerous, until the old rule was practically abolished (in fact, but *not* in theory). But the Rabbis never sought to prevent divorce for cause or by mutual consent of the parties. They did not sacrifice the realities of life to the ideal by which they were guided that marriage should be a life-long union of the parties to it. The Rabbinical theory was sound and defensible. Indiscriminate exercise of the right to divorce was condemned, and moral grounds had to be given before the Rabbis sanctioned the proceedings. But if the parties agreed to the divorce no objection or opposition of the Rabbis

⁵ Bab. Talmud, 'Gittin', Mishnah ix, 10; Jerusalem Talmud, Sotah, I, i, [16b].

⁶ Bab. Talmud, 'Gittin', Mishnah, ix, 10.

⁷ *Ibid.*

⁸ The designation of the interpreters of the Jewish law who were active from the time of the completion of the Mishnah (beginning of the third century A.D.), until the redaction of the Babylonian Talmud (middle of sixth century).

⁹ Bab. Talmud, 'Gittin', 90a.

could arise, because the mutual consent of the parties was considered the highest moral ground for divorce.

Let us now consider some specific examples of the way the Mishnah had curtailed in a number of cases the right of the husband to divorce his wife. In the first place, the oral law provided that where the wife had become insane she could not be divorced, the reason being that she could not take care of herself.¹⁰ Sanction for such a reform was found by the Rabbis in 'reading into' the Biblical provisions authority for this innovation. Rabbi Yannai (c. 220) explained it thus: 'The Pentateuch states "he shall give it [the bill of divorcement] into her hands",¹¹ i.e. she must be a rational creature capable of receiving it.'¹² The Academy of Rabbi Ishmael interpreted this differently - 'The Pentateuch says "and he sends her from his house",¹³ i.e. it refers to one who, being sent away, will not return; excluding a demented person who has no sense of shame and will probably go back to her husband's house. The Bible did not allow such a one to be divorced.'¹⁴

In the next place, it was decided that a wife could not be divorced while she was in captivity; and thirdly, that the wife who is a minor and is so young as not to be able to understand the nature of a divorce, or to take care of the actual Bill of Divorcement, could not be divorced.¹⁵

The theoretical right of the husband to divorce his wife at his mere whim was further curtailed by the formalities attending the preparation and delivery of the Bill of Divorcement (known in Hebrew as 'Get') and its delivery. The numerous rules and regulations incident to the procedure in divorce compelled the husband to seek the help of one learned in the law to assist him in divorcing his wife; and while the duties of the person thus consulted were perhaps more ministerial than judicial, he was obliged to be well-versed in the 'laws of Divorce and Marriage',¹⁶ and was expected to use every effort to reconcile the parties, unless sufficient reason appeared for the divorce.

The law compelling the husband to pay back to his wife her dowry when she was divorced also acted as a check on the husband's abuse of his right; and a decree of Rabban Gamliel deprived the husband of the power of annulling the 'Get'. According to previously existing law, the husband, after sending off the messenger with the 'Get' for

¹⁰ Mishnah, Yevamoth, xiv, 1.

¹¹ Deut. 24: 1.

¹² Bab. Talmud, Yevamoth, 113b.

¹³ Deut. 24: 1.

¹⁴ Yevamoth, *loc. cit.*

¹⁵ Mishnah, Kethuboth, iv, 9; and Bab. Talmud, Kethuboth, 52a.

¹⁶ Bab. Talmud, Qiddushin, 6a.

his wife, could summon witnesses and in their presence declare the 'Get' null and void. This could be done even if neither the messenger nor the wife was present.¹⁷ The dangerous consequences of such action are quite obvious. The woman receiving the 'Get' from the messenger would consider herself divorced, then marry another man only to discover afterwards that her 'Get' had been annulled by her former husband. Her second marriage would be void, she would be guilty of adultery, and any issue of her second 'marriage' would be illegitimate.

These qualifications of the theoretical right of the husband to give a 'Get' to his wife whenever it pleased him so to do, resulted in the gradual elimination from the popular mind that such a right ever existed. Men had become so accustomed to go to the Rabbi, who was both spiritual leader and judge, when they wished to divorce their wives, that they eventually forgot that by ancient Jewish common law they were fully entitled to give a 'Get' without Rabbinical sanction. However, at the end of the tenth or beginning of the eleventh century, the theoretical right of the husband was formally abrogated for European Jewry by an edict issued by Rabbi Gershom 'Meor ha'Golah'.¹⁸ The non-compliance with this decree was punishable by excommunication, notwithstanding that such non-compliance was in accord with the letter of the Mosaic Law. (But, since under Rabbinic rules of interpretation no reform may be introduced which contradicts a specific provision of the Mosaic Law, in spite of Rabbi Gershom's reform, it would be most difficult to invalidate a 'Get' given to the wife without her consent, although certain sanctions might be applied against the husband.)¹⁹

A source of frequent comment has been the fact that the Mosaic Law neglected to make the rights and duties of husband and wife reciprocal, and failed to provide for the wife's right to sue for divorce. But this is not surprising in a state of society where the husband had complete control over his chattels and possessions, and the wife was considered to be part thereof. By the Talmudic period, however, provision was made whereby the wife could petition for a divorce, and the husband was then compelled by the courts to issue a 'Get' to his wife. At first sight it might seem that such divorce would be invalid, on the principle that the 'Get' must be granted freely by the husband and not under duress. But the Rabbis interpreted such an act differently, by means of an interesting legal fiction. They said, in substance: 'We do not compel the husband to give

¹⁷ Mishnah, 'Gittin', iv, 2.

¹⁸ lit. 'Luminary of the Exile'.

¹⁹ H. H. Medini, *S'dei Hemed*, iii, 578.

a "Get" against his will. But it is assumed that every man intends to act according to law. The law provides that in certain cases it is the duty of the husband to give her a Get.²⁰ His refusal so to do is the result of an evil disposition which is prompting him to do that which is wrong. It is our right and duty to help him to get rid of his evil disposition, and this is accomplished by punishing him for disobeying our decree.²¹ When he has been sufficiently punished, his evil disposition will leave him and he will be able, as a free agent, to give the "Get" according to law.²² This argument justified the Rabbinical courts in enforcing their decrees in divorce against the husband; but the Rabbis refused to apply it for the purpose of validating Bills of Divorcement prepared in non-Jewish courts,²³ and actually declared such purported divorces null and void in Jewish law.²⁴ While the Rabbinical authorities readily submitted all questions affecting civil rights and contracts to the non-Jewish courts, they always refused to recognize their authority in religious matters. And divorce was deemed a quasi-religious act. The woman was said to be married 'according to the Law of Moses and Israel'. In addition, the 'Get' was peculiar to the Jews, and other nations did not make use of it in divorce proceedings.²⁵ For these reasons the interference of non-Jewish courts in matters of marriage and divorce was considered a usurpation of authority, and an interference in purely religious matters, even if both parties had agreed voluntarily to submit to its jurisdiction.

The main grounds for which a wife could petition the Rabbinical courts for a divorce, aside from mutual consent, and which the husband was compelled to grant if directed by the court, were: refusal by the husband of conjugal rights;²⁶ impotence of the husband;²⁷ wife's vow of abstention from marital life;²⁸ if the husband, after marriage, suffered from some loathsome chronic disease, or engaged in a disgusting trade;²⁹ if the husband refused to maintain and properly support his wife in accordance with her station in life;³⁰ if he was guilty of wife-beating;³¹ if he was guilty even of technical desertion (such as when he committed a crime which forced him

²⁰ Bab. Talmud, Baba Bathra, 48a.

²¹ Bab. Talmud, Yevamoth, 106a.

²² Maimonides, *Code of Law*, Gerushin, ii, 20.

²³ Mishnah, Gittin, ix, 8.

²⁴ *loc. cit.* i, 5.

²⁵ Jerusalem Talmud, Qiddushin, 2b.

²⁶ Based on Exodus, 21: 10. And see, Mishnah, Nedarim, ix, 5; Kethuboth v, 6; *ibid.* xiii, 5.

²⁷ Mishnah, Nedarim, xi, 12; Bab. Talmud, Yevamoth, 65a and 65b.

²⁸ Mishnah, Nedarim, *loc. cit.*

to flee the country); (this led to a further reform which provided that if a man was about to leave the jurisdiction of the court, he was either placed under oath not to desert his wife, or more often, he was compelled to divorce her);³² if the husband changed his religion;³³ and if the husband was guilty of notorious dissolute conduct.³⁴

The foregoing, is, generally speaking, the present-day divorce law in the Jewish legal system, and it has been incorporated in the Israeli Jurisdiction of the Rabbinical Courts (Marriage and Divorce) Act 1953. This Act gives exclusive jurisdiction to the Rabbinical courts in matters of marriage and divorce affecting Jews domiciled or resident in Israel. It also specifies that the wife may petition for a divorce and 'on the issuing of a final judgment by a Rabbinical court compelling the husband to give a "Get" to his wife . . . the District Court is authorized, on the expiration of six months after the order has been made, on the application of the Attorney-General, to compel the obedience of the order by imprisonment.'³⁵ The husband may then be imprisoned for contempt of court, until he purges his contempt by agreeing to give the 'Get' to his wife. However, it should be noted that this compulsion is provided for and is enforceable by the civil law of the State of Israel, and not by the order of the Rabbinical court or religious law.

²⁹ Mishnah, Kethuboth, vii, 9.

³⁰ *Ibid.* v, 8, 9.

³¹ Even Haëzer, *Divorce*, c. 154, §3. Based on Bab. Talmud, Kethuboth, 61a.

³² Even Haëzer, *loc. cit.* §§8-9.

³³ The marriage is still binding. See Bab. Talmud, Kethuboth, 30b.

³⁴ Even Haëzer, *loc. cit.* §1.

³⁵ §6.